

Educational Presentation

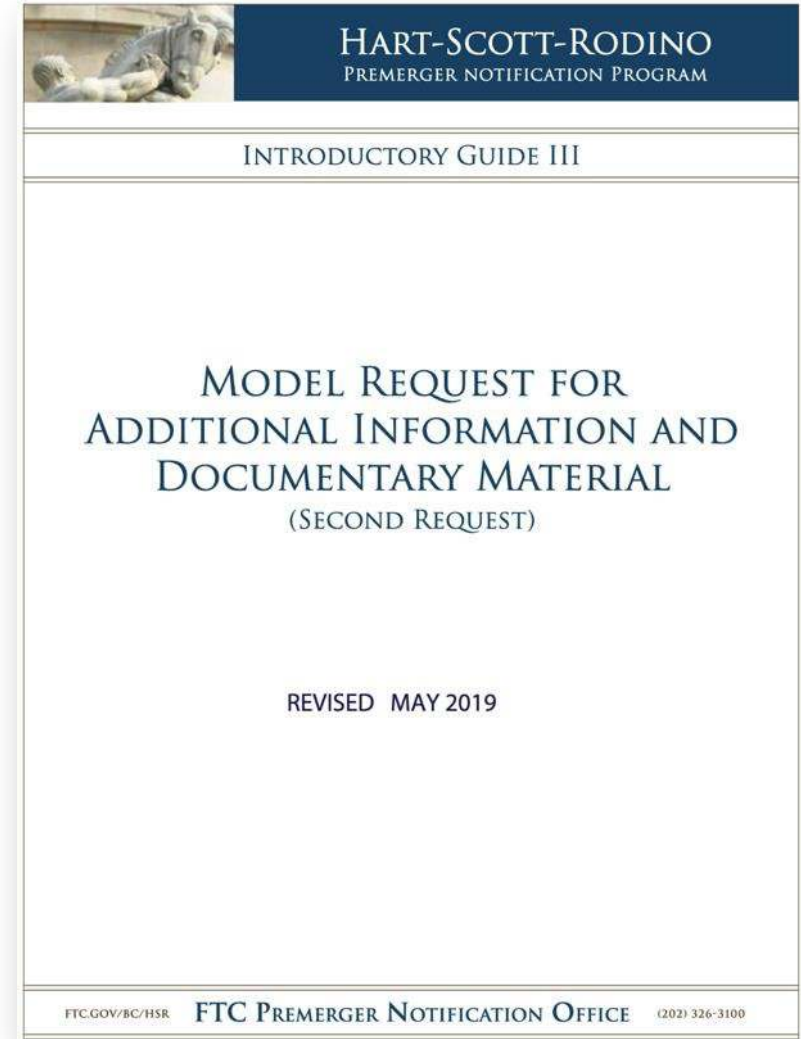
# Anatomy of a Second Request

Managing Antitrust Agency Second Requests

# Expert Presenters

## Anatomy of a Second Request

- **Michael Sarlo, EnCE, CBE, RCA, CCLO, CCPA**  
Partner and Senior EVP of eDiscovery and Digital Forensics, HaystackID
- **John Wilson, ACE, AME, CBE**  
CISO and President of Forensics, HaystackID
- **Seth Curt Schechtman**  
Senior Managing Director of Review Services, HaystackID
- **Anya Korolyov**  
Senior Consultant, HaystackID
- **Kevin Reynolds**  
Senior Project Manager, HaystackID



# Michael D. Sarlo, EnCE, CBE, RCA, CCLO, CCPA

## Partner and Senior EVP of eDiscovery and Digital Forensics

Michael is a Partner and Senior Executive Vice President of eDiscovery and Digital Forensics for HaystackID. In this role, Michael facilitates all operations related to electronic discovery, digital forensics, and litigation strategy both in the US and abroad while working on highly complex forensic and e-Discovery projects.

Michael is fluent in a wide variety of digital forensic, ECA, e-Discovery processing and hosting technologies in addition to the IT infrastructure associated with deploying and administering such tools. He is also a frequent speaker on digital forensics best practices, GDPR issues, ESI treatment methodologies, and cost containment strategies for working with massive volumes of data.

Michael is an expert witness and holds certifications around several forensic tools including Cellebrite, EnCase, and BlackLight. He is also a Relativity Certified Administrator (RCA).

# John Wilson, ACE, AME, CBE

## CISO and President of Forensics, HaystackID

John provides expertise and expert witness services to help companies address various matters related to digital forensics and electronic discovery (eDiscovery), including leading investigations, ensuring proper preservation of evidence items and chain of custody. He develops processes, creates workflows, leads implementation projects as well as GDPR data mapping services for clients including major financial institutions, Fortune 100 companies, AmLaw 100 law firms as well as many other organizations small and large. In addition, he provides expert witness services and consulting in matters of all sizes. His work spans some of the largest litigations and matters on record in the United States and many of the 39 countries where he has worked on cases.

John is a certified forensic examiner, licensed private investigator and information technology veteran. He has over two decades of experience working with the US Government and both public and private companies. He serves clients in a variety of industries and is an advisor to outside counsel, general counsel and in-house executives on best practices.

# Seth Curt Schechtman

## Senior Managing Director of Review Services, HaystackID

Seth is the Senior Managing Director of Review Services and lead for ReviewRight operations within HaystackID. Seth has extensive industry experience of more than a decade as a staff attorney and eDiscovery review manager with leading law firms to include Proskauer Rose LLP and Dechert LLP. Additionally, Seth is one of the industry's leading experts in all aspects of legal document review ranging from sourcing and evaluation of review attorneys to automated and remote reviews.

A graduate of Lehigh University, Seth holds a J.D. from Fordham Law School.

# Anya Korolyov

## Director of Client Services, HaystackID

Anya Korolyov is a Director with HaystackID. Anya has 12 years of experience in E- Discovery, focusing on data analysis, document review, and integrated complex workflows (including TAR) through the production cycle of the EDRM. She has managed large-scale complex projects in health care, anti-trust, and patent infringement litigations, as well as successfully navigated through several Second Requests as an Attorney and Senior Consultant. She has consulted on matters involving global food processing, global pharmaceutical company, and commodities trading companies in an internal investigation of their business operations in Russian Federation, Ukraine and Czech Republic with an emphasis on compliance with FCPA and the US anti-money laundering laws.

Anya has a J.D. from Chicago Kent College of Law, is a licensed attorney, and certified as Relativity Master (RCA, User, Analytics Specialist, Processing, and Project Management Specialist).

# Young Yu

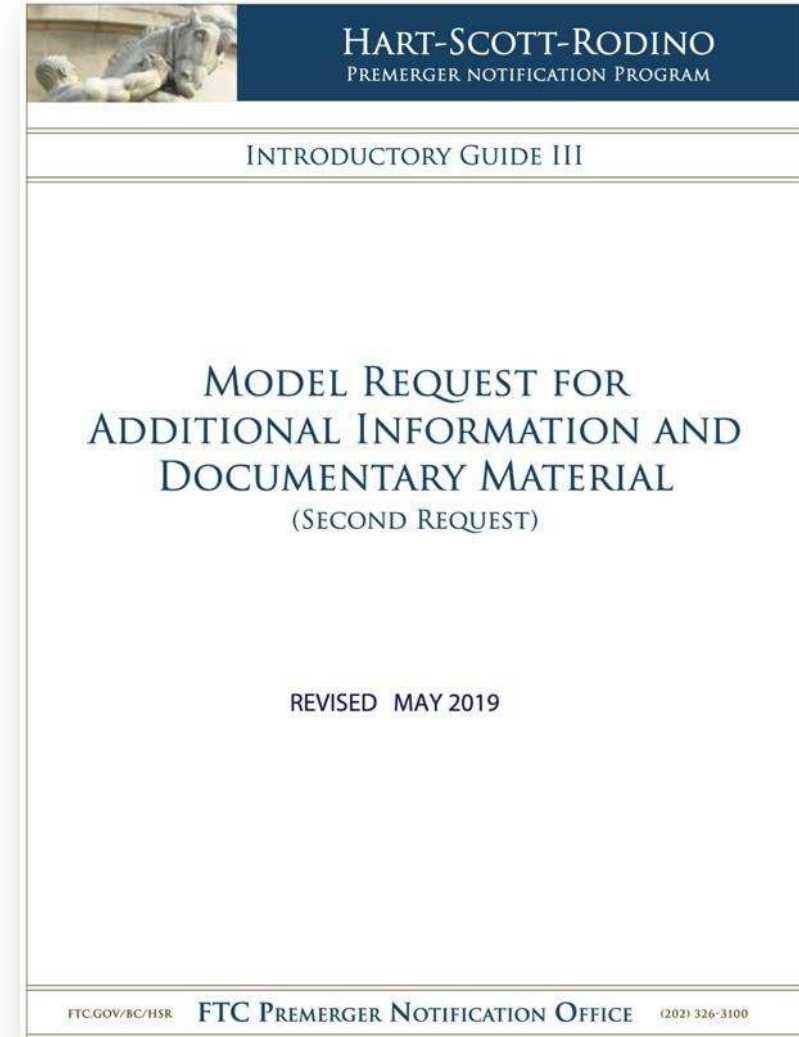
## Director of Client Services, HaystackID

Young is a Director with HaystackID. Young has 22 years of experience and acts as one of the primary strategic and operational adviser to HaystackID clients in matters relating to the planning, execution, and management of eDiscovery activities. Young has specialized in securities and regulatory litigation (AML, FCPA, anti-trust, OCC, OFAC, etc) and touched most other legal practice areas. He has been a consultant for many major financial institutions as well as other Fortune 500 companies. Over the last 10 years, he's focused on structural and conceptual analytics where they lend themselves as a beneficial alternative to data assessment or linear review.

# Agenda

## Anatomy of a Second Request

- **Defining Second Requests**  
The Requirement, Task, and Prevalence
- **A Different Type of Discovery**  
Characteristics of Second Requests
- **Managing Second Requests**  
Preparation, Planning and Execution
- **Managed Attorney Review**  
Considerations to Streamline Review and Logging During a Second Request
- **Proprietary HaystackID Technology**  
Stemming Analysis and Thread Consistency Toolkit
- **HaystackID and Second Requests**  
The Elements and Execution of Twelve Requests





Educational Update

# Defining Second Requests

The Requirement, Task, and Prevalence

# The Requirement

## Second Requests

1976

HSR Act

- Federal Trade Commission (Antitrust Division)
- Department of Justice

### The Hart-Scott-Rodino Antitrust Improvements Act

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) 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.

# Accelerated Timelines

## A Different Type of Discovery



**Accelerated Timelines** - From a timeline perspective, merging firms generally make premerger filings with antitrust agencies on an average of 13 days after publicly announcing a deal. 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.

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.**

# The Prevalence

## Second Requests

During 2019, 2,089 companies notified either the FTC or the DOJ on HSR Act reportable transactions. This number represents a slight decrease over 2018, where 2,111 reportable transactions occurred.

Of premerger notifications in 2019, approximately **3.0% were challenged and triggered Second Requests**. This represents an increase and acceleration over the 2.2% rate in 2018.

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.

- **Relatively Small Number of Second Requests**
- **Expertise and Experience Critical for Providers**

# Ready, Set, Go

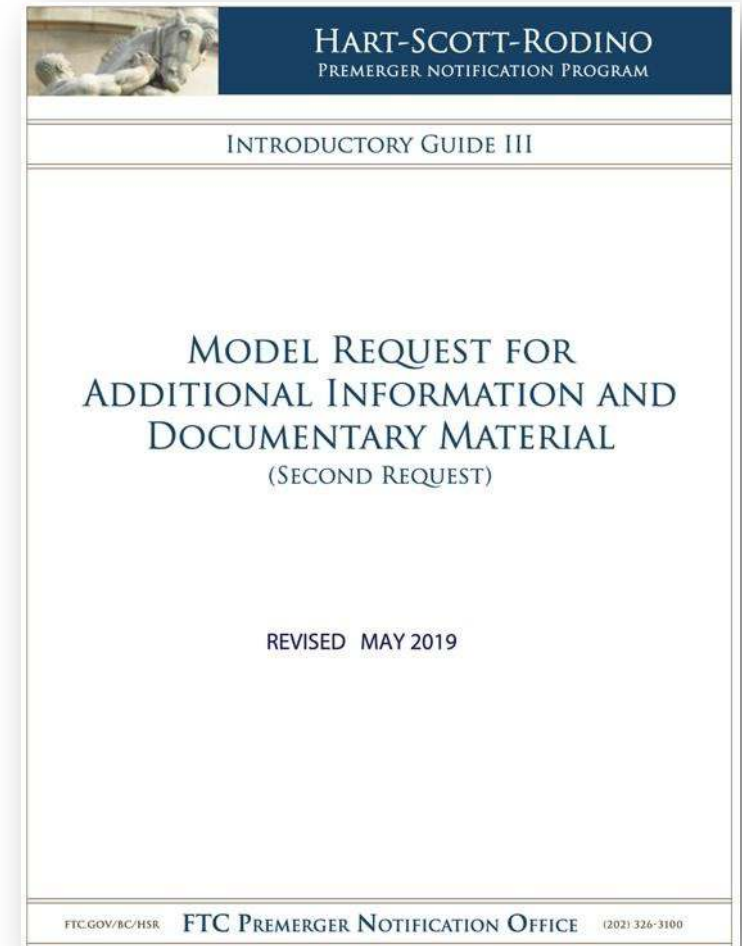
## Planning and Getting Ahead

The first phase of each Second Request case **begins with the notification** of the supported customer of additional information and documentation being requested by the FTC Premerger Notification Office.

**Good enterprise class outside counsel will know a Second Request is coming** and will urge the parties to act to prepare to respond ahead of the receiving a formal Second Request. It is a common misconception that Second Requests are Black Swan events from an anticipation standpoint.

Law Firms and Service Providers must leverage their institutional knowledge to **pre-emptively execute on an expected Second Request.**

FTC has a model request guide for Second Requests, **providers should already have pre-defined planning tasks that can be initiated immediately after contact from customers requiring Second Request support.**



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# A Different Type of Discovery

Characteristics of Second Requests

# The Task

## Second Requests

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.

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.



ACCELERATED TIMELINES



A STANDARD OF SUBSTANTIAL COMPLIANCE



DISPARATE DATA AND LOCATIONS



SUPPORT FOR MULTIPLE LANGUAGES



NEED FOR ADVANCED TECHNOLOGIES

# A Standard of Substantial Compliance

## A Different Type of Discovery



**Substantial Compliance** - The standard for certification of a Second Request response is that of substantial compliance. **Substantial compliance 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.

- **Significant and Essential Requirements**
- **Qualitative Best Effort within Allocated Time**



# Disparate Data and Locations

## A Different Type of Discovery



**Disparate Data Types and Locations** - Given the stakes and stakeholders, parties to proposed merger transactions should consider detecting, identifying, locating, and planning for the collection of 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. Having data maps and collection plans in place will significantly increase the speed in which an organization can respond with substantial compliance.

- **Leverage Custodian Interviews and Institutional Knowledge**
- **Data Map and Over-Collect – Both on the custodial level, and data source level**
  - (I.E. Slack & Mobile Devices)
  - Prepare for Additional Custodians when Anticipating and Begging Work Early on a Second Request

# Need for Advanced Technologies

## A Different Type of Discovery



**Need for Advanced Technologies** - The extensive use of advanced data and legal discovery technologies supported by expert technologists may be required to ensure compliance with Second Requests.

**Historically, both the DOJ and FTC prefer eDiscovery providers that leverage Nuix and Brainspace to comply with Second Requests.**

Using advanced technologies can substantially enhance an organization's ability to have responses certified as substantially compliant. This capability is vital given that **HSR Act violations currently have penalty maximums of \$42,530 per day.**

**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.

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.

# Support for Multiple Languages

## A Different Type of Discovery



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.

- **Multilingual Support**
- **Multilocation Support**

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# Managing Second Requests

Preparation, Planning and Execution

# Getting Ahead of The Data

## Planning for Success Across Multiple Teams Working In Sync

Planning should incorporate an understanding of potential requirements to include:

### Expected **Devices and Locations** Where Requested Information and Documentation Might Be Located

- Providers should keep collection resources on standby during the Second Request
- Collection and processing logs should be updated multiple times a day, and live as data is being collected, filtered, and subsequently processed.

### Expected Requirements for **Processing and Normalization** of Disparate and Complex Data Formats

- Providers should get ahead of data normalization if it exists and *may* be in scope. I.E. Slack, Chats, Mobile Phone Data, or Other Web Based Repositories.

### Expected Requirements for Analytics and Assisted Review with **Advanced Technologies**

- Providers should have mapped out workflows, searches to facilitate TAR workflows, and experts to attest to the TAR process.
- Additionally, be prepared to work directly with regulators to vet the process by providing access to technology.

### Expected Legal Document **Staffing and Review** within a Compressed Timeframe

- Providers should prepare for complex privilege reviews, on short schedules, and be always prepared for the unexpected – overstaffing **quality privilege review** teams is critical to avoid time squeeze.

# One Focus. Iterative Workflows.

## A Provider's Perspective

The **one focus** of all Second Requests is **substantial compliance** with information and documentation requests according to defined timeline requirements, while also **protecting privilege communications** and information.

- **Traditional discovery workflows** often run in phases across the EDRM from identification, collection, ECA, through review and production.
- **Second Request discovery workflows are iterative** in that identification, collection, processing/ECA, review and production are often all occurring at the same time.
  - It is not uncommon for data to be collected, processed, and **pre-produced** all within the same cycle.
  - Early Identification of data types that are or are not candidates for TAR and/or Structured Analytics is critical.
  - Review teams can often be handling short message format data and document types not conducive to TAR early on in, and pre-production of responsive non-privilege communications can occur as early as data is processed and identified within these categories.

# Additional Workflow Considerations

## Important eDiscovery Requirements – Preparing for More Work

The FTC Premerger Notification Office's **Introductory Guide III, Model Request for Additional Information and Documentary Material (Second Request)**, provides important information for parties to Second Requests. The guide also shares important eDiscovery-related specifications that will need to be understood and complied with as part of submissions. Areas of eDiscovery provider interest include:

- Sensitive Personally Identifiable Information or Sensitive Health Information in Data Sets (Instructions)
- Identification of any Electronic Production Tools or Software Packages Used in Response to Request\*
- Identification of Person Able to Testify on Behalf of Company Relating to eDiscovery Specifications

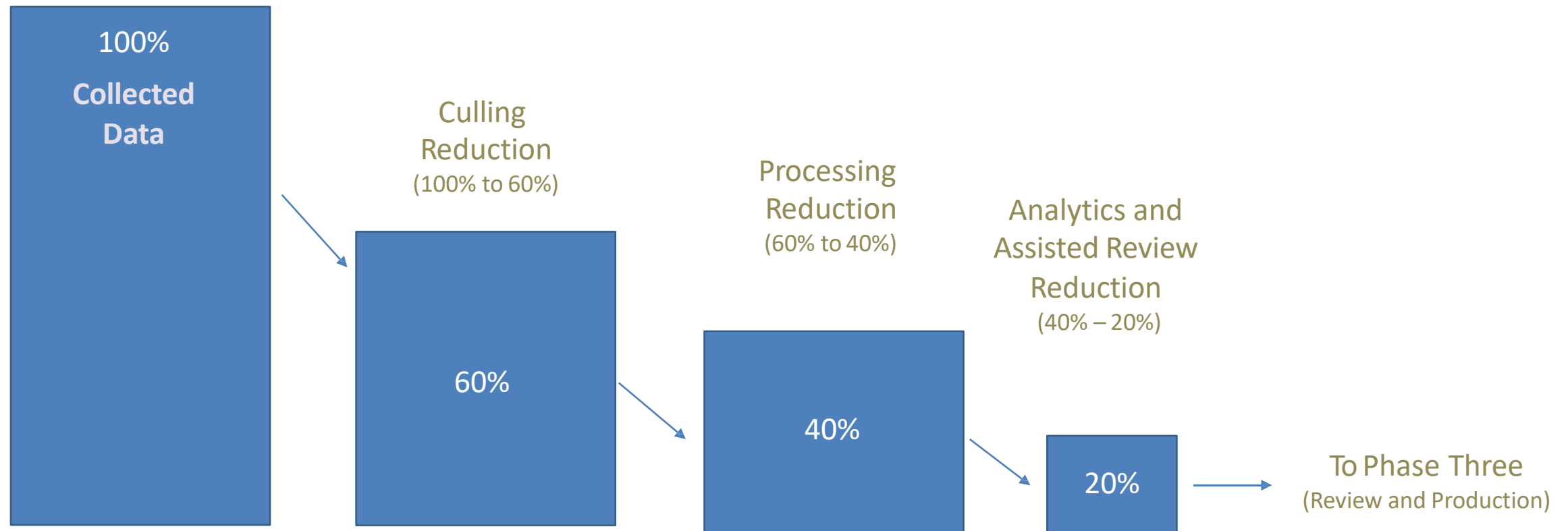
*\* Guidance on tools and software packages also include specific requirements for addressing:*

- Keyword Searching
- Technology Assisted Review
- Email Threading
- De-duplication, Global De-duplication, or Near De-duplication (All Forms Require Advance Approval)

# Data Reduction Expectations

## Phase Two: Collection and Processing

Below is a general example of potential data size reduction prior to the review and production phase of Second Request support leveraging TAR with eyes on privilege documents.





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# Special Considerations

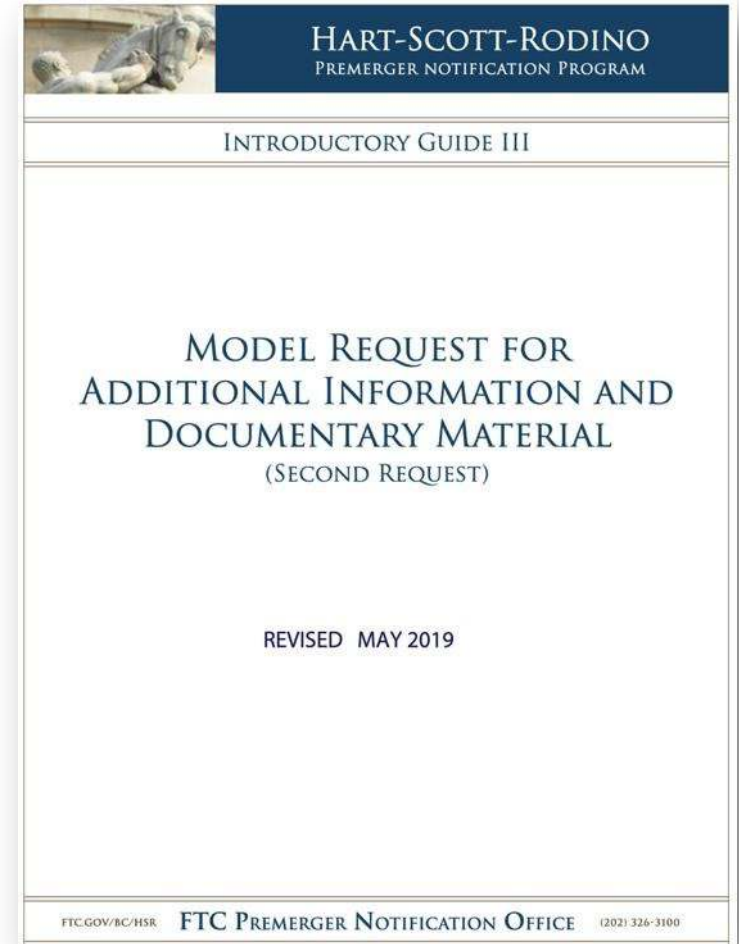
Specifications, Data, and Workflow

# Updates to Specifications

## Planning and Getting Ahead

Both the FTC and DOJ specifications for processing and producing data have been updated as recently as 2019-2020. These changes impact data processing, document review, and production.

As an example, treatment of embedded objects will factor heavily in the resulting document population post processing. While most embeddings can be suppressed, embedded audio and video files are specifically referenced as items that require extraction. For document types produced in native format, such as Excels and Powerpoints, be mindful that embedded documents do not always render extracted text in the underlying Excel or Powerpoint. This may lead to complications when reviewing for privileged material as the embedded document will not be reflected as a record in the review database.



# Workflows

## Selecting an Analytics Model

TAR 1.0: “Predictive Coding”	TAR 2.0: “Continuous Active Learning”
1. Sample Based Learning leverages small groups of manually coded documents as representative samples of the entire document set.	1. Continuous Active Learning allows the algorithm to keep improving over the course of review, improving savings and speed.
2. Trains against small reference sets and stability is measured against the control set. Metrics are reported after each round.	2. Ranks every document every time, which allows rolling uploads. Does not use a reference set but rather measures fluctuations across all documents to determine stability.
3. Subject Matter Expert handles all training.	3. Review teams train as they review, working alongside expert for maximum effectiveness. SME focuses on finding relevant documents and QC’ing review team judgments.
4. Allows for Control Sets and Training rounds to be revisited with rolling data collections.	4. Uses judgment seeds so that training begins with the most relevant documents, supplementing training with active learning to avoid bias.
5. Considered the most reasonable and affordable approach to document review for large document populations with tight turn around schedules.	5. Works great in low richness situations; ideal for any size case from small to mega because of flexible workflow.

# Additional Data Sources & Potential Refresh

## Concurrent Workflows & Downstream Effects

Additional data sources or custodial collections may be requested as they become relevant during the course of discovery. Also, regulators may request a refresh of the defined custodians and data sources. Typically, the refresh request will pick up from the last collection date to the date of the regulator's request.

Things to Consider:

- Collection Methods
- Limiting scope of potential refresh collections
- Impact on Analytics models
- Timing, timing, timing!

# Data Types

## Understanding Problematic Data

Data sources such as Slack, mobile, or any other short message formats can be problematic for TAR, although not impossible. A tactical approach and collaboration with regulators is critical.

- **Short Message Communication Challenges:**
  - Predictive Coding
  - Frequency negotiation
  - Search Terms
    - False Positives
- **Non-Relevant Data Intermixed with Custodial Data**
- **Focus On Limiting Scope for Platforms like Slack:**
  - Heat Map
  - Clustering
  - Segmenting into recompiled time blocks

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# Managed Attorney Review

Unique Challenges, Solutions, Technology and Workflows  
to Streamline Review and Logging During a Second Request

# Flexibility, Capability, Availability

## Review and Production

The requirement to have a second pass review of documents completed within the expedited timeframes of Second Requests presents a **challenge** that very few eDiscovery providers can meet in a time-efficient and cost-effective manner. Given this challenge, it is reasonable to seek providers with **integrated document review expertise, technologies, and resources** for Second Request support.

Two primary and critical objectives for Second Request review support include:

- Remote Reviewer Access (Flexibility)
- Identification and Sourcing of Review Attorneys Best Qualified to Support Second Requests (Capability)

Having an established **remote reviewer program** allows for sourcing the best reviewers **regardless of location** in addition to ensuring **continuity of reviews** during uncertain times.

# Streamlining Log Creation

## Enhancing Review Teams via Technical Execution

*Programmatically Streamlining Privilege Logging at The Outset of A Second Request*

### **Log Format**

- Review teams, eDiscovery / Advanced Technical Support Teams, and Counsel should all clearly understand the privilege log at the start of the matter, not when documents need to be reviewed for privilege in order to begin automation steps early on and develop workflows to streamline log creation.

### **Name Normalization Should Begin Prior To Privilege Review and Log Creation:**

- 50% of Name Normalization can be accomplished programmatically using battle tested methods.

### **Custom Dictionary Creation:**

- HaystackID can create custom dictionaries, which is a cross reference against First, Last, Title (ESQ or Not), which can be leveraged to populate parties where automated name normalization fails. As more documents are tagged for privilege, and log creation begins, edits to dictionary entries can be updated on a regular basis to streamline downstream logging.



# HaystackID in Action

## Privilege Logging Considerations and Practical Tips

### *Second Request Managed Review Considerations and Expertise*

#### **Do all privileged documents have to be logged?**

- Can email families be logged in a single entry noting that there are privileged attachments?
- Do privilege redacted documents have to be logged? If not, make sure that the physical redactions guidelines instruct the team to leave unredacted to/from/cc/bcc information, subject lines, etc., to provide context for the privileged material.
- Even if producing non-inclusive emails, do non-inclusives need to be logged? HaystackID has developed tools that allow us to identify to/from/cc/bcc information from lessor included emails so that they can be included on log entries for inclusive emails.
- Do exact duplicate attachments have to be logged?

# HaystackID in Action

## Privilege Logging Considerations and Practical Tips

### *Second Request Managed Review Considerations and Expertise*

**Can the to/cc/bcc fields be collapsed into a single field called, “recipients”?**

**Do families have to be logged if they are to/from/cc outside counsel?**

- The government might not require logging of documents to/from outside counsel – but, could for those that “cc” outside counsel.

**Try to get ahead of third-parties appearing on the log, especially since a unique people list with company affiliations needs to be generated.**

- What is their relationship to the client? Agent? Functionally equivalent of an employee? Privilege creator?
- Who are the per se privilege breakers (created a highlighting set for them).
- Instruct reviewers to never assume a third-party breaks privilege.

# HaystackID in Action

## Privilege Logging Considerations and Practical Tips

### *Second Request Managed Review Considerations and Expertise*

#### **Who are common interest holders and who has joint defense agreements in place?**

- Ensure that all claims of CI have the parties listed in the claim. Watch merger dates, as claims of CI with the merging entities generally shouldn't pre-date the merger announcement.

#### **Run sweeps for privileged documents that are to/from/cc/bcc .gov & .state**

#### **Run searches for privilege withhold documents that contain .gov & .state domains**

- At best they should be partially privileged.

#### **Every entry should have an attorney/legal department/law firm in the description and/or to/from/cc fields**

#### **Ensure all claims of requesting legal advice are going to attorneys.**

- The government has sometimes taken a strict view of "to" defining it as not including emails where attorneys were solely cc'd. Therefore, if you one can collapse the "to", "cc", and "bcc" fields into a single recipient field, fewer challenges may be raised.

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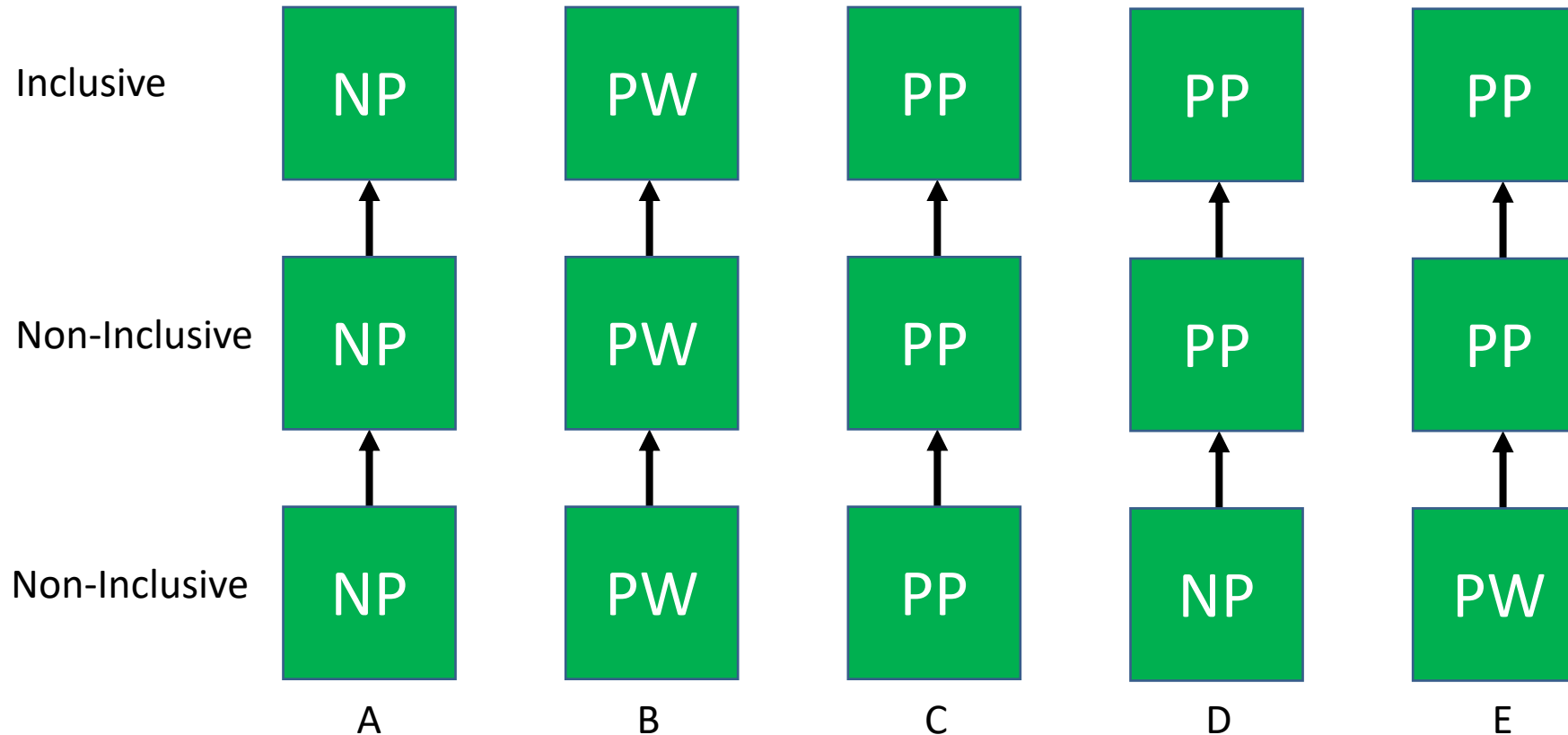
# Stem Detection and ThreadConsistency Analysis Toolkit Overview

Proprietary HaystackID Technology to Streamline Second  
Request Review Quality and Privilege Logging Burden

HAYSTACK

# Consistent Threads

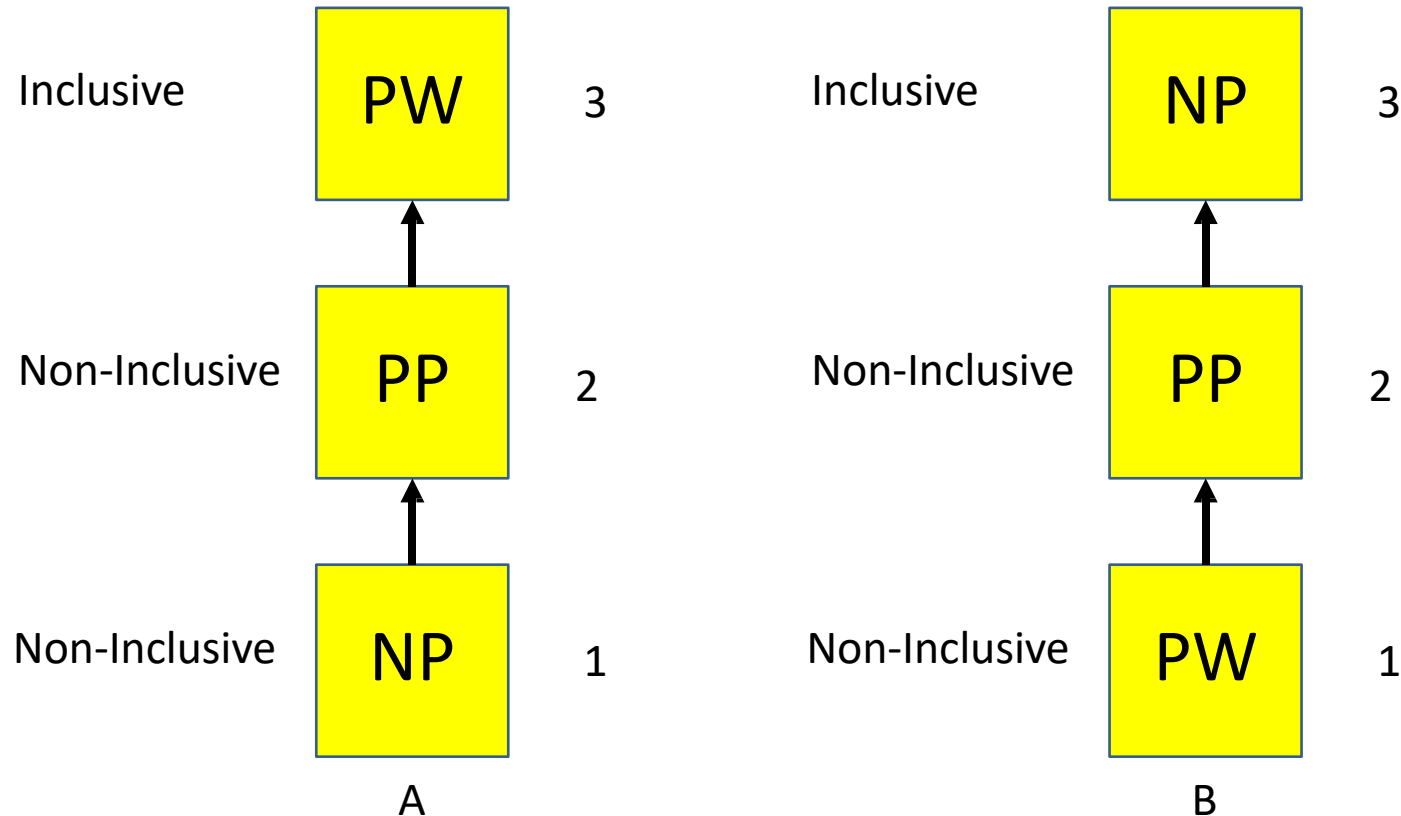
## Exploring the HaystackID Stemming Quality Control Tool



Key: NP = Not Privilege PP = Partially Privileged (a.k.a. Privilege Redact) PW = Privilege Withhold

# Inconsistent Threads

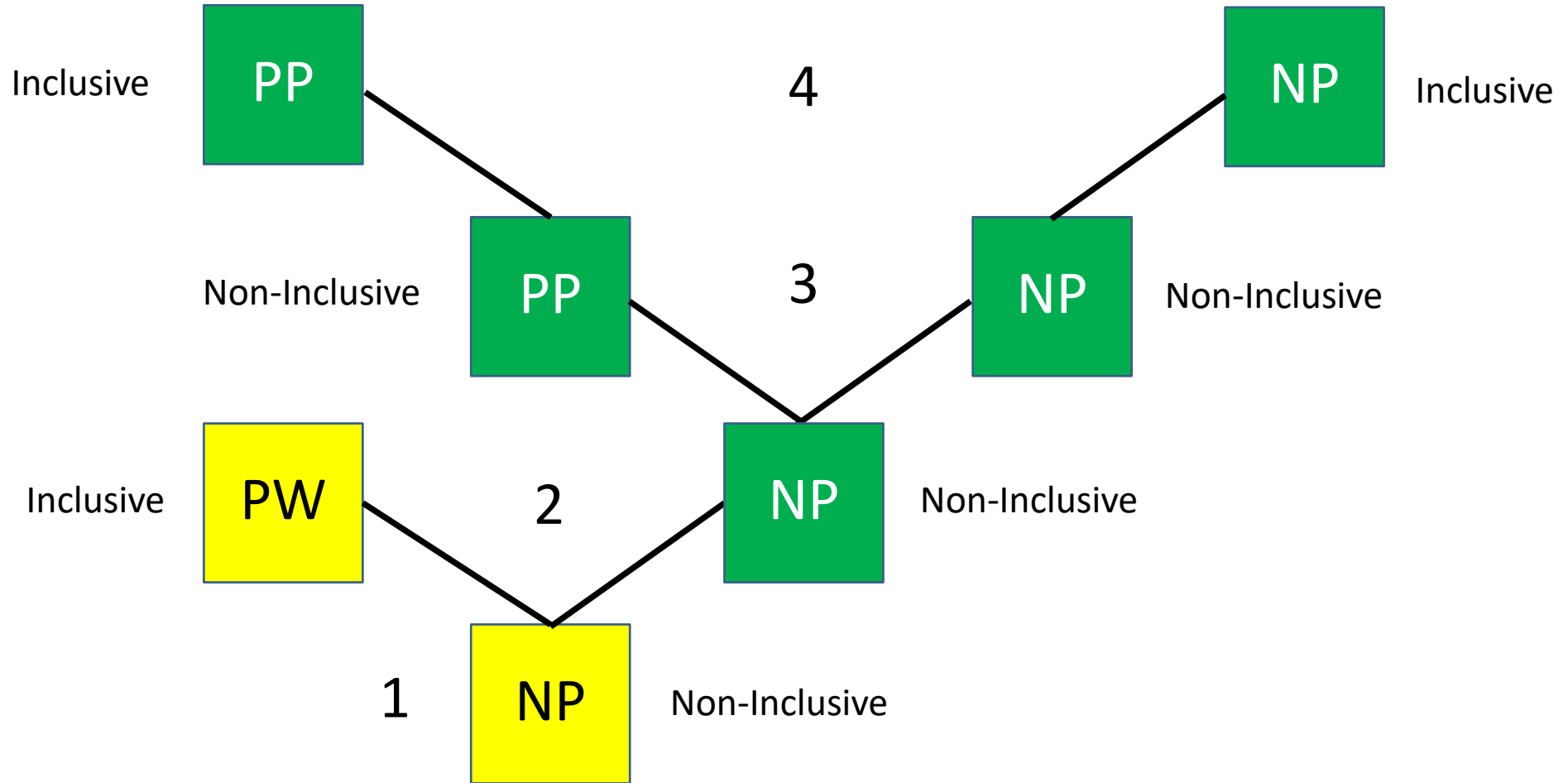
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# Inconsistent Threads

## Exploring the HaystackID Stemming Quality Control Tool



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Educational Update

# Why HaystackID?

The Elements and Execution of Twelve Second Requests



# HaystackID and Second Requests

## The Elements and Execution of Twelve Requests

- **Six Requests in Four Month Period (Case Study)**  
Antitrust Agency Request Support: An Integrated and Organic Approach
- **Addition of Seventh Request and Revision of Time Frame (Webcast)**  
Seven Requests in 90 Days, Webcast Titled Anatomy of a Second Request
- **Additional Requests Beyond 90 Days (Webcast Update)**  
Twelve Total Requests in Approximately Nine Months, Webcast Content Update
- **HaystackID and Second Requests (Background)**  
The Elements and Execution of Twelve Requests

# HaystackID in Action

## Considering Second Requests

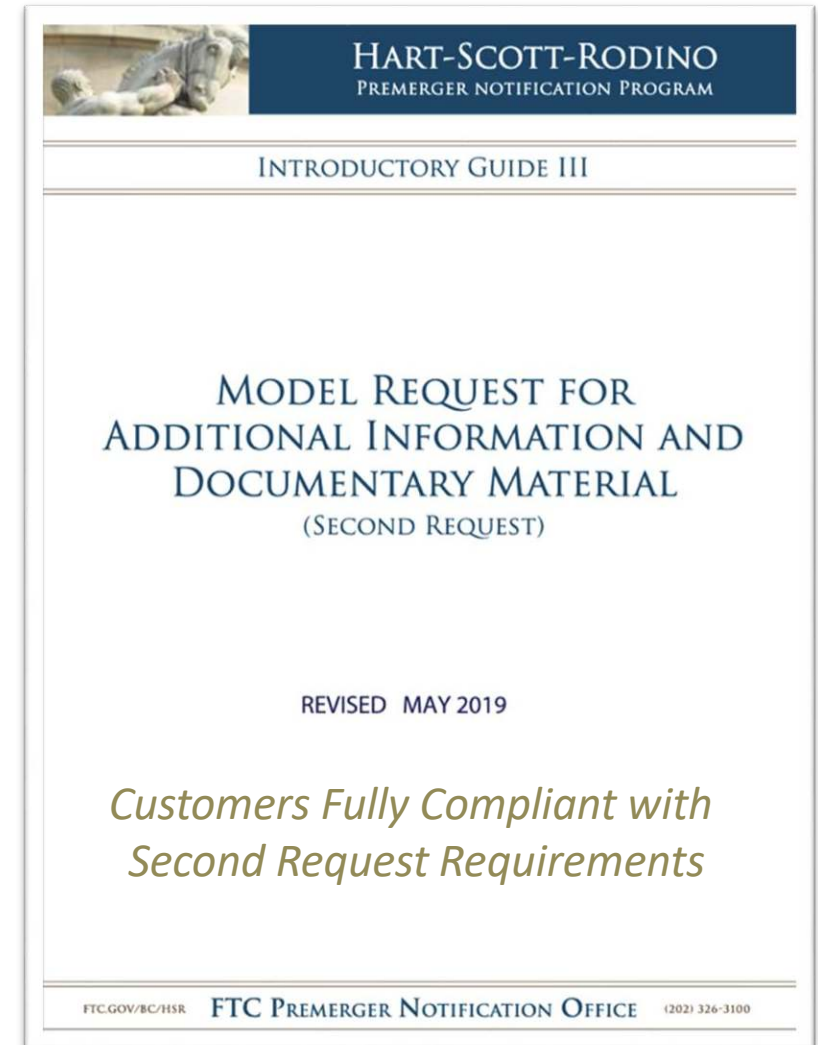
### Twelve Separate and Successful Second Requests

#### *Key Support Requirements*

- Rolling Collections (Field Collection Expertise)
- Review Staffing and Management (On-Site Expertise)
- Rolling Reviews (Review Management Expertise)
- Custom Privilege Logs (Development Expertise)
- Test Productions (Executorial Excellence)

#### *Benefits for HaystackID Customers*

- Dedicated Second Request Support (Experience)
- Organic Forensics and Collections Team (Flexibility)
- Optimized and Integrated Sourcing and Review Approach (Speed)
- Advanced Technology-Assisted Review (Technology)
- Custom Development of Support Tools (Capability)

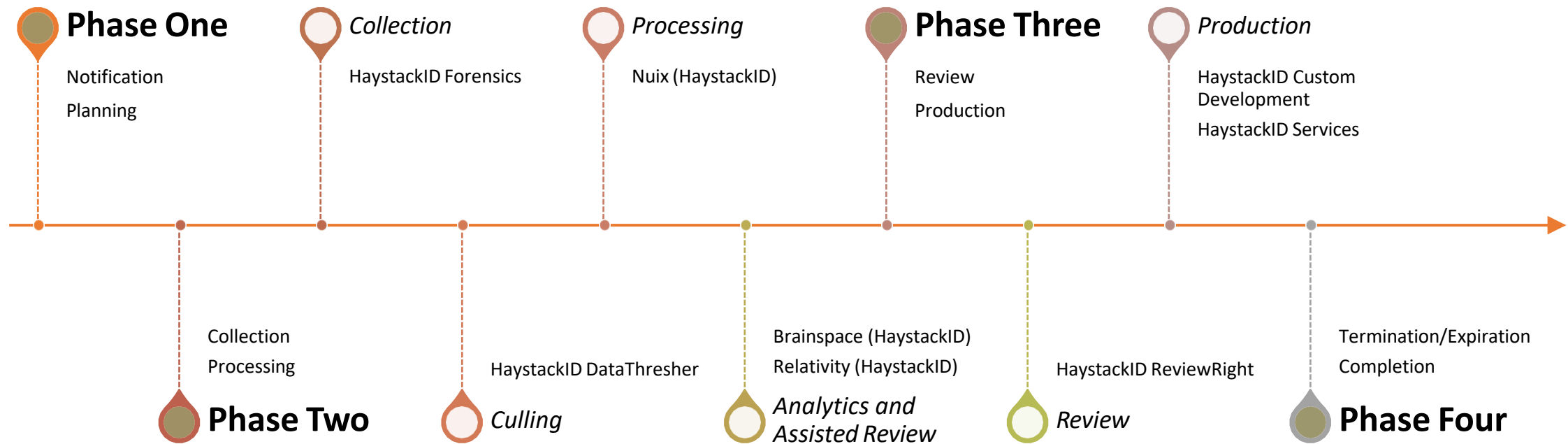


# Questions and Answers



# HaystackID and Second Requests

## Phases and Tools Overview



# About HaystackID

## Why HaystackID Instead of Other Providers

HaystackID is a **specialized eDiscovery services firm** that helps corporations and law firms find, listen to, and learn from data when they face complex, data-intensive investigations and litigation.

Focus	Enablers	Markets	Workstreams	Models
Forensics	Experts	Law Firms	Audits	Pay for Use
Early Case Insight	Technology	Corporations	Investigations	Subscriptions
Legal Review	Integration	Governments	Litigation	MSA*

HaystackID serves more than 500 of the world's leading corporations and law firms from North American and European locations. HaystackID's combination of expertise and technical excellence coupled with a culture of white glove customer service make it the **alternative legal services provider** that is *big enough to matter but small enough to care*.