

Consilio Institute: White Paper

A solid orange vertical bar is positioned to the left of the main title text.

CLEAR THE FINAL MERGER HURDLE: A GUIDE TO SECOND REQUESTS IN THE AGE OF ANALYTICS

By Adam Wells
Senior Vice President, Consilio

Consilio Institute: White Paper

CLEAR THE FINAL MERGER HURDLE: A GUIDE TO SECOND REQUESTS IN THE AGE OF ANALYTICS

TABLE OF CONTENTS

How to Establish a Workflow for Second Requests	3
Defining Characteristics of Second Requests	4
Terms to Know	5
What to Look for in a Second Requests Partner	5
Four Questions for a Prospective Second Requests Partner	6

Disclaimers

The information provided in this publication does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available in this publication are provided for general informational purposes only. While efforts to provide the most recently available information were made, information in this publication may not constitute the most up-to-date legal or other information. This publication contains links to third-party websites. Such links are only for the convenience of the reader; Consilio does not recommend or endorse the contents of the third-party sites.

Readers of this publication should contact their attorney to obtain advice with respect to any particular legal matter. No reader of this publication should act or refrain from acting on the basis of information in this publication – without first seeking legal advice from counsel in the relevant jurisdiction. Only your individual attorney can provide assurances that the information contained herein – and your interpretation of it – is applicable or appropriate to your particular situation.

Use of this publication, or any of the links or resources contained within, does not create an attorney-client relationship between the reader and the author or Consilio. All liability with respect to actions taken or not taken based on the contents of this publication is expressly disclaimed. The content of this publication is provided “as is.” No representations are made that the content is error-free.

I A GUIDE TO SECOND REQUESTS IN THE AGE OF ANALYTICS

Massive data volume and tight turnarounds are par for the course with Second Requests. Having a rock-solid workflow and the right partner helps ensure success.

Second Requests are high velocity, high volume, and high visibility — under normal circumstances. Now, as legal departments are facing an unprecedented post-pandemic economy and ever-growing reliance on digital communication, the demands in this final merger step are higher than ever.

Having a reliable, repeatable approach to Second Requests allows legal teams to be flexible and responsive when the Department of Justice (DOJ) or Federal Trade Commission (FTC) come knocking. In the coming months and years, this may prove critical. Although M&A activity slowed in 2020 — global deal volume fell by 32 percent in the first half compared with the same period in 2019, and deal values declined 53 percent¹ — many anticipate a surge in M&A activity.

“Post-Covid, we reasonably expect a once-in-a-generation sea change in the market landscape and potential target companies that may be available,” said one senior executive participating in a survey by the M&L Leadership Council. “To get where we want to be strategically, we need our deal volume to increase by 2-3x our baseline.”²

Reporting in June 2020 on the M&L Leadership Council survey, Harvard Business Review said that organizations should bolster their capabilities to prepare for post-Covid M&A. “To operationally execute M&A remotely during crisis and through a still highly uncertain economic recovery... will

require a level of internal M&A capability beyond what is currently in place at many companies.”³

Corporate and outside counsel should prepare now for the M&A activity that lies ahead. It starts with — and ultimately depends on — process and people.

HOW TO ESTABLISH A WORKFLOW FOR SECOND REQUESTS

Process-wise, Second Requests are similar to traditional e-discovery proceedings supporting litigation, however, they have some unique characteristics: accelerated timelines that require advanced technology, a standard of substantial compliance, disparate data and locations, and support for multiple languages.

A Second Request is a large people and technology effort that needs to be fully integrated in order for it to work successfully. Establishing a sound workflow includes but is not limited to the following factors:

Negotiation with regulatory agencies

Executing a Second Request involves back-and-forth communication with regulatory agencies. Experience with these exchanges and established relationships with the agencies can go a long way toward moving things along.

¹ *Global and Regional M&A Report 1H20*, Mergermarket.

² *“What M&A Looks Like During the Pandemic,”* Harvard Business Review.

³ *Id.*

“
A Second Request is a large people and technology effort that needs to be fully integrated in order for it to work successfully.”

Project planning and management

Second Requests require detailed planning across multiple functions, including technology and attorney teams, and workflow managers. Teams must be able to respond nimbly to new challenges and midstream changes.

Identification and collection

It's important to understand the scope of potentially relevant material in a Second Request effort. Once the scope is established, a plan is crafted for collecting the data — with a close eye on production deadlines.

Multi-language support

Since Second Requests may involve companies with an international presence, multi-language support, including expert human translators assisted by automated translation, can be a critical part of the workflow.

Processing

This is where raw, collected data (e.g., emails, Word documents, PDFs, etc.) gets converted to a reviewable format for the database. Teams need the operational infrastructure to process large amounts of data with speed and accuracy.

Managed review

Second Requests involve a massive review effort. From staffing and scheduling to specialization for protected content and privilege workflows, securing an experienced review team is a requirement for successful Second Requests.

Technology-assisted review

Machine learning and predictive analytics — now table-stakes technologies for Second Requests in the digital age — get to relevant information faster, which accelerates the managed review and production processes.

I DEFINING CHARACTERISTICS OF SECOND REQUESTS

High stakes

When the DOJ or FTC issue a Second Request, they are looking for proof that a deal is not anti-competitive. The outcome of the Second Request determines whether an important merger or acquisition can proceed.

Substantial data volume

Regulatory agencies demand a great deal of information for a Second Request. Especially now that so many corporate records are digital, the volume of data involved in Second Requests can be massive.

Tight time frame

When the DOJ or FTC say one month, they mean one month. It is not uncommon for a Second Request to require a 30-day turnaround time. Regardless of how tight the deadline is, extensions are rarely granted.

Nuanced regulatory requirements

The DOJ and FTC can be picky when it comes to Second Requests. They have specific requirements that are nonnegotiable and nuanced, demanding that corporate counsel have a team in place that's experienced with these requests.

I TERMS TO KNOW

Hart-Scott-Rodino Act

Under this act, the DOJ and FTC review proposed mergers of a certain size to determine if they would “substantially lessen competition” in the U.S. market.

Civil Investigative Demand

A civil investigative demand, or CID, is a tool used by federal U.S. regulatory agencies when they suspect a company of antitrust violations.

Supplementary Information Request

The Competition Bureau, a regulatory agency in Canada, may issue a supplementary information request (SIR) to obtain additional records during the 30-day waiting period before a merger closes.

I WHAT TO LOOK FOR IN A SECOND REQUESTS PARTNER

The right Second Requests partner amplifies the deep domain expertise of outside counsel by using technology. They provide a platform of support that allows the attorneys’ legal knowledge to take center stage. When evaluating partners for Second Request efforts, consider four key areas:

Experience

With Second Requests, experience is critical. They require established relationships with regulators and a time-tested workflow. Corporate counsel should inquire about these areas and favor partners that can demonstrate a successful track record.

Technology

Digital communication is ubiquitous in the corporate environment. As such, the volume of data involved in Second Requests is quite substantial. It requires accelerated processing that can only be performed with advanced technological capabilities. Verify that any partner you’re considering has the capacity and experience for the task.

Capacity

Significant bandwidth is required to manage the data volume and tight turnaround involved in a Second Request. Look for firms with a deep bench of qualified attorneys – ideally ones with relevant domain expertise, remote capabilities, and in multiple locations and time zones.

Process

Before agreeing to work with a Second Request partner, ask for documentation of their process. Do they have a playbook? Is the workflow they’ve used for other Second Requests repeatable? Do they have a regular meeting cadence? It’s one thing to talk about process and another to be able to show it.

“*The right Second Requests partner amplifies the deep domain expertise of outside counsel by using technology.*”

FOUR QUESTIONS FOR A PROSPECTIVE SECOND REQUESTS PARTNER

01

Does the organization have relationships with regulatory agencies?

02

What technology do they use to execute Second Requests?

03

How deep is their bench of attorneys?

04

Can they demonstrate success with Second Requests?

ABOUT THE AUTHOR

Adam is a passionate Legal Tech executive with 20 years of experience in the industry. He has led cross-functional operational, sales, and client engagement teams in both law firms and legal tech firms. Adam currently oversees consulting in the North American market, helping craft bespoke technology-enabled solutions. Adam holds a master's from Georgetown University and B.A. from George Washington University, where he graduated Summa Cum Laude and was elected to Phi Beta Kappa.



Adam Wells

Senior Vice President, Consilio

e adam.wells@consilio.com

[consilio.com](https://www.consilio.com)