

Antitrust Agency Request Support: An Integrated and Organic Approach to Second Requests

How HaystackID Helped Multiple Cannabis Industry Consolidators Rapidly Respond to Six Comprehensive Second Requests

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Proven Experience and Domain Expertise for Second Requests

A proven provider of eDiscovery support for FTC and DOJ Second Requests, HaystackID was especially active during a four-month period of mid-2019 when it successfully supported six separate Second Requests. These six requests required both antitrust request process experience and cannabis industry expertise in order to meet and exceed reporting requirements for the time-sensitive and comprehensive information and documentation requests.

Second Requests: The Requirement, Task, and Prevalence

The Requirement: The Hart-Scott-Rodino Antitrust Improvements Act of 1976 was adopted to help the federal government avoid anti-competitive outcomes during the course of mergers and acquisitions. The HSR Act requires parties to mergers or acquisitions of certain sizes to notify the Federal Trade Commission (FTC) or the Antitrust Division of the Department of Justice (DOJ) and to provide information and documentation regarding the proposed transaction. Upon review of submitted information and documentation, the FTC or DOJ may make additional requests, known as Second Requests, before rendering a decision on the proposed transaction. (1)

The Task: Second Requests are discovery procedures that consist of formal requests for additional information and documentation and generally follow the framework of the Model Request for Additional Documentary Material (Second Request) as published by the FTC Premerger Notification Office. (2) While leveraging many of the technologies, techniques, and tactics used in traditional eDiscovery activities supporting audits, investigations, and litigation, Second Request discovery is different in the fact that it typically has unique characteristics that need to be considered in each case. These characteristics include but are not limited to:

- Accelerated Timelines
- A Standard of Substantial Compliance
- Disparate Data and Locations
- Support for Multiple Languages
- Need for Advanced Technologies

Accelerated Timelines

From a timeline perspective, merging firms generally make premerger filings with antitrust agencies on an average of 13 days after publicly announcing the deal. (3) These filings typically trigger a 30-day waiting period that commonly results in either the early termination or natural expiration of the waiting period without additional Second Requests. However, when antitrust agencies do make Second Requests, challenged parties must work with antitrust agencies to respond to the Second Request within an acceptable time frame that generally ranges from 30 days up to five months. Additionally, once a Second Request response has been certified as compliant, a second waiting period of an additional 30 days is initiated to allow for a decision on the transaction. *Based on this accelerated timeline, eDiscovery providers to the challenged parties must be able to support all elements of a Second Request discovery project in an expedited manner or potentially expose the challenged parties to legal and financial adverse outcomes.*

A Standard of Substantial Compliance

The standard for certification of a Second Request response is that of substantial compliance. Substantial compliance (4) is compliance with the significant or essential requirements of a Second Request that satisfies the purpose or objective of the request even though the formal requirements may not be completely complied with at the time of the response. This standard is unique among discovery requests in that it is time-driven and represents a qualitative best effort at compliance instead of a quantitative, time-independent approach to compliance. *Based on the standard of substantial compliance, eDiscovery providers to the challenged parties must be able to balance time, effectiveness, and efficiency to meet certification requirements for Second Requests.*

Disparate Data and Locations

Given the stakes and stakeholders involved, parties to proposed merger transactions should consider detecting, identifying, locating, and planning for the collection of information and documents before a Second Request is issued. With disparate types of business data located both on-premise and off-premise at potentially multiple multinational locations, time is of the essence once a Second Request is received, and having data maps and collection plans in place will significantly increase the speed in which an organization can respond with substantial compliance. *Based on the complexity of collecting data of different types from different locations, eDiscovery providers supporting potential Second Requests must be able to quickly translate collection requirements into plans and execute those plans to inform the downstream discovery effort required to respond to antitrust agency requests.*

Support for Multiple Languages

With more than 70% of proposed transactions in 2018 being greater than \$200 million in value, it is reasonable to consider that supporting foreign language discovery and review in today's business ecosystem will be a part of most Second Request response efforts for larger deals. Larger companies generally have a higher propensity for conducting business in multiple languages. *Accordingly, eDiscovery providers supporting multilingual and multilocation discovery and review must be able to assemble language-appropriate and domain-qualified review teams quickly without sacrificing quality to allow for the achievement of substantial compliance with Second Requests within the typical accelerated timelines required for responses.*

Need for Advanced Technologies

With short deadlines and potentially voluminous information and documentation requests, the extensive use of advanced data and legal discovery technologies supported by expert technologists may be required to ensure compliance with Second Requests. Using advanced technologies can substantially enhance an organization's ability to have responses certified as substantially compliant as they increase the velocity at which key eDiscovery tasks can be completed. This capability is vital given that HSR Act violations currently have penalty maximums of \$42,530 per day. (5) Additionally, as highlighted in the FTC Premerger Notification Office's Model Request for Additional Documentary Material (Second Request), challenged organizations are required to identify the use of selected advanced technologies or tools used for specific discovery tasks ranging from email threading and all forms of de-duplication to Technology-Assisted Review. *To comply with Second Requests, supporting eDiscovery providers not only need to be able to implement and execute tasks with advanced technologies, but they also need to be able to understand and explain the usage of these technologies to gain approval from antitrust agencies before use.*

The Prevalence: During 2018, 2,111 companies notified either the Federal Trade Commission (FTC) or the Department of Justice (DOJ) on Hart-Scott-Rodino reportable transactions. This number represents an increase of 2.9% over 2017 and is indicative of the increasing pulse rate of premerger notifications. Of these premerger notifications in 2018, approximately 2.2% were challenged and triggered Second Requests for additional information and documents with the challenges ultimately resulting in outcomes ranging from proposed transaction restructure or abandonment to acceptance of consent orders for public comment. *Based on the importance of Second Requests coupled with the fact that there are limited opportunities for eDiscovery providers to gain experience in this critical discovery area, it is important that companies notifying antitrust agencies of proposed transactions also proactively prepare to engage with a proven and experienced eDiscovery provider to ensure the best possible outcome should Second Requests support be required.*

The HaystackID Solution: HaystackID and Six Second Requests

With under 40 of the 2,111 reported transactions under the HSR Act being challenged in 2018 (6), it is readily apparent that HaystackID's positive reputation for supporting Second Request played an important role in its selection to support six specific Second Requests during a four-month window in mid-2019. Each of these Second Requests required not only eDiscovery provider experience in the specific processes and reporting requirements for antitrust agency requests but also needed to be supported by a provider having domain expertise in the information and documentation related to integrated medical and wellness companies. Having extensive expertise in the tasks required in Second Requests as well as an experiential understanding of supporting eDiscovery audits, investigations, and litigation for healthcare and pharmaceutical companies, HaystackID was selected to support the six requests and upon notification of each request immediately began planning and preparing to receive the specifics of the requests from the respective supported companies. Given the standard yet incredibly comprehensive requirements of Second Requests as well as the similarity of the requests supported by HaystackID in mid-2019, an aggregate overview of the four phases of support for each request is provided below to share an example of HaystackID's approach and proven performance in supporting Second Requests.

One Focus, Four Phases.

The one focus of all Second Requests is substantial compliance with information and documentation requests according to defined timeline requirements. To translate this focus into action on the six Second Requests supported in mid-2019, HaystackID quickly organized each request into four phases; phases that served to frame the tasks required to achieve positive support outcome and help clients meet both timeline requirements and substantial compliance certified responses. These four phases included:

- Phase One: Notification and Planning
- Phase Two: Collection and Processing
- Phase Three: Review and Production
- Phase Four: Termination/Expiration and Completion

From support request notification to the completion of support, HaystackID proactively defined, deployed, and executed the essential discovery tasks to create certified compliance with each Second Request.

Ready, Set, Go: Notification and Planning (Phase One)

The first phase of each of the six individual HaystackID Second Request cases began with the notification of the supported customer of additional information and documentation being requested by the FTC Premerger Notification Office.

As the FTC has a model request guide for Second Requests, HaystackID already had pre-defined planning tasks that could be initiated immediately after contact from customers requiring Second Request support. The pre-defined tasks ranged from the administrative and contractual tasks needed to initiate support (e.g., Second Request Statements of Work and Project Timeline and Cost Estimations) to the operational tasks necessary to support the development of data maps, collection plans, and determine discovery resource requirements. Considerations for Phase One Second Request planning incorporated an understanding of potential requirements and included:

- Expected Devices and Locations Where Requested Information and Documentation Might Be Located
- Expected Requirements for Processing and Normalization of Disparate and Complex Data Formats
- Expected Requirements for Analytics and Assisted Review with Advanced Technologies
- Expected Legal Document Staffing and Review within a Compressed Timeframe
- Expected Reporting and Production Formats and Test Reporting and Production Requirements
- Expected Hosting Requirements

The timeframe from customer notification to HaystackID until the initiation of support could be measured in terms of hours for all six cases. This quick response capability based on proactive planning and previous experience was critical as each of the six Second Requests supported by HaystackID were paramount to the future business success of the challenged companies, and the cost of missing timeline expectations could impact antitrust agency decisions and result in adverse short-term and long-term financial outcomes.

Upon notification from customers and completion of the administrative and operational planning required to support the individual Second Requests, HaystackID formally established its case discovery team for each case consisting of experts from appropriate Second Request investigation functional areas including:

- Forensics and Collection (Forensics First Team)
- Processing and Analytics (Early Case Insight Team)
- Review and Production (ReviewRight Team)
- Case Management (Project Management Team)

These experts coordinated the support of customers with a team of four project managers under the leadership of an expert eDiscovery consultant. The HaystackID expert eDiscovery consultant then began to work with both customers and HaystackID teams to finalize plans and translate those plans into action.

Rolling, Rolling, Rolling: Collection and Processing (Phase Two)

While specific information and documentation requests were defined by the antitrust agencies in each of the six separate Second Requests, it was incumbent on the customers and HaystackID to finalize, initiate, and execute collection plans to support the requests. To accomplish this task, the HaystackID lead eDiscovery consultant conducted detailed interviews with critical organizational and information technology leaders to develop collection plans that comprehended the multiple geographical locations, differing storage locations, various storage/communications devices, and disparate data applications and types needing to be collected to meet information and documentation requests.

The geographic locations varied amongst the six individual Second Requests; however, the storage and communication locations and devices generally included the following elements:

Key Storage Locations

- Application/Email Service Providers
- Archived Data
- Audit Trails, Logs, and Registries
- Backup Computer Files
- Legacy and Disaster Data
- Removable Media
- Voice Mail

Key Storage and Communication Devices

- Servers (Network)
- Personal (Desktop and Laptop) Computers
- Mobile Computing Devices
- Mobile Telephone Devices

Understanding the collection plan requirements as well as the geographic and storage locations of data needing to be considered as part of Second Requests, HaystackID conducted a combination of on-site and remote collections for each Second Request with qualified forensics experts and leveraged industry-leading tools from Cellebrite, Oxygen Forensics, and HaystackID (Mobile Device Integrator) and tracked collection activities with defensible and comprehensive chain-of-custody best practices.

Given the expedited timeline requirements of each Second Request, HaystackID collection teams conducted rolling collections when appropriate, thus accelerating the movement of collected data and ensuring its preparation for processing and review as early as possible in the Second Request investigation window.

With collections from enterprise applications and systems ranging from O365, One Drive, and Team Drive (File Share) to G Suite and G Drive as well as enterprise platforms such as Slack and Jira, HaystackID eDiscovery technicians began the process of data ingestion and reduction using tools such as HaystackID's proprietary DataThresher technology for searching and culling text and metadata to reduce data set sizes prior to further processing.

After initial culling reduction, HaystackID then further prepared the remaining data collected as part of each Second Request with the Nuix platform to further process the data for Second Request specifications. This further processing typically resulting in:

- Initial Processing Status Report for the Customer
- Exception and Hold File (EHF) Identification
- Applied Second Request Protocol Guidance to EHF
- Completed Processing for the Customer

This proven approach resulted in significantly reduced sizes of Second Request data sets and prepared the data for further translation as required for foreign language documents and analysis with advanced tools that included Authenticity.AI and Brainspace.

For multi-lingual documents requiring foreign language translation, HaystackID leveraged a combination of Authenticity.AI machine-learning artificial intelligence assisted automated translation technology and expert human translators.

With translation accuracy rates of 80% when optimized, Authenticity.AI's translation technology, coupled with HaystackID organic foreign language translation expertise, allowed HaystackID to support language translation requirements, including both German and Russian language documents, for Second Request cases requiring document translation in an accelerated and accurate manner. Once foreign language documents were translated and QC'd by HaystackID translation teams, those documents were moved, along with all available documents, and analyzed using Brainspace analytics.

Using Brainspace's analytics capability, HaystackID experts conducted analysis tasks on all case data to determine responsive documents. These analysis tasks included but were not limited to:

- Document Collections and Tagging
- Cluster Wheel Visualizations
- Data Visualization and Objective Culling
- Communication Mapping and Analysis
- Keyword and Concept Searching

Additionally, leveraging Relativity-Assisted Review technology supported by a team of approximately twenty HaystackID Relativity Certified experts, (7) HaystackID further reduced Second Request data sets by allowing high-level review experts to execute first-pass rolling reviews of each Second Request data set to identify potentially responsive material quickly and to allow for the concentration of reviewers on priority documents as early as possible in the Second Request investigation window.

This Phase Two Collection and Processing approach prepared Second Request data sets for the final review of targeted requested data and provided a significant reduction of data set sizes for the critical phases of review and production.

- Collection – 100% Data Set (HaystackID)
- Culling – 100% to 20% Data Set (DataThresher)
- Processing – 20% to 5% Data Set (Nuix)
- Analytics and Assisted Review – 5% to 2% Data Set (Relativity)

This rolling collection and processing approach also expedited the movement of information and documentation into the review and production phase of Second Request support.

Flexibility, Capability, Availability: Review and Production (Phase Three)

The requirement to have a second pass review of documents completed within the expedited timeframes of each of the six Second Requests presented a challenge that very few eDiscovery providers can meet in a time-efficient and cost-effective manner. Given its integrated document review expertise, technologies, and resources, HaystackID was able to immediately accomplish three primary objectives for each of the six Second Request cases, objectives that would be critical to review success. Those objectives included:

- Establishment of On-Premise Review Centers (Flexibility)
- Use of ReviewRight Technology to Identify and Source Review Attorneys Best Qualified to Support Second Requests (Capability)
- Use of ReviewRight Sourced Reviewers to Conduct Second Request Reviews (Availability)

Having complete and fully functional review centers available to address the physical review presence preferences of Second Request customers, HaystackID immediately was prepared to support each customer's Second Request case from a state-of-the-art, secure review facility. This immediate capability to help the client was integral to getting the review of Second Request documents underway as early as possible. With the on-premise facilities ready for immediate use, HaystackID then sourced the best-qualified reviewers to support the specifics of each Second Request.

Using its proprietary ReviewRight Match technology, HaystackID was able to begin sourcing document reviewers at the inception of Second Request support for each customer. This sourcing process allowed for the identification of geographically available attorneys who were qualified to excel in Second Request document reviews. Essential elements of the review team selection that occurred before the initiation of case support as part of ReviewRight's on-going sourcing process included:

- Background Checking
- Document Review Skills Testing
- Conflict Checking
- Second Level, QC, Team Leads, and Review Manager Assessments
- Work History and Reference Checking
- First Pass Review Assessment

With a pre-qualified pool of Second Request reviewers ordered by a proprietary review attorney ranking system that also comprehended expertise in medical and wellness related reviews, HaystackID was able to put together qualified, efficient, and cost-effective review teams in a matter of hours from the notification of each Second Request. This capability allowed case leaders to quickly focus on the review of Second Request documents rather than concentrating on the usually required, time-consuming, and challenging analysis of reviewers.

With Second Request review teams that approached 100 reviewers in some cases, HaystackID was able to conduct rolling reviews to include specific privilege reviews and Personally Identifiable Information (PII) reviews for cases as large as 600,000 documents while meeting established timelines and quality expectations. This highly effective rolling review approach also allowed HaystackID to provide requesting antitrust agencies production samples prior to review completion to ensure that production formats and standards of final productions would be compliant with agency expectations.

Final productions, as well as the submission of custom-developed Privilege Logs that included tracking of entire email chains in addition to standard data, were provided on time and in accordance with established case timelines agreed upon during antitrust agency and challenged company discussions. HaystackID's performance in Phase Three (Review and Production) of Second Request support for each of the six Second Requests allowed each customer to meet timelines and the standard of substantial compliance for each request.

Reflect, Record, Report: Termination/Expiration and Completion (Phase Four)

While tasks in phases one through three of Second Request support for each of the six antitrust agency requests were important in successfully meeting request requirements and meeting customer objectives, HaystackID's support for each customer was not concluded until the reflection, recording, and reporting of the process and progress for each completed Second Request was finished. This after-action review and consolidation of learning from each request was accomplished by members of the combined customer/HaystackID eDiscovery Team and consisted of experts from the following areas and teams:

- Forensics and Collection (Forensics First Team)
- Processing and Analytics (Early Case Insight Team)
- Review and Production (ReviewRight Team)
- Case Management (Project Management Team)

This after-action review process and the corresponding lessons learned and applied to follow-on Second Request cases is one of the primary reasons that HaystackID has become not only the first choice but the best choice for Second Request support for eDiscovery tasks.

An Aggregate Overview of an Integrated and Organic Solution

In the aforementioned aggregate representation of six Second Request cases supported by HaystackID within a four-month period in 2019, HaystackID provided supported customers with a combination of expertise and capabilities that allowed them to meet the timeline expectations and substantial compliance standard of responses to antitrust agency requests.

HaystackID's fully integrated Second Request support capability including Forensics First, Early Case Insight, and ReviewRight processes supported by forensics experts, eDiscovery experts, experienced and proven project managers, and qualified reviewers allowed HaystackID customers to detect, identify, locate, review, and produce data certified as compliant to Second Request specifications with unparalleled time and cost-efficiencies.

Based on integrated processes, a combination of proprietary and best of breed technology, and proven past performance support for these types of data-intensive, time-sensitive cases, HaystackID optimized each customer's opportunity to achieve their acquisition objectives.

Learn More. Today.

Contact us today to learn more about how we can help you in your audits, investigations, and litigation as well as support antitrust agency Second Requests.

About HaystackID

HaystackID is a specialized eDiscovery services firm that helps corporations and law firms find, listen, and learn from data when they face complex, data-intensive investigations and litigation. With an earned reputation for mobilizing industry-leading computer forensics, eDiscovery, and attorney document review experts, our Forensics First, Early Case Insight, and ReviewRight services accelerate and deliver quality outcomes at a fair and predictable price.

HaystackID serves more than 500 of the world's leading corporations and law firms from North American and European locations. Our combination of expertise and technical excellence, coupled with a culture of white glove customer service, makes us the alternative legal services provider that is big enough to matter but small enough to care. Learn more today at [HaystackID.com](https://www.haystackid.com).

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