Second Requests Take Discovery To Next Level

Law360, New York (November 03, 2010) -- Merger and acquisition activity accelerated during the first half of 2010, following a year in which reported transactions under the Hart-Scott-Rodino Act plunged approximately 59 percent compared with the prior fiscal year, according to statistics issued in a 2009 joint annual report published by the Federal Trade Commission and U.S. Department of Justice Antitrust Division.

While transaction filings decreased in 2009, the percentage of second requests issued actually increased 4.5 percent from approximately 2.5 percent in 2008. Going forward, the predicted expansion of enforcement and investigation activity is likely to bolster this trend to increased activity in second requests in the coming year.

During the relative lull in merger and acquisition transaction activity over the past several years, e-discovery best practices evolved significantly, led primarily by advances in managed review technologies. These advances continue to shift the ways in which second request responses are carried out, providing compelling alternatives to established data culling and review methodologies.

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The Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires that prior to certain mergers, tender offers or other acquisition transaction closing, the parties involved in the transaction comply with the statute's premerger notification program. The program provides both enforcement agencies the opportunity, time and information to conduct their antitrust review.

After submission of the Notification and Report Form by both parties, there is a specified waiting period, usually 30 days or 15 days in the case of a bankruptcy sale or cash tender offer. If either agency determines during the waiting period that additional information and documentation is necessary to complete its review, a second request is made to the parties to provide such information and the waiting periods are extended, typically by 15 or 30 days.

The informational categories of interest requested by the agencies typically concern sales, marketing data, facilities, assets and structure of the businesses which are party to the transaction. By nature, these broad categories can generate tremendous volumes of data.

Proposed rule changes by the FTC, while simplifying some of the technical reporting requirements, would expand the categories of requested information on the notification and report form, providing what is expected to be a net increase in the amount and types of information requested.

By their nature, second requests tend to require fairly large volumes of information be collected, analyzed and produced; therefore, the FTC's proposed rule changes are potentially expanding the challenges with regards to data volume.

Early-Stage Blueprint Ensures Success

While only a relatively small percentage of filings results in a second request, it is prudent to proactively plan for one prior to or during the initial 30-day review period. A successful second request response most often results from a combination of efforts — advance, comprehensive project planning which includes the establishment of sound communications channels, use of reliable and efficient technology, and well-executed support provided by a diverse team of people.

By their very nature, second requests can create significant workload issues and timeline pressures for the responding parties. There is often added stress and concern associated with the prospect of offering too much or too little information within a highly compressed time frame.

Significant preparation is required when planning a response and approach to this type of specialized request, especially given that the volume of electronic business information and communications has expanded exponentially over the last decade.

As with most discovery response scenarios, a thoughtful second request project plan provides the blueprint for successful response execution. Defining and assigning critical process steps in your project plan will put you ahead of the curve, should a second request occur.

Among the most important elements to be included in this blueprint include precise definition of the workflow process in a manner that addresses all stages, owners and trigger events, as well as identification of your custodian pool and a map of data and documents to be collected across the custodian pool and from the noncustodial data pool.

Tracking and forecasting all moving parts and highlighting potential critical issues are key in your preparation and planning. From a management perspective, assign a seasoned project manager with an eye for detail and the strength and diplomacy needed to handle tasks and personnel in a stressful environment.

Create a communications group that meets daily, one which identifies potential problems and then implements corrective measures as needed. Encourage open communications among the team, establish a collaborative environment, and work to get the best out of your processes, technology and team.

In terms of understanding the data landscape, identify likely custodians, estimate the volume of effort and identify the locations of all the data and draft an initial plan for its retrieval. Draft initial volume estimates and locations where data is stored. Close planning with corporate information technology personnel and your selected vendors is important since well-executed planning yields meaningful time and cost savings and helps mitigate risk.

Detailed capacity planning and the associated budgetary and personnel requirements are also key issues to address in early planning stages. A detailed timeline and budget model should be created to track daily anticipated data volumes, review throughput and production progress. The model will be instrumental in helping to ensure that milestones are met on time and within budget.

Review Capacity and Capabilities

In the event you require external support, it should not be assumed that an organization's existing e-discovery and review partners have the necessary scale to handle the volume throughput and output requirements that a second request can create. Many providers may be hard pressed to handle the demands and speed requirements created by these large-scale projects.

To ascertain that your service partners have appropriate personnel and technology to handle large volumes of data handling for collections, data processing, review speed and productions within a very compressed timeline, be sure to ask very detailed questions during the vetting process and ensure they are able to support the latest advances in e-discovery software to quickly, accurately and cost-effectively identify responsive information.

Your timeline will benefit greatly from the use of advanced technology that accelerates the assessment of the data population, prioritizes the data set to review, increases review speed and intelligently integrates various document relationships such as e-mail threads, near-duplicates and, of course, attachments into the review workflow.

While intelligent and reliable technology is a critical determinant of a successful outcome, your service partners will only be as good as the project management behind their process and technology. Carefully examine the experience level, size and structure of their project management group.

Given the intensity of a second request, the service team, consisting of project management, training and technical support resources, as well as operations management, needs to be fully committed and in complete alignment with the project plan.

Technology Advances and Document Review

The document review phase is not only one of the highest stress points during a second request, but it typically accounts for the majority of the discovery budget. Historically, the solution was to size the review team to ensure that the review completes within the schedule without much consideration for the incremental expense incurred.

An enlightening example involves the merger of Delta Air Lines Inc. and Northwest Airlines, which ultimately forged one of the world's biggest airline organizations in 2008.

According to a recent public statement made during an earnings call, Delta CEO Richard Anderson said that the firm had approximately 270 lawyers between the two parties assigned to document review in order to comply with the Department of Justice's second request within 90 days and producing somewhere in the neighborhood of 35 million documents. Many other megamergers have followed the same pattern over the past several years.

Today we see a shifting landscape where many legal counsel are adopting the latest advances in e-discovery software to quickly, accurately and cost-effectively identify responsive information. Advanced analytics and prioritization technology are combining to form a streamlined assessment, culling and review prioritization workflow whereby attorneys are able to reduce review time and cost, improve the consistency of review decisions across related documents and custodians, and reduce the risk of producing false positives that may contain nonrelevant proprietary business information.

While there are undoubtedly two schools of thought regarding just how much care and precision should go into the relevancy review process for a second request, the decision point becomes moot to a certain extent because the technology advances of the past year or so, when deployed as part of an overall efficient process, allow the legal team to save time, save money and emerge with a very focused set of responsive documents to provide regulators.

While the adoption of integrated analytics expands, keyword filtering remains a widely used method for reducing data sets prior to the expensive, time-consuming full review phase. The general effectiveness of keyword filtering has been subject to much debate over the years.

The primary issue with relying on keyword search filtering is that within large volumes of nonrelevant data there are often false positives in the context of the key terms and carrying those documents forward into the review phase can be a very expensive and time consuming proposition.

Another negative consequence is the potential for relevant files to be missed by the keyword search. These false negatives may prevent the legal team from gaining access to documents that would be beneficial to share with the regulators.

Keyword filtering can be an effective step in the data reduction strategy, as long as it is incorporated into a broader intelligent data assessment process that leverages advanced analytics, including clustered search result analysis, which automatically organizes search results into organized concept folders.

Having the legal team analyze the search results in this manner allows them to quickly identify the false positives and the basis for their inclusive in the result set. The keyword search process becomes an exercise in iteration, until such time the keyword terms are optimized and the results are more in line with the legal team's intent.

Other types of data analysis — including domain analysis, folder analysis, concept searching and social network analysis — can also help to quickly identify nonrelevant candidate files, potentially privileged files and communications to external parties of interest.

For relatively little time invested, all of these features present the legal team with a tremendous opportunity to narrow the data set substantially prior to full review. These same tools can obviously be used to identify relevant and key documents.

When combined with a document categorization feature, which identifies documents of interest by having the database pool conceptually group similar documents automatically, it makes for a tremendous opportunity to pare the data set and quickly isolate key sets of documents.

Perhaps the most innovative technology advancement which may be leveraged is the ability to automatically predict whether a document is likely responsive or not, based on sample of documents examined by a single lawyer or small team of lawyers. In this approach, often referred to as predictive coding, the decisions they make as to relevance are interpreted by the software and propagated to the rest of the document population.

Not all predictive coding software is the same with regards to its technical approach. It can be instructive to take the time to proactively understand the subtle differences of the options in the marketplace.

Broadly speaking, there are two main approaches being utilized — one which uses query as a component and one which relies on a clustering methodology. Regardless of the specific approach selected, the primary benefit of deploying a "predictive coding" approach is the realization of substantial cost savings.

In the case of applying predictive coding technology to a second request scenario, some would agree that the time savings is equally as important as the cost savings. Other advantages of this technology-based approach are the ability to identify the preponderance of key responsive documents and issues within days of initiating a review, regardless of the size of the document population. As a result, your team is able to make strategic and tactical decisions based on the knowledge gained during initial review.

Predictive coding truly represents the intersection of attorney judgment with computerized assessment to not only accelerate the review process, prioritize the document collection but perhaps most importantly, provide a level of accuracy and consistency typically not found in a traditional linear human review.

Conclusion

Compared with litigation and other types of discovery, second requests come with a unique set of requirements that are tailor-made for latest best practices and technology advances in the e-discovery arena. The combination of comprehensive planning, assembly of an experienced and well-coordinated team, and advanced technology-driven processes makes for an excellent recipe for the successful execution of a second request.

In the end, second requests are not routine, particularly when it comes to e-discovery.

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