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Electronic Discovery Surpasses Paper Filings in M&A Regulatory Reviews

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Computer files have nearly replaced hard-copy document creation and storage in most companies. Each day, 9.8 billion e-mail messages are composed and sent, accounting for about half of all new electronic information created each year, according to the *New York Times*.

Consistent with this change in business practices, the Justice Department and the Federal Trade Commission the government agencies responsible for reviewing deals for possible anti-competitive effects — now routinely direct organizations to produce electronic data as part of the agencies' investigations.

To solicit input on improving its merger investigation process, the FTC in June held meetings in five cities with corporate personnel, attorneys, economists, consumer groups, and others with an interest in deal review. These workshops highlighted the government's increasing interest in electronic documents and confirmed that producing electronic data in response to government requests is one of the most widely discussed issues among antitrust attorneys and their clients today.

Producing necessary documents in mergers and acquisitions can strain a firm's resources and affect a deal's schedule. Businesses involved in mergers and acquisitions could benefit from selecting

skilled legal counsel and an experienced electronic discovery service provider to help craft and implement a successful response plan.

Businesses generate an astounding volume and variety of electronic documents on desktop and laptop PCs, networks, servers, and hand-held devices. Each type of electronic document is frequently stored in multiple versions in various locations and may include "red-lined" revisions or other relevant evidence stored in the document's meta data, also called "data about the data." Some programs carry more than 90 different types of meta data, which extend beyond the document's appearance to reveal its behavior and history.

While businesses traditionally have stored documents in file cabinets and archived them in offsite storage facilities, they are now more apt to store them on the company's servers, individual employee computers, and backup tapes. Documents that once would have filled hundreds of boxes in a warehouse can now be stored on a few tapes or a small stack of computer disks.

Companies must learn to handle electronic information in ways that minimize interruptions to business operations, yet still facilitate the document review steps required by the due diligence process or by the DOJ or FTC when reviewing a pending deal. A "second request" by the

antitrust agencies can impose substantial organizational challenges and financial burdens on companies seeking to close a pending merger or acquisition if they are caught unprepared.

An organization should begin preparing long before it receives a document request. Lawyers and clients need to thoroughly examine the kinds of information created by the company, how information is used by the company, including its divisions, subsidiaries, and local offices, and how and where information is stored. This examination also lets the lawyer address broader issues concerning document creation and retention.

An information inventory should be scheduled during this process to address the following points:

Why is information being kept? Establishing and enforcing a document retention program for both hard-copy materials and electronic documents will pay off when the company must collect, review, and produce documents in response to the FTC or DOJ, particularly as part of a second request response. Even in companies with existing policies, a review will reveal how well the policies are understood and have been followed.

Where is all current, backup and legacy information stored? The govern-

ment's broad definition of a document in second requests includes not only information stored on desktop computer hard drives and active network servers but also data on backup tapes or other archival systems. Even information from outdated systems or software programs no longer in use by the company may be subject to review. When taking inventory of computer systems, consider all current and previous servers, network systems, laptops, handheld devices, remote workstations, home computers used for business purposes, and any other equipment used to create and store electronic information. Include the company's IT team in the inventory process.

Getting an accurate picture of the scope of electronic media issues will help the organization to negotiate the scope of a request with the DOJ or FTC. The agencies are far more willing to consider modification requests — such as narrowing the scope of documents that must be reviewed — that are supported by real numbers and factual information. Efficiently storing and indexing backup information and legacy data, together with the ability to search backup information by date, custodian, author, or keyword, can also give companies and their legal counsel a significant advantage when data must be quickly accessed and examined for responsiveness to a second request.

Who is responsible for electronic data storage procedures? Corporate managers and their legal counsel must have a close working relationship with the IT department in order to understand how data storage and retention policies are implemented throughout the company. Issues include the use and enforcement of prescribed backup and deletion schedules; variations in data management protocols for different offices or physical locations; and procedures for halting document destruction or overwriting practices when information must be preserved for legal reasons. IT personnel also must understand how their technology deci-

sions, such as technology purchases, hardware and software integration, and company-wide system maintenance, affect the company's legal interests.

Which company employees are responsible for key business documents?

When a second request is received, legal counsel must identify the sources and location of all potentially relevant information. Electronic data storage makes every employee a document custodian, and thus a participant in the company's data management plan. At a minimum, every employee must understand the following:

- E-mail is not private;
- Deleting an e-mail or other document does not necessarily remove it from the network; and
- Any document written or received on the company's computers may become public.

Companies should promote effective data management as part of employees' daily work, periodically remind workers about electronic data management policies, and emphasize each employee's role in protecting the company's interests.

Companies involved in mergers or acquisitions should seek legal counsel with proven skills in effectively handling electronic document review. Counselors experienced in electronic evidence discovery can apply the lessons learned from other investigations to best position their clients to gain approval for the pending transaction. Knowing the inherently intrusive nature of antitrust investigations and second requests, experienced antitrust counselors will have tested procedures for efficiently uncovering, gathering, and handling relevant electronic materials to ease the burden and allow the company to conduct regular business. Also, they can facilitate discussions between the reviewing agency and company to determine timelines, assess available and relevant data, and narrow the scope of the inquiry when appropriate.

The help of an experienced electronic discovery company is also important to

effective data review. Electronic discovery service providers assist in the m&a process by helping with data gathering and backup media restoration; processing disparate file types into a uniform, readable format; and organizing the company's electronic documents in a fully searchable database. This allows companies and their legal counsel to quickly locate relevant information, providing a significant savings of time and money when a deal is pending.

With electronic discovery technology, computer-generated documents are never reduced to printed form to be reviewed. Instead, they are kept in electronic form, maintaining the entire text, meta data, and document format associated with the original files. Electronic files of any type can be stored in a centralized database from which they can be searched, reviewed, redacted, marked, and prepared for production — from any computer with an Internet connection. In addition, the accuracy of electronic discovery technology protects a company's private information from accidental disclosure. Eliminating paper processes from the task of reviewing and processing electronic media makes electronic discovery substantially less expensive than previous methods as well.

Electronic data is becoming an increasingly important element in mergers and acquisitions. A well-executed plan for reviewing electronic documents can streamline the investigation stage. Effective methods of handling electronic documents will also make the process of locating, reviewing, and producing electronic deal information much faster and less expensive. □

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