

Outside Counsel

Strategic and Practical Information Governance Considerations in M&A

M&A activity in the United States has reached a total value of approximately \$35 billion

in the last 30 years, and activity has steadily increased over the last decade. 2017 held a record number of deals in a single year, up 12 percent over the previous year. Since 2000, transactions in the health care, financial services and energy sectors account for the majority of M&A activity. Alongside this rise in deal size, the scope and complexity of post-M&A activity is also increasing, introducing an entirely new set of considerations for in-house legal departments. For example, in recent months CBS and Viacom announced a merger, forming one of the largest media enterprises in

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the world. Several pharmaceutical sector leaders have announced strategic acquisitions, with Bristol Meyers Squibb's purchase of Celgene Pharma and AbbVie's announcement of its acquisition of Allergan.

While the executive suite focuses on the financials, strategic outcomes and growth potential, counsel must address a variety of additional issues to fully harness the strategic objectives of a deal. Many of these—such as merging legal hold systems, separating sensitive document repositories, reviewing contractual obligations and realigning data governance policies—involve a heavy lift. Even before those activities commence, counsel is often immersed in the complex and resource-intensive process of responding to second

request investigations from regulators. After working to fulfill a second request and receiving clearance for the deal, in-house counsel has little breathing room before the legal integration process must begin. Early planning and securing the buy-in for resources and funds is key.

Initially, an Integration Management Office (IMO), typically sponsored by the CEO or COO, is established to work through the various merging or separating work streams across finance, records, IT, HR, legal, compliance and business units. While HR, finance and certain IT functions are often prioritized, information governance, compliance and records management also require due diligence and dedicated resources. As noted by Sedona Conference commentary on information governance, "Information is crucial to modern businesses. Information can have great value, but also pose great risk, and its

governance should not be an incidental consideration.”

Below is a playbook for the five key areas general counsel must address from a legal risk mitigation perspective, in partnership with records management and IT teams, during a merger or divestment.

- **Data privacy.** Whether a transaction involves entities governed by HIPAA, GDPR, the California Consumer Privacy Act (CCPA) or other data protection laws, organizations must assess and mitigate risk relating to personally identifiable information (PII) and other sensitive data. This includes addressing the locations and sources of PII for employees, customers, vendor partners and other data subjects and may require a thorough data mapping exercise. Understanding the flow of data—what is received, what is done with it, where and why it is stored and for how long—is critical in order to take action to maintain compliance with various data privacy regulations. As an example, PII that may be contained on networks and servers of a divesting company, but belongs to the employees and customers of the parent company, will need to be separated and scrubbed from the divesting company’s systems. Data

privacy programs may also need to be updated for the merged company or divesting company to assess if any new data privacy laws and regulations will be applicable to the new entity due to doing business in new geographies or service areas. Security must be addressed in the due diligence process to avoid vulnerabilities after the deal is closed. To this end, Sedona advises, “The parties should identify a deal team ‘quarterback’ with data privacy and security expertise”.

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- **Contract intelligence.** In pre-merger stages, counsel must make informed decisions about the target company’s contract obligations, risks and liabilities contained in each party’s contracts, Day 1 closing requirements and whether anything within the contracts may create barriers for the transaction. Post-merger, counsel should be leveraging outside technology

providers and experts to identify synergies and opportunities for consolidation between contracts. This includes locating and benchmarking “most favored customer” clauses within contracts to drive value and optimize revenue.

- **Legal hold and preservation.** Acquiring companies must analyze the legal matters they are inheriting, including the custodian and data source landscape (employees, business and information systems, hardcopy records and their locations globally) and their impact to business continuity and legal hold obligations, navigating local laws and regulations around data preservation and data transfer. Close attention to preservation requirements and how acquired data sources are incorporated into legal hold workflows is critical to avoid data spoliation or inadvertent violation of a local data protection law in existing or future cases. This is also a good time for counsel to evaluate existing legal hold technology and whether it needs to be updated to meet the needs of the new litigation profile.

- Similar steps must be taken for legal matters that will be managed jointly or transferred to the divesting company for separating custodians and data

to maintain ongoing legal hold data preservation obligations for companies being divested. Tactically, counsel or their delegates in information governance, records or e-discovery teams must be prepared to work with IT. Collaboration will be needed for email migration, collection and copying of data to appropriate secure networks or cloud storage, documentation of the preservation process and locations of data on legal hold and establishing points of contacts for requesting additional legal holds.

• **IP protection:** When a company is divested, it is critical for the parent company to separate its IP from departing network servers and other data sources that may contain critical business information and trade secrets. Without this step, both organizations may face trade secret misappropriation or data leakage. Stakeholders in various regions should collaborate on creating workflows for identifying files, folders and systems that contain IP in order to identify documents and data that need to be removed from the divesting company's networks or vice versa. Outside experts can support the team by developing custom workflows using a combination of file indexing technology

solutions, AI enabled algorithms, data analytics, conducting sample document reviews and remediation applications that log and track decisions on a file by file basis throughout the remediation process.

• **Resources.** Executing legal integration activities during the commotion of a merger or divestment is often too resource-intensive for internal teams to manage alone. Counsel must secure executive sponsorship for these initiatives, and the resources needed to complete them. Bringing in

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outside experts with specialized skill sets across information governance, data privacy and legal hold management is a prime solution. This provides counsel with experienced project managers and ad-hoc resources to supplement the team in ensuring a smooth transition and sound risk mitigation. Many of these activities extend beyond Day 1, and outside resources can keep things moving forward

while allowing the legal team to focus on their core day jobs. Outside experts are also able to step in and help counsel make a strong business case for securing initial and ongoing resources for mission critical legal integration projects.

While M&A activity is a massive undertaking for corporate legal departments, it also provides a timely opportunity to evaluate information governance programs. Teams can take a proactive approach to the process and identify best practices and checks and balances that should be built into the newly formed company to bolster legal hold, IP protection, contract obligations and compliance. The end result is an improved data governance framework and an overall stronger risk posture for the organization.

