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## Orange Legal Technologies Considering Second Requests?

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## Considering Second Requests?

# Quick Looks, Second Requests, and the Hart Scott Rodino Act (HSR)

### What Is A Second Request? A Quick Overview of HSR

Adopted in 1976 as a way to provide the federal government a formal process in which to help ensure anti-competitive outcomes during the course of mergers, acquisitions, or consolidations, the Hart Scott Rodino Act (HSR) is anti-trust regulation that can definitely challenge an organization's ability to identify, review, and present electronically stored data.

Typically conducted by the Department of Justice (DOJ) and the Federal Trade Commission (FTC), HSR simply requires organizations of certain sizes to both report specific information at the initiation of the merger process and, if requested, report on additional data points based on a second request for information. The goal of this reporting is ultimately to avoid some of the difficulties and expense that the enforcement agencies encounter when they challenge anti competitive acquisitions after they have occurred. These reporting requirements and the time frames in which they must occur are the principal reasons why merger and acquisition professionals need the quickest, most efficient way available to provide electronic documents to the requesting entities.

### What Time Is It? - An Understanding of Merger Timelines

If, based on the size of the potential merger or acquisition, involved parties are required to complete and file a Notification and Report Form; all participating parties must file the form with both the DOJ and the FTC. This form helps in the evaluation of potential anti-trust implications and, once it is filed, triggers a waiting period in which the parties may not complete the transaction. This waiting period is typically 30 days after all parties have filed and, in certain circumstances, the DOJ and FTC may grant requests for early termination of the waiting period. The waiting period can also be extended by either the DOJ or FTC through a request for additional information. This request for additional information is commonly referred to as a "second request" and typically extends the waiting period for 30 additional days after all parties have answered the second request and have received certification of "substantial compliance". If, upon the expiration of waiting periods, the parties involved have not had either a second request or have not been informed of further agency action, the parties are free to complete their requested transaction.

### Why Does Speed = Money? - The Economics of Mergers

In the merger process speed, quantified as time, is money. Each day a requested merger remains unapproved by the DOJ or FTC increases the potential for valuation volatility amongst the parties involved. This volatility can potentially result in value swings that may in fact ultimately put the requested merger at risk. With this in mind, organizations that can identify, collect, and present information quickly and efficiently to the DOJ and FTC can help decrease the potential of value volatility which have a negative impact on the deal.

### What Does Electronic Discovery Have To Do With Second Requests?

#### *Repository and Review Considerations*

In meeting information requests from the DOJ and the FTC in relation to mergers, there appears to be two approaches that merger and acquisition professionals are considering today. The first is the conventional filing of the Notification and Report Form and proceeding based on DOJ and FTC response - to either follow up on a second request or go ahead and complete the transaction. The second approach is the filing of the Notification and Report Form and also providing a limited set of important documents that may be reviewed and potentially prevent a formal second request.

This providing of a limited set of important documents as part of the initial filing is commonly referred to as a “Quick Look”. In both “Quick Looks” and “Second Requests”, many electronic discovery providers can help merger and acquisition professionals by providing a centralized and secure repository for high volumes of electronic documents and allowing those documents to be reviewed by multiple parties from multiple locations.

### *Centralized Repository for High Volumes of Documents*

In reviewing FTC Form C4 (Notification and Report Form), Item 4 highlights the fact that the following documents must be filed as part of the initial filing:

- Documents filed with the US SEC
- Annual Reports, Annual Audits, Reports, and Regularly Prepared Balance Sheets
- Studies, Surveys, Analyses, and Reports

From an electronic document perspective, the “studies, surveys, analyses and reports” requirement includes any of these items that were prepared by or for any officer(s) or director(s) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competitions, competitors, markets, potential sales growth, or expansion into product or geographic market, and indicate, if not contained in the document itself, the date of preparation, and the name and title of each individual who prepared each such document.” Understanding the use of email in the sharing of information in today’s workplace, it stands to reason that there would be a significant amount of informal yet relevant communications in the form of email that would need to be provided at the time of submission of this form.

With these requirements in mind, the ability of supporting merger and acquisition professionals to quickly and securely set up a repository for high volumes of applicable electronic documents is a paramount requirement for preserving merger value and meeting submission requirements. This ability to immediately set up a repository translates into speed (decreased time required) in meeting submission timelines, and thus can directly contribute to saving money and maintaining value for participating parties.

### *Multiple Party Review from Multiple Locations*

All information that has to be submitted to the DOJ and FTC must ultimately be reviewed by both internal counsel (participating parties) and by agents of both the DOJ and FTC. With this multiparty review requirement, which most certainly will include multi-geographic locations of reviewers, merger and acquisition professionals need to be able to quickly provide internal counsel the opportunity to review documents for both privilege and relevance, and then provide appropriate documents to the DOJ/FTC so they can review through the lens of anticompetitive concerns. This multi-party review capability from reviewers at different geographical locations is critical to meet the internal and external review requirements within the timelines required of the FTC Premerger Notification Program. Using a centralized repository, many electronic discovery providers can meet this requirement and allow all parties and reviewing entities – regardless of geographical location - to quickly review documents securely and efficiently online. This capability not only accelerates the actual document review process, but can also help decrease the complexity of the submission process, thus saving valuable time and money. Additionally, foreign language capability for review is also an incredibly important consideration today as many of S&P 500 companies are getting over half their revenues from foreign sales.



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## Second Requests, Not Second Chances

Once second requests are responded to by participating parties, there are typically no additional requests before the DOJ or FTC determine if no further action is required, if the seeking of injunctive relief is required, or if a settlement is warranted. As there are no second chances to second requests, choosing the right process and technology for identifying, reviewing, and submitting electronic documents is key to meeting information request requirements with the appropriate information in a timely manner. Organizations with the ability to provide immediate set up of a centralized repository that can be used for multi-party review with multi-language capability from multiple locations can truly help decrease the time required for DOJ and FTC mandated premerger initial submissions, initial submissions with quick looks, and second request submissions. Saving time while decreasing compliance complexity translates into saved money for merger and acquisition professionals – both in the cost of complying with requests and in the decrease of deal value volatility.

## Where might Orange Legal Technologies help?

Orange Legal Technologies' OneO® Discovery Platform provides legal and business professionals with an integrated, web-accessible, forensically sound electronic discovery platform that enables online analytics, processing, and review of data from the security of a hosted centralized repository. Key differentiators of the OneO® Discovery Platform include:

- A Complete Electronic Discovery Platform: OneO® can provide analytics, processing, and review – the core tasks of electronic discovery – from within a single platform. *This means that once data is received and ingested, there is no need for an additional platform or provider to complete these key electronic discovery tasks thus saving clients over 50% of the time and 50% of the money required for electronic discovery<sup>i</sup> when compared to traditional offerings.*
- An Integrated Electronic Discovery Platform: OneO® architecture provides for integration of electronic discovery tasks at the application level vs. the platform level. *This application level integration helps OneO® index documents twice as fast as other leading solutions<sup>ii</sup> - substantially decreasing the time and cost of electronic discovery.*
- An Online Delivery Model: OneO® is delivered to clients via a Software-As-A-Service Model (SaaS). *This means that there is no additional client-side resource or infrastructure investments necessary to implement and maintain the OneO® Discovery Platform – thus providing client's cost savings for today and investment protection for tomorrow.*

These differentiators - when purposed to support Second Request activities – can help save time and decrease compliance complexity – thus saving money for merger and acquisition professionals – both in the cost of complying with requests and in the decrease of deal value volatility.

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The Paperless Second Request, Robert Cook (FTC), June, 2002. 16 C.F.R. Part 803 – Appendix, Notification And Report Form For Certain Mergers And Acquisitions, FTC Form C4, September, 2002.

<sup>i</sup> Orange Legal Technologies, Predictive Pricing Estimator, August 2008. (100GB Estimated Client Volume At Initiation).

<sup>ii</sup> Clearwell Systems Rapid Indexing, <http://www.clearwellsystems.com/products/e-discovery-processing.php>, December 28, 2009. (Clearwell Indexing @ 10-12GB/Hour, OrangeLT® Indexing @ 25GB/Hour).



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