

CORPORATE COUNSEL

The Future of Deal Review

For Second Requests, all-electronic productions will soon be the norm.

BY VIRGINIA LLEWELLYN

Your legal team has been working diligently for two years to prepare a bid to acquire a rival company. As chief legal officer, you've told your board of directors that the acquisition will increase your company's market share by more than 25 percent, representing nearly \$1 billion in increased annual revenue. Negotiations have progressed without complications, and management teams for both companies approved the merger, pending final shareholder and government approval.

Then, just weeks before you expect clearance from the government, the investigating agency issues a Second Request, seeking information stored on the company's computers, including e-mail messages and other computer-generated documents. To make matters worse, antitrust counsel advises you that the company must search not only active computer systems and servers, but also backup tapes and archived files, as well as data stored separately on laptops, stand-alone PCs, or handheld devices such as Palm Pilots or BlackBerries.

The Second Request specifies more than 30 subjects the government wishes to explore in further detail. It covers a period of three to 10 years and could cover up to 350 employees as document custodians.

Complying with this document production will put a serious strain on the company's resources and will likely impact the merger schedule. The next meeting of your board of directors is in two weeks, and you cringe at the thought of telling them that the deal is stalled while the legal team struggles to comply with the government's request for information.

Had you known that locating, reviewing, and producing electronic documents would play such an important role in the deal, you would have planned ahead.

With multimillion-dollar mergers and acquisitions at stake, the demand for electronic information by government agencies presents unique challenges to in-house counsel. Electronically created documents have all but replaced paper documents in most companies, and the rate at which these documents are created across a large organization can be staggering. Very soon, electronic documents will make up the majority of the materials demanded by federal agencies during a merger review.

THE MERGER INVESTIGATION PROCESS

The Department of Justice and the Federal Trade Commission are the government agencies responsible for reviewing pending deals for possible anti-competitive effects. Both agencies are keenly aware of the importance of electronic data in their investigation process, and are working to find more effective ways to conduct their deal review.

The government's interest in electronic documents was highlighted by recent FTC "best practices" workshops held in June. These meetings, led by a panel of FTC staff members in five cities nationwide, solicited input on improving the FTC's merger investigations process from a broad range of interest groups, including corporate personnel, outside and in-house attorneys, economists, consumer groups, and others who participate in merger reviews. The workshops focused on the best ways to handle electronic information, especially in a Second Request.

Most attorneys attending the workshops had had some experience preparing electronic documents for production in electronic format (rather than printing all electronic documents for manual review), and many were aware of the increasing importance of electronic data in the merger

investigation process. However, it was apparent that few companies involved in mergers are adequately prepared to respond to requests by federal agencies for electronic documents.

Attorneys attending the workshops sought guidance from the FTC on the preferred form of document production. While some parties are still printing electronic documents and providing the FTC with boxes of paper, others have embraced a true electronic approach, finding that a completely electronic review and production provides significant time and cost savings.

The workshops also stressed the importance of working cooperatively with the FTC staff members. As in traditional productions, in many cases parties can successfully narrow the scope of electronic information that must be reviewed in response to a Second Request.

Without effective tools for sifting through the masses of electronic documents, a company's efforts to locate, review, and produce electronic information in a merger investigation will be burdened by undue delay and expense. A plan for efficient electronic document handling in a government investigation should include the following steps:

1. Educate Employees. Knowing that the request is coming is half the battle. Don't be caught off guard by a request for hundreds of thousands—sometimes millions—of pages of electronic information. Educate employees about the importance of good record-keeping procedures. Think of all employees as document custodians, and teach them how to manage documents properly. Be sure to include the company's information technology department in document retention discussions. The IT department must effectively manage the rotation of backup tapes or other archival procedures to avoid evidence spoliation, as well as storage and collection of unnecessary surplus data.

2. Establish a Protocol for "Pulling." You must be prepared to mobilize your document review team the moment a Second Request is received. Your team should include outside counsel, an electronic discovery service provider, key people from your law department, and IT staff members who can assist with electronic document gathering. At your outside firm, the team should include partner-level antitrust counsel with experience negotiating with the FTC and DOJ, as well as a senior associate to manage the review process. (The actual document review is

frequently conducted by junior associates or attorneys hired for the particular project.)

Experience in handling the unique issues related to a Second Request is also an important credential for your electronic discovery service provider. When turnaround times are critical and large volumes of electronic information must be reviewed, it is risky to experiment with an unproven service provider.

Working in tandem, the members of your team can determine the best way to conduct the electronic "document pull" to gather information. Although your internal IT staff will be able to gather company information most efficiently, the advice of your outside counsel and service provider will help to collect the data in a way that makes it easiest to review.

3. Train Your Legal Team to Leverage Technology. The days of printing electronic documents from a computer to conduct a manual review are waning. Electronic discovery technology has been used by the country's most savvy law firms for a number of years, and is now available at a fraction of the cost of paper review and production. Leveraging this technology, your review team can search, review, redact, mark, and prepare documents for production, all from one easy interface. In addition to its efficiency and cost-effectiveness, electronic discovery technology protects your company's private information from accidental disclosure.

While production in electronic format is not currently required by the FTC or DOJ, it clearly represents the future of merger investigations and can significantly improve turnaround times for deal clearance.

The burden of reviewing electronic documents in a merger investigation can be a deal-killer if your company is unprepared. By saving time and improving the quality of document review, electronic discovery practices can enhance the efficiency of the process and improve your deal's chance of success.

Virginia Llewellyn is corporate counsel at Bellevue, Wash.-based Applied Discovery Inc., a leading provider of services and technology for automated document search, review, and production for electronic discovery. She writes, teaches, and speaks on topics related to the law of electronic document discovery. She may be reached at virginia.llewellyn@applieddiscovery.com.