

Mergers, Acquisitions, Divestitures and Closures

Records and Information Management Checklists

By

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INTRODUCTION

Worldwide expectations for increased competition in mature business markets are creating a daunting vision of either collaborative company consolidation or the complete elimination of some corporations. An attitude of "eat or be eaten" prevails today in many industries. Such aggressive business strategies can rapidly lead to mergers, acquisitions, divestitures, and closures without fully informed decision-making occurring. Changing consumer technologies, imbalances in currency exchange rates, political instabilities, and national environmental disasters all can exert unplanned negative economic forces on corporations if they are without significant resources to respond quickly. These and many other constantly changing financial factors drive organizations to consider drastic changes in their business models and organizational structures as they strive to survive. Properly executed mergers, acquisitions, divestitures, or closures can become a critical component of organizations' responses to changing business environments.

Strategic business planning during turbulent economic times is often short-range at best. Tactical exercises such as the Due Diligence efforts that occur during merger and acquisition (M&A) valuation and planning initiatives can be accompanied by reactive thinking and poor documentation. During these M&A activities an opportunity exists for corporate executives to build decisional consensus and document the rationale for the M&A by initiating excellence in Due Diligence recordkeeping. However, this has historically often not occurred thus contributing to well known M&A disasters such as the merger in 1999 when America Online (AOL), an Internet service provider, used its market capitalization to capture one of the entertainment and communication industry's prizes, Time Warner." "Even before the ink was dry on the deal, questions were raised about its feasibility." There are many other examples of "deals gone bad" with little documentation created for lessons to be learned.

A "problem posed by the phenomenal merger trend was the serious strains put upon the Due Diligence process on Wall Street. Due Diligence was the homework that investment bankers and securities lawyers were expected to do when packaging a deal to ensure that legal and financial problems were not present. The degree to which it was pursued depended to a great extent upon the urgency and speed with which a deal is generated." The results of failures in Due Diligence and preservation of the resulting documentation and records are often cited as a major reason for unexpected results from M&A entrepreneurial efforts, despite the investment of billions of dollars in assets assumed to ensure such ventures will be financially rewarding.

Basic procedural checklists are occasionally found in the recommendations of experts in M&A processes and Due Diligence procedures specifically: Such lists typically include Assets Checklists, Risks Checklists, and Due Diligence Process checklists. However most examples are limited and created as though an afterthought rather than making



quality recordkeeping an integral part of the M&A process overall. In fact, the role of checklists is quite evident in many industries and professional activities.

In some ways, M&A related business activities might be said to be as complex as open heart surgery, and M&A professionals could follow the lead of physicians in emergency rooms dedicated to keeping their patient (the deal) alive and well. In The Checklist Manifesto – How to Get Things Right, Harvard Medical School Professor Doctor Atul Gawande describes today's challenges and solutions very accurately for endeavors where "We have accumulated stupendous know-how." However, "Avoidable failures are common and persistent, not to mention demoralizing and frustrating across many fields – from medicine to finance, business to government. And the reason is increasingly evident: the volume and complexity of what we know has exceeded our individual ability to deliver its benefits correctly, safely, or reliably. Knowledge has both saved us and burdened us." Dr. Gawande shows clearly in The Checklist Manifesto that when complex fast paced decision making is occurring, having a checklist of procedures and processes to follow can literally be a life saver. So why not have M&A teams employ records checklists during the proliferation of information processes and data stores that occur when companies are bought, sold, merged, and even closed?

Of course, the use of *organized*, *focused* and *communicative* checklists may be culturally repugnant to the "seat-of-the-pants planning" to which some M&A deal makers are accustomed. There is no doubt that business intuition, knowledge of finance, and state-of-the-art expertise in financial markets are critical personality traits for the free-wheeling executives and venture capitalists that often initiate an M&A undertaking. However, the success of many such ventures is usually dependent on investors and other committed partners that require a way to monitor and calculate some Return on Investment (ROI) and a way to measure business benefits or financial rewards. Capturing and retaining accurate records is the only way to enable team collaboration along with the preservation of evidence for future deliberations and activity review.

Dr. Gawande says "Complicated problems are like sending a rocket to the moon. They can sometimes be broken down into a series of simple problems. But there is no straightforward recipe. Success frequently requires multiple people, often multiple teams, and specialized expertise. Unanticipated difficulties are frequent. Timing and coordination become serious concerns." Sound familiar? Dangerous and complex problems such as keeping an airplane flying have been managed through the use of checklists for decades. By using a combination of human expertise and checklists, planes fly every day despite unforeseeable mechanical failures and unpredictable weather.

Business models may change but many recordkeeping challenges remain the same. By understanding the records produced during M&A business activities while planning ahead for their capture and sharing, M&A related business activities should be able to have successful teams communicating more effectively with actions being well documented. Attending to recordkeeping issues early, especially during Due Diligence



business processes, should assist collaborative thinking, better document M&A process initiatives, and increase the ability to produce records during audits or litigation. Experts in this arena almost always agree that better management of records would increase the quality of their processes and their eventual conclusions.

In common public usage, "'Due Diligence' is a term used for a number of concepts involving either an investigation of a business or person prior to signing a contract, or an act with a certain <u>standard of care</u>." "During M&A transactions, Due Diligence refers primarily to an acquirer's review of an acquisition candidate to make sure its purchase would pose no unnecessary risks to the acquirer's shareholders." "Acquirers generally do this by creating a checklist of needed information. "In this process, acquirers may conduct interviews and site visits, maintaining records of all this information. "In fact, it might be said that Due Diligence is comprised of a series of business processes directed toward building a set of records for sharing and preservation.

In the midst of this organizational and economic turmoil often resides a Records Manager striving diligently to assure records issues are thoroughly, professionally, and cost effectively addressed. In fact, due to the enormous variety and volume of mergers, acquisitions, and other organizational changes, it is very likely a corporate Records Manager will be dealing with this issue at some time in their career. M&A activities, along with any potentially resulting litigation, electronic records discovery and document production issues, will test the will, resolve, and dedication of any professional. Hopefully the insights and checklists in the report will aid both Records Managers and the M&A professionals with whom they will be working to preserve and retain records appropriately.



MARKETPLACE COMPETITION DRIVES CHANGE

Business Environmental Challenges

The pressure to survive in increasingly complex global economies encourages extreme competition that often creates new business relationships and changing business models. Ever increasing demands for expansion of markets or utilization of scarce resources pushes organizations to think strategically in order to have well planned business options. Market forces may almost seem to dictate company mergers, acquisitions, divestitures, or closures. Quickly changing technologies, fluctuating consumer buying patterns, or experiencing natural disasters can drive organizations to expand markets, contract operations, or engage in new partnerships. However, this dynamic business environment also calls for new strategic and tactical solutions with respect to records and information management (RIM).

Evolving economic realities for the modern corporation drives a need to acquire new enterprise capacity, establish presence in new markets, add intellectual capital, and grow resources quickly. This extreme financial pressure causes corporations to strive to continually expand the organization's assets, add personnel for more capabilities, contract operations during economic stress, and actually sell off or close down some business divisions or facilities when required. During all of these whirlwind changes data, documents, and records become the life blood of the organization to be sought after, organized, retrieved, stored, and eventually discarded.

Business model changes through mergers, acquisitions, divestitures, and closure have occurred throughout history. "During the 1980's, nearly half of all U.S. companies were restructured, over 80,000 were acquired or merged, and over 700,000 sought bankruptcy procession in order to reorganize and continue operations." "The 1990's were equally dynamic in terms of companies evolving through upsizing and growth, downsizing, rollups, divestitures, and consolidation..." And the use of M&A's and restructuring continues. "In 2004, 31,233 deals transactions were announced worldwide, a 9 percent increase over the 28,702 announcements in 2003." 12

Mergers and acquisitions have increased during many business cycles and during 2008-2009 seemed to be flat or headed for a decline. However, by late 2010 they seemed to have become regenerated as an option for rejuvenating enterprises. "If 2010 was the year in which mergers and acquisitions got back off the mat, 2011 could be the year in which it starts throwing haymakers. Global M&A has totaled \$309.6 billion since January 1, according to data from Thomson Reuters. That's a 69% jump over the same period in 2009, and represents the busiest start since 2000."¹³ So it seems that M&A and similar



business activities are here to stay. Managing records during what can be a crisis for a business will continue being a challenging task for M&A planners, Due Diligence teams and their support personnel.

Typical rationales for M&A endeavors include:

- 1. Gaining market share and an ability in influence prices,
- 2. An ability to market existing products into new markets,
- 3. Economies of scale allowing reductions in costs,
- 4. Expanding internationally to utilize new facilities of production,
- 5. Greater control over the supply chain within an industry segment, and
- 6. Synergy between similar business entities.¹⁴

However, many M&A strategies fail when a variety of challenges are faced including:

- 1. There is discovered to be little actual synergy in business strategies,
- 2. Due Diligence fails to identify financial, operational, or cultural issues,
- 3. Core business processes and strategies become diluted through distraction,
- 4. Acquired facilities or entities are poorly managed,
- 5. Critical personnel leave before the M&A can become successful, and
- 6. Customers do not respond well to the new business entities.¹⁵

A good example of the unforeseen challenges that may arise can be viewed in the unfolding of Oracle's 2009 attempt to buy Sun Microsystems. After IBM first started to buy Sun but the deal fell through, "on April 20, Oracle surprised a lot of people by announcing that it would acquire Sun for about \$7.4 billion, less Sun's cash on hand." However, major challenges were raised regarding the acquisition. Some Sun Microsystems shareholders filed several class action law suits to block the acquisition. The U.S. Department of Justice decided to pursue more time consuming Due Diligence on the acquisition. The European Commission decided to investigate potential antitrust issues due to Sun's Java networking software and MySQL database software potentially creating a threat to competition in technology marketplaces. Several digital civil liberties groups also begin to protest the acquisition as anti-competitive.

After several U.S. congressmen also got involved, Oracle agreed to a set of commitments to ensure the merger was best for the marketplace. "Software giant Oracle finally completed its \$7.4 billion acquisition of Sun Microsystems on January 26, for \$9.50 per share in cash and debt deal, setting up an opportunity for the company to dominate its competition in the database software and enterprise computing systems markets." Obviously, such acquisitions can become very convoluted requiring a good recordkeeping environment to assure that all activities and actions can be documented.



Business Changes Require New RIM Activities

Mergers

Mergers are perhaps the most challenging business change wherein information resources management becomes critical to the success of the resulting organization. Mergers create a combined company with consolidation and integration occurring of previously separate business units. Generally, a larger business organization overall is created, that is in primarily the same line of business as the previously distinct organizations, though there may be a re-orientation of overall business strategy. Market presence or strength is typically the goal. RIM Programs may or may not be combined in the new company, depending on many different factors, such as records subject content, facility location, and users served. However, the overall ownership of records from a corporate perspective evolves to the newly created larger corporate entity. An immediately pressing issue after a merger will be the cooperative resolution of previously existing policies, procedures, and practices that will become adopted or combined for the new organization.

Acquisitions

Acquisitions occur when one company buys and takes over the operations on another company. Usually a larger company with greater assets and more facilities buys a smaller company that is less complex, though not always. This often occurs when an organization wants to take advantage of new assets or information that may be of value to current operations, services, and products. RIM Programs may be combined on an equal basis for cooperative management of records. However, it will be more common for the acquired organization to need to adopt the records management policies, procedures, and practices of the new owner. This can be mandated, but a transition period will occur in which not all new business units will be in compliance with expected operational standards. In some cases, if government imposed regulatory mandates supersede corporate records retention mandates; the acquired organization may continue its current practices and processes.

Divestitures

During Divestitures, an organization sells a division of itself to another company. (One organization's acquisition may be another's divestiture as another company buys the business unit.) The division may be "spun off" to create a new independent business organization with its own recordkeeping issues. Some records may be transferred to the divested organization, and some may be retained as originals or copies by the initial business unit owner. Such decisions will be a function of the relative responsibilities of each resulting organization. Older tax records, for instance, will be of primary interest to the initial owner of the business unit, while intellectual property records (such as patents



and copyrights) relevant to the separated business function will be of primary interest to the divested organization. Irrespective of the format of records being originals or copies, final ownership of records and recordkeeping responsibilities must be clear.

Closings

During Closings, also known as "liquidations", the operations of a division of an organization are shut down, assets are often sold, and personnel reduced in force or transferred. Records retention may not actually change, as the parent body may still retain recordkeeping responsibilities for the original operations for some time. Documentation of assets that were used in tax preparations for the parent organization, will probably still need to be retained for use in case of future tax audits. Other documentation required by regulatory agencies such as the Environmental Protection Agency, may need to be retained for many years, despite the cessation of operations at a particular business site. However, it is unwise and potentially risky to try to maintain unneeded records if they are no longer of use to the remaining organization.

Bankruptcies can present another difficulty from many records retention perspectives. As bankruptcies have recently proliferated during difficult economic conditions for businesses, it is not uncommon for a surviving business to have few assets and little available funding to properly maintain records. It is common for those last stalwart employees before the completion of a business closure or bankruptcy to simply shred many records or destroy them. Records on accounting issues, employees, or vital business assets may be retained in some manner for the continuation of the enterprise. There is often a flurry of desperate activity that is poorly organized and managed, including directing off-site records storage centers to simply destroy their holdings, as the surviving business entity has no funds to pay for their storage and maintenance. Records storage vendors may have to absorb the cost of destroying the records themselves.

M&A Market Trends

According to several M&A business sector research sources, M&A activity is in a decline over the last few years starting in 2007. In one study of industry M&A deal flow in North America covering mid-sized acquisitions having transaction values between \$15 million and \$500 million, there was a decline of 22.8% in the number of deals between 2007 and 2008, and a 24.7 % reduction in the number of deals between 2008 and 2009. These economic environmental issues are placing more pressure on deal makers to take more time in scrutinizing records accumulated during Due Diligence. The current economic environment has changed the way buyers conduct due diligence."

Due Diligence and the attendant document intensive processes are taking longer because of increased caution in evaluating past financial performance and to obtain better



financial predictions for future performance of companies. In addition, "the process is taking longer because buyers often hire consultants to validate their internal due diligence. The consultant checks to be sure that all issues have been identified within their area(s) of expertise." For this reason, businesses engaged in M&A ventures will need to retain evidentiary records longer and be more capable of controlling records that are collaboratively shared during the M&A Due Diligence processes.

Although M&A activity has become common for many organizations, with some companies buying another smaller company every month, there are very few laws or regulations that provide specific guidance or recordkeeping responsibilities during these activities. For this reason, new records retention research is often required for specialized industries when organizations undertake M&A actions. It can be assumed that each organization's originally mandated recordkeeping practices will change little, though some records retention research may be needed to be sure this is the case.

RIM Issues Do Not Change

M&A activities are exceedingly complex and "fraught with potential problems and pitfalls. Many of these problems arise either in the preliminary stages, such as forcing a deal that shouldn't really be done ... as a result of mistakes, errors, or omissions owing to inadequate, rushed, or misleading Due Diligence; in not properly allocating risks during the negotiation of definitive documents; or because it became a nightmare to integrate the companies after closing." Letters of intent, non-disclosure agreements, contracts, and other forms of definitive documentation grow astronomically as M&A activities proceed.

Some authorities have in the past recommended creating a "Diligence Summary Book" "The purpose of the due diligence process is to decrease the amount of risk associated with the purchase of the target company. All actions reports and procedures should in some way contribute to achieving that purpose...Tracking and reporting on these items is an important part of due diligence because the reports become the means through which the discovered information is relayed to the negotiating teams....Creating a book in which all pertinent information is collated provides a simple, yet effective way of organizing, tabulating, and tracking discovered information...This book might be as simple as a three-ring binder or as complicated as a relational database complete with video files, Web links, and photographs."²³

Today's sophisticate office environments with office suite software, Web browsers, and Internet connectivity have creating enormous opportunities for depositing and sharing electronic records in computer based document repositories. However, this information must be managed in some manner or it can become as much a litigation landmine, as it is useful to the organization. Fortunate companies will have professional Records Managers that oversee the collection, dissemination, and management of information during trying times so that executives, attorneys, auditors, investment analysts, consultants, and a



variety of office personnel will have the information available that they need. Although each workgroup has its own information requirements and expected document flow, overall sharing of information and proper long term retention of records are most thoroughly addressed when a centrally managed RIM Program assures that the right information is in the hands of the right people at the right time. An important aspect of such programs is the participation of the Corporate Records Manager in planning efforts that may arise when new records intensive workgroups, such as M&A Teams, begin Due Diligence processes prior to an organizational change.



PLANNING DUE DILIGENCE RECORDKEEPING

Once M&A types of business transactions appear to have benefits, a variety of processes are begun and many actions are taken by multiple parties with extremely varied interests. Although the principle idea of M&A's, as well as, divestitures and business closures, is to maximize organizational payback or cost savings, these activities must proceed in an organized and well measured manner to achieve expected goals. To reduce risk and examine opportunities, a process generally termed "Due Diligence" is begun.

What is Due Diligence?

Due Diligence is a term that is often used in many contexts, so the precise meaning of the terminology can vary. It is most typically "a term used for a number of concepts involving either an investigation of a business or person prior to signing a contract, or an act with a certain standard of care". More specifically, "in mergers and acquisitions (M&A), Due Diligence refers primarily to an acquirer's review of an acquisition candidate to make sure that its purchase would pose no unnecessary risks to the acquirer's shareholders. "Acquirer's generally do this by creating a checklist of information…" and then examining a variety of records called for in the checklist.

Although telephone calls, exchanges of emails, the conduct of interviews, and a variety of meetings will all occur throughout the process of Due Diligence, all of these activities are invariably documented with records that proliferate among all interested parties in many different formats and respositories. Conduct of Due Diligence activities will vary with the types of organizations. If public companies are being acquired that issued securities, some Due Diligence may have already been conducted by the underwriter and their legal counsel when he company's prospectus was created. If the company has been a public company for some time, there may exist 10K and 10 Q reports on file with the Securities and Exchange Commission. With private company procurement, Due Diligence may begin when the acquirer requests a possible seller to provide representations and warranties regarding financial issues in an initial acquisition agreement document, before conducting their own investigations. "Thus the scope of a private company investigation depends in part on what information the seller is willing to give in the form of representations and warranties to be included in the purchase agreement." "27

Due Diligence is the phase of M&A activities that occurs after a decision has been made to investigate the value of a business opportunity. For this reason, the timing, scope, and nature of Due Diligence activities will vary greatly between acquisitions, mergers, divestitures, and closures, as well, as the company types, amount of assets at risk, and technical issues unique to each situation. What is commonly recognized however is that there are many records that are commonly needed to be captured and preserved.



M&A records that are of most interest will be the computer data and physical documents that are 1) created for decision analysis during Due Diligence activities, and 2) the records directly related to the business transaction agreements. This data will be continually changing before, during, and possibly after a business transaction takes place, so it is of critical importance to capture and preserve these records early in their life cycle. Some business records of interest may be discovered after a transaction takes place, but the most important records will be those that document the rationale for the transaction and the processes that occur during the transaction.

Advanced planning may not occur for RIM issues during Due Diligence activities, simply because the need to address storage, retrieval, retention, and preservation issues is often not realized until after a record is created. This is a common occurrence in all organizations, however, it has particularly grave consequences when the value of some documents may be very high (possibly worth millions of dollars) and the risk of loss increases drastically as the complexity of M&A workflow rises. For these reasons, it is critically important to begin early planning for RIM activities that will assist in records preservation and organization well in advance of records loss or misfiling. Confusion in who may be responsible for managing records after an organizational change takes place makes planning ever more important.

Although considerable discussion between executive management and their advisors will have taken place prior to formal Due Diligence beginning, it not until a Due Diligence Team or process begins that it is feasible for Records Managers and their staff to undertake significant actions. If Chief Executive Officers (CEOs), Chief Financial Officers (CFOs), Vice Presidents (VPs) for Marketing, or other senior personnel want to include a Records Manager in their meetings, then that individual should take advantage of the opportunity to influence planning at an early stage in M&A initiatives. Once formal Due Diligence business processes take place, however, it is much easier to define document workflow and added value from RIM Program related initiatives.

Key participants in Due Diligence activities generally come initially from in-house sources of expertise and retained consultants for the acquiring firm. Accounting personnel and legal counsel are indispensible. However, economic, engineering, environmental and other consultants, from both internal and external sources, will be added to the teams as the projects continue. It will be important for RIM professionals to have generated a relationship with management before Due Diligence processes occur, to be sure they are included in appropriate meetings.

RIM initiatives are most effective where there is involvement early in the life cycle of records creation. It is especially true that records tracking, inventories, checklists, ownership, and retention decisions can be most effectively planned if there is professionally insightful review of the flow of information throughout a Due Diligence activity. In one PricewaterhouseCoopers survey it was noted that as much as 80 percent



of M&A transactions did not finally create value for company shareholders. Why did this occur? Expertise in the industry contends that "While there is no single reason for the high failure rate, many transactions are unsuccessful because the acquirer *cut corners on due diligence* - downsizing or delegating important due diligence work." Due Diligence activities are extremely information intensive and very dependent on data, documents, and evidentiary records.

Discovery of records and other forms of information add major insights to M&A decisions. The records of companies to be acquired, industry research reports that are publicly available, and consultant reports directed at being informative about M&A issues are all critical documents that must be received and evaluated by M&A Due Diligence teams. In many cases these teams are composed of legal counsel, auditors, and business analysts all receiving duplicative records, as well as, specialized records that are informational regarding selected business decisions. Unfortunately, many of these records will be very confidential in nature, causing some concern about sharing them beyond narrowly defined distributions.

Timeframes for Due Diligence activities can vary from weeks to years. This factor is primarily a function of the complexity and risk of the acquisition or merger. Timeframes will often be extended when government regulatory intervention or oversight is experienced. The volume of documents and data required for Due Diligence processes can increase dramatically during those circumstances. The longer the Due Diligence process takes, the greater the risk for records loss or compromise.

Due Diligence Records

It may be tempting during Due Diligence processes to try to capture everything possible in the way of available information and to conduct exhaustive investigations. However, considering the complexity of modern organizations and the numerous endless requests for information that could be generated, most M&A projects learn that they must take advantage of selected records that are traditionally needed as itemized in professionally prepared checklists. The alternative is to generate enough records and data that would paralyze any process team and prevent timely decision-making. For that reason, these general classes of records are typically identified for review, capture, and preservation:

- M&A administrative records those records that document the actions of the M&A team related business processes and activities,
- 2. Acquisition target financial statements those records that document and inform regarding assets, liabilities, balances, tax filings and other status documents,
- 3. Management of operations reports those records that indicate processes, procedures, activities or actions to establish the authenticity, reliability, and credibility of management, operational, and accounting information and sources,



- 4. Legal documents those records that are evidentiary or document legal findings or status of the acquisition target company, and
- 5. Compliance reports those records that document status reporting to regulatory agencies and organizations.

Managing a Due Diligence process is often done through two key initial documents. These are 1) a Due Diligence Checklist, and 2) an Acquisition Agreement. These are the two most critical M&A Administrative Records and are often found at the beginning of an M&A process. Although the Acquisition Agreement will vary little over time, the Due Diligence Checklist may change as various information investigations are carried out. However, the Due Diligence Checklist is a listing of issues to be investigated, not a listing of records to be gathered. Of course, for every issue to be investigated, relevant records will document the activities and the results of the investigations.

The actual conduct of Due Diligence also will commonly take advantage of these standard records:

- 1. Transaction timetables,
- 2. Document request lists,
- 3. Closing memoranda,
- 4. Confidentiality agreements, and
- 5. Consultant engagement letters.²⁹

In addition, a large variety of records will begin to be identified during the Due Diligence process as a Document Request List is transmitted from the buyer to the seller. Typical documents will include:

- 1. Corporate Records,
- 2. Public Filings and Financial Information,
- 3. Corporate Agreements,
- 4. Employee Information,
- 5. Governmental Regulation and Environmental Compliance, and
- 6. Legal Matter related records.³⁰

A more complete checklist of documents is included in the appendix of this report.

It has been observed by some Due Diligence experts, that "The files of interviews should be maintained by someone functioning as a 'librarian.' The ideal candidate is an experienced paralegal secretary with special training for this purpose. The paralegal can manage a 'data room' (even if it only involves a shelf in a room) where records are stored..."³¹ In some instances, these are referred to as "Data Room Documents.³²" It can be seen why one might need "Virtual Data Room" software to manage this body of information in electronic format, as will be discussed later in this report. Extrapolate this concept to all records for the entire M&A process, including Due Diligence, and one can



easily see the added value from including a RIM professional in these business processes from the beginning of business transaction activities.

The documents, data, and evidentiary records created during the Due Diligence process will comprise one of the most important sets of information that an organization possesses. For instance, merger or acquisition agreements, financial documents, strategic plans, technology plans, inventories of organizational assets and researched copyrights or patents can be documents that literally "seal the deal" on multi-million dollar ventures. The inadequacy of this documentation or its misplacement can also create a multi-million dollar loss for any enterprise. Considering the high number of contested acquisitions or mergers, the need to create serious RIM support for Due Diligence processes is self evident.

Management of records and information resources is often not appreciated as an integral part of managing an organization well. This failure to adequately prioritize planning for the management of information assets, can create multi-million dollars losses of expected revenue, lost intellectual capital, and failed ventures. Business mergers or acquisitions that do not deliver expected financial benefits to company owners or share holders are common. In many cases, higher quality Due Diligence processes with better recordkeeping and improved information acquisition and retention could have resulted in better business decisions.



RIM PROGRAM INTEGRATION

When one organization acquires or merges with another organization, it is assumed that there will be integration in business strategies, models, processes, human resources, and assets at some point in time. The same is true of computer systems, networking architectures, information, data, and records, although the degree of integration varies tremendously. With divestitures and closures, there is little to integrate, as in both of these cases, there is less, not more, to deal with. Overall organizational communication and integration is always a major factor in how successful M&As become over time.

Successful Recordkeeping Requires Planning

Companies that are consistently successful plan endeavors thoroughly to assure success. In the world of company acquisitions, Cisco Systems, Inc. is a world leader with the acquisition of a company a month during some years. It has been observed that "Cisco puts together a planning matrix that acts a map for determining development or acquisition direction." "Cisco creates an integration team for each new acquisition that has responsibility for making their particular integration work as smoothly as possible while ensuring that acquisition business objectives are met as outlined in the acquisition business case." Cisco Systems RIM personnel work toward integration of records management systems as the acquisitions process is conducted and completed. Various new repositories of records are planned for integration into overall records accountability by the Enterprise Records and Information Management Program Team.

However, this is not the case with many organizations. It is commonly found that either the acquiring organization or the organization being acquired may not have a formal RIM Program. In these cases, the loss of records over time becomes a much greater danger, as they are typically left in the original departments in which they were created. Legal counsel retains legal issue related records, accountants may retain financial records, and information about electronic information systems may continue to reside in notes gathered by the Information Technology (IT) organization, because Due Diligence team members come and go over time. The rationale for the acquisition can be lost making it difficult to calculate any ROI in the future or to be accountable to auditors and courts.

Getting ahead of conflicts and challenges during M&A transactions and subsequent integration issues is good for anyone assigned responsibilities for information management. This is especially true for Chief Information Officers (CIOs) as is emphasized by recent research by Gartner in a report entitled "Timing is Everything in Mergers, Acquisitions, and Divestments". The results indicate that "CIOs who take on the role of integrator from an early stage in the process can improve the success of the



overall deal."³⁵ Of the ten distinguishing practices of M&A experienced CIOs, are some practices such as "Ensuring that the department is MA & D-ready long before a deal is on the table. It should be a key consideration when building a scalable enterprise architecture."³⁶ Why would this level of advanced program planning not also apply to the capture and retention of M&A evidentiary records? After all, once an integration of organizations is complete records holds received from courts can easily apply to all of the records that came from the original organizations.

Once an M&A business transition is in the works, RIM Program actions are often requested. However, it may require coordination to determine which RIM Program is to initiate actions. For instance, are record inventories to be performed by the acquired organization's RIM personnel? Does the acquired organization have any RIM personnel, information policies, a retention schedule, or an inventory of records? Who is on the target organization's team of personnel that will be responding to the acquiring organization's Due Diligence requests for records? Are those personnel authorized to work with the acquiring organizations' personnel? It can be seen clearly that Executive Management at some level will need to formally establish the role of internal RIM staff in assisting the Due Diligence efforts.

For these reasons, the Due Diligence Team should work closely with RIM staff for both business entities. Specific RIM personnel should be tasked to act on behalf of the acquiring or merging organizations. This could include initiating communications with the other organizations in some cases, or simply accepting received Team records into a repository for replication and/or distribution. It is entirely possible that a Due Diligence Team Records Center should be created that includes dedicated document management equipment and a records management repository and software system. This level of dedicated support would allow assurance the Due Diligence Team records were handled professionally and expediently. It would help assure that records of long-term interest during regulatory investigations, tax audits or litigation would likely be preserved and available in the future.

Integrate Policy, Staff, or Both?

The growing volume of records during M&A activities can become a major asset or a convoluted and confusing nightmare. Much has been written in the professional literature in books, articles and Internet postings about the various issues to be addressed during Due Diligence to reduce M&A activity risk by obtaining and sharing information. The various types of records such as financial statements, operating procedures, management briefings, legal contract documents and other records have often been itemized in checklists of both procedures and processes. However, seldom does one find examples of Due Diligence teams during M&A activities thinking seriously and professionally about how to capture and preserve these records over time.



Although it is possible for RIM professionals to become actively involved in the Due Diligence processes to such an extent that they accompany Due Diligence teams on information gathering expeditions, this will be rare. For one reason, the amount of information reviewed will be large compared to the amount of information actually selected for retention and use by the teams. However, RIM professionals are almost always brought into organizational integration efforts at a point when it becomes clear that large corporate level quantities of existing information must be coordinated and integrated. This is especially true once the respective roles of the merged or acquired companies become clear.

A variety of RIM related questions arise during merger, acquisition, divestiture, or closings that must be addressed. When there is more than one RIM Program in place among the companies to be merged, which RIM Program's policies and practices will be adopted by all, or will significantly different procedures between workgroups or sites be left in place? If another company is acquired, does that also mean that records will be transferred between sites to a more central repository? If an organization sells a division of itself to another firm, what remaining recordkeeping responsibilities remain with the original owner of the activities, and what recordkeeping responsibilities accrue to the new organization that now owns those products, services, and assets? In the case of closing operations at a site or in a business function, what recordkeeping responsibilities remain for some duration of time? These are typical challenges that must be addressed as organizations grow, combine, and close down business units and organizational processes.

Should an organization begin to engage in M&A activities, existing information management programs in all organizations need to be identified, as well as, any staff, facilities, policies, procedures, guidelines, standards or best practices that are already in place. One must establish the existence of programs, their scope, the thoroughness of the initiatives, and the ability of the program to work with current M&A processes for the transmission and receipt of records. In many cases, no formal RIM Program will exist in all organizations causing the existing Program to have to work directly with records creators or administrative staff in another organization. This could cause a major increase in workload for that existing RIM Program.

A significant challenge in most organizations is that records, data, and information are often seen as "owned" by work groups. Accountants, lawyers, M&A specialists, and every company's departmental units all may see information as "theirs" to create, receive, and store indefinitely, as long as no visible corporate polices are violated. Despite many organizations having Chief Information Officers, these positions are typically focused on computer technology systems management, rather than true comprehensive information resources management programs. Business groups will "share" information, if policy, procedures, culture, data privacy, data security, and personal expediency promote an environment in which users of information are encouraged to be open about information resources. However, in many organizations today, there still persists the idea that the



information contained in records should be only known to a few individuals directly involved in related events or matters. These information "silos" often do not serve the interests of the organization as a whole, and in some cases, have resulted in poorly documented decisions during M&A activities. Well-organized support for RIM Programs during M&A activities is still the exception, rather than the rule.

Do RIM Tools and Resources Exist?

A very important issue that will arise is whether or not the tools that assist in managing records programmatically, a retention schedule and a records inventory actually exist in a completed state in any of the organizations affected by M&A activities. These tools can be used to identify records for request by the strategically oriented M&A Team as they provide an indication to an organization of what records may be available. They also serve as a starting point in developing checklists of informational items that can be used to document the actions and processes of a target entity and the actions and processes of the investigation oriented Due Diligence Team.

As each organization looks at RIM Program activities across many functional units and enterprises a number of meetings will need to be set up to assess the relative strengths and weaknesses of each. This can be a very trying time for all, as it is easy to assume (sometimes correctly) that the end result of an acquisition or merger will be a reduction in the workforce overall that may affect the RIM Program staff as well. The expectation of a layoff of personnel is a well known danger during any M&A business transition, as executives are often both the most informed about company operations and the first personnel to decide to leave an organization. Their records are some of the most high-value documents that an organization should preserve. For this reason, it is even more critical to engage RIM Program resources and expertise so that all available documentation relevant to M&A decisions can be captured and protected.

If more than one RIM Program exists, an evaluation of all programs, polices, procedures, and guidelines should be undertaken. Without such a global review there will be expected to exist many conflicts and inconsistencies in records management, retention, and compliance practices. A primary decision will be to either 1) adopt some existing company standards, or 2) combine existing ones and develop those into new guidance. Some RIM Programs should expect a change in their internal customer base. A transition to a different information ownership culture may need to be facilitated, if one organization has expected compliance with records management mandates, while another organization is lax in enforcement or their records creators are not accepting of the need for global management of records in a formal manner. It will be particularly awkward if management does not notify records management services users that a transition is to take place by a certain date and provide required resources.



When two organizations merge, through either acquisition or mutually agreed mergers, decisions must be made regarding staff, records collection management, and records retention policies. For instance, it is possible to merge only high level policies to have them integrated and applicable across all business units, while leaving detailed procedures and staff dedicated to subsidiary departments to retain some local control and operational flexibility. This must be done with the assurance that all required records for the enterprise overall can be located, retained properly, and retrieved when necessary.

As an example in Figure 1, Business Entity A and Business Entity B may merge both policy and staff after an M&A transaction, resulting in a new Business Entity C with new Policies C and an integrated RIM Program Staff C. This can be the most complete and thorough solution to integrating RIM Programs, but requires considerable management leadership and staff flexibility. Over time merging all information management programs under one umbrella is generally best to assure consistency in the application of information management practices and principles.

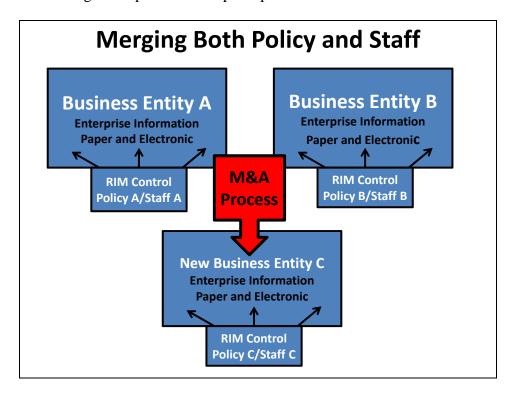


Figure 1. Complete RIM Program Integration.

A very common initial practice is to work toward integrating RIM policies overall, while allowing RIM Program staff and procedures to remain local in focus, at least initially. For instance, even after the M&A process is completed, Business Entity A & Business Entity B remain functionally separate while retaining dedicated information repositories and staff. This preserves the ability to have precisely focused locally directed procedures and locally dedicated personnel knowledgeable about local information management issues.



The RIM Program "integration" occurs through Policy C being applied across the enterprise. In this manner, information access and retention rules can be applied consistently while removing the need to reorganize personnel and facilities management. An example of this approach to RIM Program Integration can be seen in Figure 2.

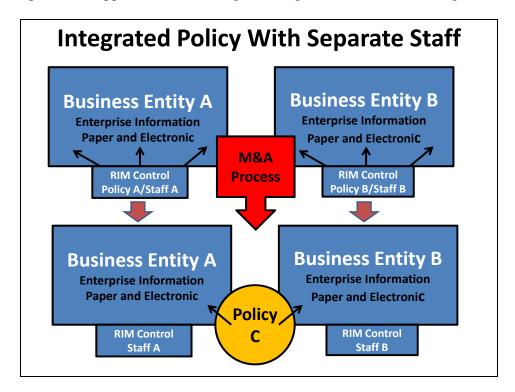


Figure 2. RIM Program Policy Integration Across Separate Business Entities.

One question that will follow-on from evaluating RIM Program activities is the realization that additional RIM Program resources overall may be needed to fund a newly increased level of staffing and increased responsibilities in serving new business processes. If many coordination meetings will take place to plan strategies for M&A related evaluations and decisions, existing staff may need to be temporarily relieved of some current duties, to better concentrate on new responsibilities. The redesign and publication of integrated policies and procedures can take a lot of time. Actual physical transfers of records will be labor intensive and call for planning of new records collections. Creating solutions to electronic records transfers takes meetings with internal and external IT personnel, and may redirecting staff away from providing normally expected services. In order to assure that the inclusion of RIM Program personnel in M&A activities does not reduce current services levels to customers, management will probably need to consider adding personnel and funding to existing RIM Programs.

In some cases, outsourcing of RIM Program services to support some M&A business processes will be warranted. Due Diligence related activities are often very document and data intensive and the creation of new dedicated records repositories and RIM functions



to serve this activity may not be needed. Temporary records storage, bulk transfers of records, wide-spread distribution of physical records, records duplication, and document scanning and indexing require specialized facilities and services that are not available onsite in most corporations. If M&A activities are to be on-going for months to years, with fluctuating workloads, contracting for some of these support services will be a good business decision, rather than planning to add staff and dedicated facilities internally. The same decision opportunity will arise for the procurement of consulting services to assist in M&A RIM Program transition planning.

M&A activities and actions are often questioned after a business transaction and transition takes place. Lawsuits can drag on for years. It is critically important to plan the RIM programmatic impacts and identify records that will be needed for long term retention to assure that information resources are available as needed in the future. During these times, redefinition and re-chartering of the RIM Program would be very wise. A new program scope, vision, strategy, and plan for staffing and facilities management may be recommended. The best way to accomplish this goal would be to have executive management charter a RIM Executive Committee or RIM Council composed of executives, legal counsel, auditors, records creators, IT, and the Corporate Records Manager that exists beyond the activities associated with any particular M&A endeavor.

Expect RIM Program Integration Opportunities

RIM Programs must be supportive of M&A activities, and most corporate environment Records Managers should expect to deal with these issues at some point in their career. These organizational changes can be an opportunity rather than a detriment to the existing RIM Program, if involvement in M&A business processes begins early. Only RIM Programs and Records Managers are uniquely qualified to assure the responsible acceptance, storage, and retrieval over time of corporate records. All attempts to create separate work teams of Due Diligence business analysts, legal counsel, internal business experts, and IT systems support personnel invariably create "islands of information" and mismanaged records over time. Although there are often clear reasons for direct transmission of business records to lawyers, accountants, and consultants initially, the moment that these separate groups start trying to share information, a proliferation of duplicate redundant and poorly organized documents begins.

RIM Program changes that can result from the effects of M&A organizational modifications are varied. In some cases, the need to survey existing collections of documents being used to support Due Diligence processes can result in the discovery of sets of records previously unidentified. New challenges that will arise include the need to create appropriate acceptance and storage processes for electronic files, emails, and database data, as well as the creation of management processes for physical records.



Actual merging of two or more RIM Programs will be an initiative in itself that demands much attention and consideration.

Delivering support to M&A Teams is a major opportunity for any corporate Records Manager. Initial assistance with Due Diligence efforts can range from the creation of checklists for records capture to actual receipt and management of the record themselves. It is quite apparent that records in both paper and electronic format will be exchanged by many parties, and creation of a tracking system to control the receipt and distribution of such records should eventually become are responsibility of the RIM Program. Inventories of records onsite at a business entity to be acquired may be needed, and no one is better equipped professionally to perform records inventories than Record Managers. RIM Program mergers will require numerous meetings between any potentially involved Records Management staff, to collaborate and coordinate on a smooth transition to any new combined business function. When sites or facilities are closed, someone must take an interest in assuring that any vital records from the closed entities are captured, preserved, and retained. The irony for RIM Programs is that the tumultuous change that results from M&A activities may actually result in a new appreciation for and acceptance of the value of RIM programs and services over time!



ELECTRONIC RECORDS CHALLENGES

The proliferation of technology enabled office workers today means that the vast majority of records created are now or will be electronic. Sophisticated and capable computers and networks have become the expected operational infrastructure for the modern office. Although paper based records are still used in many cases, especially where individuals cling to cultural norms like physical signatures, most organizations expect to accept and use records electronically. Electronic records are not only accepted in most legal and regulatory settings, they are considered the only productive media for creating, transmitting, and using large quantities of information. Paper based information is increasingly perceived as expensive to create, retrieve, exchange, store, and retain.

RIM Programs and personnel are expected to a work with both formats of information, but electronic records increasingly dominates their work. As paper volumes decline and paper records are considered less useful and therefore less valuable, RIM professionals have expended policies, procedures, and retention schedules to encompass information in all formats. The need to plan for the archiving and retention of electronic records in multiple formats over time is an issue that demands long-range vision. However, as organizations transmit, store and retrieve information electronically, the most challenging arena is often the need to capture and store records responsibly from workgroups with a variety of contributors for the overall good of the organization.

Electronic Records Data and Media Formats

The data formats used by computer application software vary tremendously creating data sharing and long term records storage issues. Although Microsoft Office software tools such as Outlook, Word, PowerPoint, Excel, and Project are very common, it is possible to see many different software types in use today, especially if one considers cross-border international projects. In many cases these office files are also converted to Adobe Acrobat Portable Document Format (PDF) creating a theoretically more stable and useable information exchange data format, while also creating duplicate records to compare and contrast later. Information in business applications for multiuser implementations that serve accounting, human resources, enterprise resources planning and other collaborative business functions are typically stored in database formats, such as those offered by Oracle, Microsoft, and other vendors. Reports from these systems can be generated as records in either paper or PDF electronic formats.

Scanned images of electronic files or paper documents can be stored as Joint Photographic Experts Group (JPEG) or Tagged Image File (TIF) formats. Information saved from Internet Web pages could be stored in a variety of Hypertext Markup



Language (HTML) and related formats. Electronic mail messages will most likely be stored in Outlook.pst files on local disk drives, in files on network based Microsoft Exchange servers, or even in Google Mail or other "cloud" resident email formats. There are a variety of data formats and even locations of data storage that may be used by office workers today.

For this reason, it is important during the early stages of organizational transition activities to establish some expected data and media standards for use by the M&A planners and Due Diligence Teams. These standards can be presented as a suite of acceptable software file formats or media types such as specific CD-ROM or DVD-ROM disk formats. One way to specify these requirements is in the original M&A letter agreements signed early in the acquisition or merger process. Another time to specify these requirements is before any major information downloads or exchanges occur between the respective organizational transition teams. Otherwise, the RIM Program personnel will need to identify the major data and media types used as the projects proceed, creating a situation where some information may be exchanged that will be difficult to read and use in the future. Gaining early control of this proliferation of data/media formats and sources of information is critical to being able to manage M&A records.

Post M&A Records Management Issues

Despite the knowledge that specification of standards for data and media formats should precede M&A transactions, incompatibilities between information formats and difficulties in data retrieval will occur. This is especially true in instances of divestitures and closures, as there is relatively little motivation for business entities shutting down to undertake new demands on how they manage information in technology based systems. M&A's often occur between two organizations that do not share IT standards with respect to desktop computers, database servers, email systems, office suites, business applications, network protocols, or backup/archiving systems.

It is important to be able to identify the locations of data for exchange and retention. This can begin by reviewing existing retention schedules and any available information technology architecture diagrams or applications. Of particular value are any "data maps" that may have been created for litigation related electronic discovery actions, even if they are simply listings of computer systems and the data resident there. Workflow modeling of the data going into and out of workgroups may be needed just to understand how different types of electronic records are being transmitted, received, and stored. Computer data located in modern organizations can be stored on floppy disks, hard disks, magnetic tapes or CD-ROM/DVD formatted disks, as well as "thumb" drives and other solid state media. However, much of the data being exchanged between working groups will exist in database applications or email systems that can be identified by IT personnel as being commonly used across an organization.



In some cases, direct transmission of electronic records to individuals on an M&A Team is desirable to assure free information flow. In other cases, an acquired organization might prefer to off load files and data to tapes for physical shipment to an M&A Team records center or administrative support workgroup. In any case, for electronic records to be properly protected and preserved, at least a copy of the electronic records must be transmitted to the M&A Team's records management staff to assure they are captured and stored properly so that they can be used over time by a larger audience than the immediate workgroup. This copy may be no more than a copied email with an attached document, or a separately sent set of CD-ROM disks that contains data files. However, it may require executive level sponsorship to get cooperation to perform these endeavors across two different enterprises, as an electronic records assessment will be required to profile the types and volumes of data to be exchanged.

Documentation of the e-systems that contain accounting, email, human resources, and enterprise resources planning records will significantly enhance the ability to import data into existing applications and to re-use electronic records in the future. In some cases, system specifications must be transmitted along with the data to be able to read media and load the data. For instance, one can probably not know how to use "Oracle" accounting system data unless one has at least a database schema and information on what operating system and archiving software was used to prepare a particular magnetic tape. An "acquiring" organization" may be able to mandate standards for delivery of electronic records' data, but this could be more politically difficult in a merger. And this challenge will become all the more critical if some systems with Due Diligence related data will eventually be shut down or consolidated. Tracking back later to find out why some claims of organizational financial value were not true may be impossible if no one has read and validated the information in a useable format as it is received.

To plan these eventualities and decisions, a Due Diligence Team would be well advised to have IT specialists and Records Managers focusing on these issues as the records are being identified, captured, and delivered. Unlike, mergers and acquisitions, where there may be a plan to merge data into consolidated applications, divestitures and closings are equally poised to loose critical data, as their very nature is one of cessation of some operations. This data must be planned for long term static retention, by copying to CD-ROM or magnetic tapes in a stable media format and in a data format that can be most easily re-used in the future, such as PDF, TIF, or HTML. All archived data should have the name of the operating system, data format, and software application used to create the data, as well as some contact information to refer to as the source of its creation. Without at least this basic level of information, it could require considerable resources to attempt to load and read these electronic records in the future. In addition, all electronic media will need to be stored in a climate controlled records storage facility for long term durability.



Preservation of Actively Used Systems Data

In many cases, organizational integration or shut down activities will be occurring while some actively used systems, such as email or database applications, are continually creating and storing new data. This will cause current systems to be changing in their records content, and can make it impossible to establish the exact status of records within the system at a later date. It may be best to offload a complete set of a database application's data along with applicable documentation to be able to ascertain in the future the status of the information before and after an organizational change such as a merger. For instance, it would be desirable to have generated a series of standard reports to PDF files, so that accounting balances and other financial data can be captured at a point in time to be available for future audits.

A particularly dangerous situation will occur if electronic records data is simply imported into existing software systems for analysis and reuse. Such data must have incompatible metadata and other logical constructs that make it less meaningful in the new application system. E-mails could be imported into a new email system, but some of the audit trail related metadata could be lost or compromised when server names, time stamps, and other system configuration changes on the new server. Audit trails in email, accounting, and human resources applications can be of extreme interest should the value of a merger one day be contested by shareholders or executives. Rather than simply importing database data into a new application, it may be best to create authoritative database reports as snapshots of a previous application's status to Adobe Acrobat PDF objects that freeze information in a difficult-to-contest format.

Office software suite file properties should be tagged with a Read-Only status to make it less likely that they will be changed after organizational transitions. Another option is to create PDF or TIF file versions of documents as they are transmitted during information exchanges. Unfortunately, performing these functions by hand a file or directory at a time can be very time-consuming. The best way to take control of electronic documents and make sure they have not been altered as authentic records is to import them into an electronic content management system that can serve as a long term repository for retention and preservation.

In some cases, one organization may take the initiative to set up an electronic document management system for collaborative use with sufficient electronic record management capabilities to assure records protection and viability over time. There are advantages to using existing in-house systems for this purpose, as they are already staffed and maintained in a manner that makes data and document imports relatively simple due to the familiarity of IT and RIM staff with already existing system functions. However, it may be that a separately funded and maintained electronic content management system with shared usage offers better access management and user functionality than any existing internal electronic records repositories.



VDR ELECTRONIC RECORDS

A new software application and hosting environment has come into growing use over the last decade that enables collaborative teams from different organizations to share records. Often called the Virtual Data Room (VDR), it typically offers an Internet browser Web interface to an electronic document management system hosted by a third party provider. Investment bankers, M&A Due Diligence teams, M&A consulting firms, corporate legal counsel, outside law firms, and various contractors or bidders may all need to share and review documents related to business transactions. These documents may include letters of agreement, non-disclosure agreements, accounting reports, engineering drawings, patents, employment contracts, copyrighted materials or other business confidential data.

M&A Organizational Collaboration

M&A business transactions inherently involve many different organizations and may involve business relationships that cross international boundaries. Bankers, lawyers, accountants, investment brokers, technical experts, clerical personnel, and administrative support staff all need to exchange documents and data during deal construction, Due Diligence, extensions of offers, and transaction closures. Historically, when paper based information processes were the norm, "deal rooms" were often set up internally or at rented sites for individuals to read and review confidential information where it could be shared in confidence. Controlling access and limiting printing of copies to authorized personnel was much easier when the physical records could be easily controlled, than when mailing multiple copies of information between involved parties and then hoping that confidentiality expectations would be honored. In some cases, companies arose to service these types of business transactions by also providing additional services, such as printing, copying, file room management, and legal or subject matter consulting services.

With the advent of electronic mail, many organizations began to share information by simply emailing items and attaching documents as needed. However, it was soon realized that the inherent risky nature of email communications and the absence of any overall M&A project controls allowed inadvertent copying of subsequently forwarded emails. This soon drove organizations to using Web sites for document control and dissemination due to the capability to control access through user authentication. As outsourced remotely hosted applications offered by Application Service Providers (ASP) became more accepted in IT shops there arose an increasing number of vendors offering remote access to document management services. Soon, some document management ASPs began to cater to M&A deal makers, and some previous Deal Room providers simply began to offer their own remotely hosted document management systems for their clients.



Today's office environments are largely "automated" and digitally produced documents and data are the norm. Even when paper is used for reading and review, it has typically been generated by electronic systems. Should hand written or other paper based information need to be shared between organizations, the norm is to scan the paper documents into electronic format and then share the information by email attachment or posting the documents to an Internet accessible Web site. Deal rooms tend to be localized and used for small working groups and the review of signed or other hardcopy documentation. It is for this reason, that many organizations now use remotely accessible document management systems to share information.

Collaborative System Use and Support Issues

Although M&A related electronic documents are generally produced in-house on someone's personal computer and possibly stored in a document management system for internal collaboration, granting systems access to external parties may violate IT and Records Management security or privacy norms, as well as, information compliance policies. In some cases internal IT staff cannot bring up and support a collaborative document management application as quickly as is needed. In other cases, the computer security issues associated with accepting confidential information from other organizations into internal systems not configured with robust user management features is too risky. Having external non-company personnel access internal systems across network firewalls may present issues. And, of course, how does one establish a model for cost sharing the use of the system, when users with different access needs may come from different organizations and countries?

When M&A Teams agree to communicate through electronic means, the issue of software compatibilities may arise. Application software and operating systems versions may vary between teams creating difficulties reading files and retaining the same appearance of records when transmitted between users. An often used solution is transform office documents, graphics, and database reports into PDF files. If this is to be done by every team member it may require multiple copies of the viewer on many machines and can give rise to more software versioning and compatibility issues. The same concerns can apply to downloaded Hyper Text Markup Language (HTML) files from Internet browsers such as Internet Explorer.

By sharing a commonly accessible document management system application hosted by a third party application provider a number of benefits can be realized:

- 1. A centralized document repository is available for collaborative use,
- 2. Systems and support can be brought up very quickly, often within one day,
- 3. Impacts on internal IT staff and business applications can be minimized without altering internal IT systems metadata, software, or networking architectures,
- 4. Worldwide records review can be secure, with multiple levels of access offered,



- 5. Documents can be encrypted before any transmission occurs if required,
- 6. Intellectual property can be protected for all participants,
- 7. International records compliance and data privacy issues can be addressed,
- 8. Intuitive Internet Web browser interfaces can be leveraged,
- 9. Customized document filing systems can be implemented,
- 10. Confirmation of document viewing and receipt can be implemented,
- 11. 24/7 access with audit trails is available across time zones,
- 12. 24/7 help desk support can be available with multiple languages offered,
- 13. System training can be offered globally by the software vendor,
- 14. System users can be prevented from inadvertently seeing other users' documents,
- 15. Printing, copying, and forwarding can be controlled with images available to users, thus preventing downloading of files,
- 16. Paper documents can be scanned and uploaded for worldwide access,
- 17. Copies can be registered through the use of custom generated watermarks on each page of every document identifying its origin and date,
- 18. Audit trails of document viewing and actions taken can be recorded, including dashboards monitoring system usage with graphical reports,
- 19. Customized Due Diligence processes can be implemented and leveraged,
- 20. Documents can be preserved in native uploaded formats, as well as, their contents indexed for searching with optical character recognition of text in imaged files,
- 21. Regulatory compliance mandates regarding documentation can be implemented,
- 22. Electronic discovery activities can be supported with more accurate records holds,
- 23. Accelerated M&A Due Diligence and overall transaction processing can occur,
- 24. Post transaction document archiving of all parties relevant documents can occur, with sets of records made available offline for long term retention needs, and
- 25. Data can be backed up and protected for business continuity during disasters.

Records Management and Retention Issues

All of these features and capabilities can enhance the quality of record keeping activities and attempts to preserve, archive, and retain electronic records. While it is rare to see the use of VDRs early in M&A types of transactions, they are often seen during Due Diligence activities because of the volume of records and data that must be shared and cooperatively evaluated. However, no VDR software was identified that had a significant level of sophistication regarding the assignment of complex rule based retention periods to differing classes of records. Most software companies indicate their clients are only interested in retaining all documents in these systems for one to three years, with the information either delivered to the client and/or discarded after that time period.

Some software vendors indicate that it is possible to deliver the complete set of VDR resident data and documents to clients for import into their own document management environments. This capability should be of great interest to Records Managers, attorneys, auditors, and tax advisors, as the value of VDR resident documents can be of great



benefit over time periods longer than three years. Obviously, there is a potential for tax related information to be of use after a merger for up to at least seven years. However, the need for records and information and the technologies used for access can be a critical component of the success of merged organizations as they move forward.

These records from the VDR repositories can in some cases be delivered in the native database formats of the VDR's infrastructure, such as an Oracle database output. In other cases the records can be delivered as compressed "Zipped" files on CD-ROM complete with the electronic documents, folder structures, and system usage audit trails. This capability alone can enable users of VDR systems to offload electronic records for future use, after the VDR data is no longer being used within the VDR system itself. Such VDR data could be used for records management purposes at a later date, if such information was deemed to be of use during litigation, audits, or other investigations.

Merrill Corporation (www.merrillcorp.com) offers VDR services through DataSite (www.mergermarket.com) to conduct an industry study of corporate executives and M&A professionals about primary post merger company integration issues. It was found that "Once a merger is complete, the vast majority of overall respondents (76%) use technology to assist in the integration process. Specifically, 94% of North American respondents and 85% of Asian respondents use technology to streamline the process, compared to only 48% of European respondents."37 The lesson learned in these statistics is that electronic records and communications in technology based systems form a major opportunity for records to be identified and preserved that can have lasting value for the organizations undergoing M&A related business changes.

VDR System Vendors

Virtual Data Room software could be deployed using products from many different software vendors, including software from some more generic traditional electronic document management system vendors. However, it is readily apparent when reviewing VDR software that a major advantage of using vendors specializing in this arena is their understanding of the workflow, document types, and team collaboration needs of organizations involved in M&A type activities. In addition, these organizations often offer supporting services such as M&A process advisement, legal services, printing services, translation services, and other associated financial services.

Readily identifiable vendors with VDR offerings that specialize in supporting M&A activities include:

1. Merrill Corporation (www.merrillcorp.com) provides legal, financial, and corporate professionals with a variety of services for gathering, organizing, and managing information related to transactions in confidential time-sensitive



- environments. They offer DataSite (<u>www.datasite.com</u>) as a VDR system for customers to use for managing documents and data associated with M&A and other types of business transactions.
- 2. Intralinks (www.intralinks.com) provides customized solutions to enhance communication, collaboration, and support for critical business processes in both M&A and other industries. They provide the Intralinks Exchanges software environment to facilitate the exchange of critical information, collaboration, and workflow management inside and outside of organizations.
- 3. Brainloop (www.brainloop.com) provides productivity, compliance and document security related software such as the Brainloop Secure Data Room. This webbased application allows sharing confidential documents and integrates with Brainloop Secure XChange to enable securely using email with attachments.
- 4. Ansarada (<u>www.ansarada.com</u>) provides VDRs for M&As, Corporate Finance, Corporate Legal, Real Estate, Life Sciences and other transactions. Ansarada allows assigning one's own project manager, creating custom branding of sites, and other specific solutions, as well as 24/7/365 support.
- 5. RR Donnelly (www.rrdonnelley.com) provides integrated communications and document preparation services for a variety of industries. It also offers the Venue Virtual Data Room (www.rrdonnelley.com/wwwVenue/WhyVenue/Default.asp) to assist deal life cycles, streamline document management, and link to RR Donnelly's other services.

Individuals interested in becoming more informed about M&A transactions, workflow, and related records management issues are encouraged to visit these sites. Each of these vendors offers numerous highly informative white papers, industry research studies, and webinars from their Web sites, especially regarding the use of VDR software. However, many traditional document management software vendors also offer similar services, though generally they are more focused on in-house use. One is encouraged to conduct some Internet based information searches to identify all of the software options available. An example of a possible functional architecture is illustrated in Figure 3.



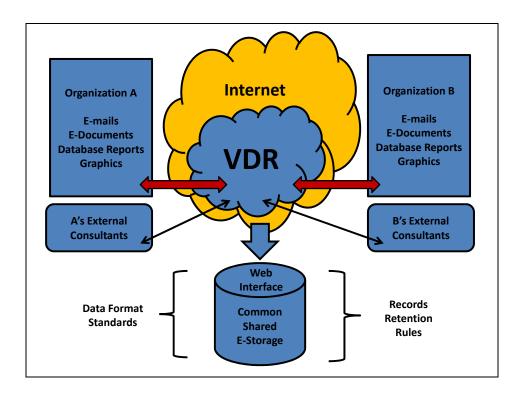


Figure 3. Organizations Share Electronic Records in a VDR

SUMMARY

It should be clearly noted that organizations have varying degrees of comprehensiveness in coverage of the records issues related to Mergers, Acquisitions, Divestitures, and Closures, as is typically true of all Records Management Programs. In some organizations, they are concentrating on the capture and retention of records created during the Due Diligence phases of M&A transactions. In other organizations, the integration of Records Management Programs subsequent to a merger may by taking place. Litigation subsequent to a company acquisition can drive a need to reconstruct specifically targeted electronic records such as accounting systems data. In each instance, the precise business case that drives inclusion of these "satellite records" into the enterprise Records Management Program's scope of influence will vary. However, in every case there are identifiable benefits from appropriately retaining records and obvious risks from failing to do so.

Business mergers, acquisitions, divestitures, and closings offer challenges for executives, Due Diligence Teams, Records Managers and RIM Programs. However, during these trying times, there can be opportunities as well as frustrations. Support and funding for RIM activities in organizations is often an afterthought when the normal course of business does not experience a crisis or calamity. During extreme business changes and transitions, the need to manage information resources becomes more apparent, as critical systems and business processes fail unless provided data and electronic records. Information resources are the raw materials used to create new products and services and without timely high quality records and information, poor decisions can result. This is especially true in the world of M&A adventures.

As M&A teams are formed, Due Diligence processes are initiated, business consultants are retained, and legal counsel becomes involved, each organization's RIM Program must reach out to accomplish new recordkeeping objectives while working within constrained resources and timeframes. The goal of this report is to provide a ready reference of strategies and practices that can serve as a starting point for Records Managers and their management in discussions of the recordkeeping challenges. By exploring issues in advance of problems occurring, organizations will be able to assure that records required for quality decision-making and long-term retention are identified and properly preserved.

There is a large volume of books, articles and Internet references on business information related to M&A topics, including strategic planning, executive retention worries, corporate culture change, Due Diligence analyses, and morale boosting self-help guides. Very few of these deal realistically with the records and information that will form the core basis for creating successful business transitions. Several references of special note



that do cover in some detail the data, document, and records management issues for the M&A business environment are included in the appendix of this report. They will be found to be most useful to RIM practitioners and Due Diligence Teams planning how best to manage information. Notice that many are 10 years or more old, so additional consultation with additional more current Internet based resources is well advised.

Of particular interest regarding properly addressing recordkeeping challenges within the M&A environment, it was found that Virtual Data Room vendors' Internet Web sites were often very informative and supportive of the need to capture and manage electronic documents. Many of these Web sites have informative research papers for free download and most software vendors will schedule or offer free online demonstrations and Webinars to review the functions offered by their products. Although most software has limited sophistication in so far as implementing complex retention rules, the use of VDR software to capture and retain information provides a focused setting for many different teams to share and collaborate on managing electronic documents.

Two different Checklists of issues to be addressed by RIM practitioners are available as appendices to this report in the Records Management Checklists section. They are 1) the RIM Program Checklist for Mergers, Acquisitions, Divestitures, and Closings, and 2) the Records Checklist for Mergers, Acquisitions, Divestitures, and Closings. The RIM Program Checklist is intended to provide an itemization of the questions and decisions that Records Managers should use in Program evaluation and planning. The Records Checklist itemizes specific records types that will be of interest, when Records Managers must assist Due Diligence Teams in establishing the records series to be acquired and stored for later retrieval by the Team.

It is easy for existing RIM Programs to become overwhelmed when confronted with a vast expansion of requests for assistance, so there is no better time to plan additional resources than during times of crisis with self-evident change indicating a need for program reappraisal. While requests for incremental increases in operating funds may fall on deaf ears during normal times, the opportunities offered by business expansion and reorganization can create fertile ground in which to grow new services and capabilities. For the resourceful RIM professional, M&A activity can offer prospects to justify new capital expenditures for facilities, add more professional staff, increase enterprise scope and grow more customer support. Influence and leadership opportunities will increase during challenging times for those poised to take a bit of professional risk and strive to achieve new goals.

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RECORDS MANAGEMENT CHECKLISTS



RIM Program Checklist for Mergers, Acquisitions, Divestitures, and Closings (MADC)

Issue No.	Description	RIM Team Member Responsible	Date Completed	Remaining Issues
1.0	Current RIM Program Issues			
	eventually affecting MADC			
	actions			
1.1	Does the current program have informative management contacts to identify upcoming MADC activities?			
1.2	Does the current program have informative legal counsel contacts to identify new MADC activities?			
1.3	Has strategic planning occurred to create an activity list for MADC business changes?			
1.4	Does a decision process exist to determine internal Records Management authority after organizational changes?			
1.5	Does a decision process exist to determine inhouse or outsourcing of records storage for current operations affected by MADC decisions?			
1.6	Does a decision process exist to determine and approve consulting assistance if required?			
1.7	Have communications methods been established with Points of Contact (POCs) for liaison with M&A team?			
1.8	Have communications methods been established for liaison with internal personnel?			

Issue No.	Description	RIM Team Member Responsible	Date Completed	Remaining Issues
1.9	Has the Records Retention Schedule been updated within the last 6 months?			
1.10	Has the Records Inventory been performed and completed within the last year?			
2.0	RIM Participation Issues in			
	activities that support Due			
	Diligence for MADC			
2.1	Has a formal relationship been created between the RIM Program and M&A Due Diligence Teams?			
2.2	Has there been established support for a working relationship between the RIM Program Legal Counsel, Auditing, Compliance and IT organizations regarding participation in Due Diligence?			
2.3	Has a checklist of required records, in both paper and digital format, been created for conducting Due Diligence processes?			
2.4	Has a Requested Records Checklist been reviewed and validated by all internal groups participating in the Due Diligence process – business analysts, legal counsel, financial auditors, executives, and records management?			
2.5	Are there different records lists for public and private MADC related activities?			
2.6	What corrective action steps are taken when			

Issue No.	Description	RIM Team Member Responsible	Date Completed	Remaining Issues
	some records are not obtained during the Due Diligence process?			
2.7	Does an Acquisitions Agreement, Merger Agreement, or other business documentation contain a legally specified listing of records to be produced by either party?			
2.8	Does a Due Diligence Team organization chart exist with contact information?			
2.9	Does a process workflow diagram exist for different types of MADC projects with timelines and deliverables?			
2.10	Does a workflow diagram exist with different types of records requests itemized at each stage of the project?			
2.11	What is the information classification level and appropriate long-term repository for Due Diligence project records?			
2.12	What is the information classification level and appropriate long-term repository for Due Diligence project records acquired from other organizations?			
2.13	What regulatory authorities will require a specific set of records during a particular type of business transaction?			
2.14	Are interviews of personnel of companies to be acquired considered records for special treatment and retention?			
2.15	Are there known on-going legal proceedings			

Issue No.	Description	RIM Team Member Responsible	Date Completed	Remaining Issues
	on the part of either party that dictate or indicate the need for certain records be added to the Requested Records Checklist?			
2.16	Do records value decisional thresholds exist regarding which documents are worthy of further investigation, whereas other documents are simply requested?			
3.0	New RIM Program Issues to			
	Occur During MADC activities			
3.1.	Has the nature and extent of all existing RIM Programs and activities, both domestic and global, been determined?			
3.2	Have contacts been established with each existing RIM Program for communication and coordination?			
3.3	Have any relevant retention schedules, records research, or guidance related to RIM been identified and documented?			
3.4	Have the RIM Program relationships with customers, departments, users, and IT been evaluated to determine if similar or dissimilar?			
3.5	Has the location and status of records collections of interest to RIM Program coordination been assessed?			
3.6	Has the need to include M&A team generated records in RIM Program been assessed?			

Issue No.	Description	RIM Team Member Responsible	Date Completed	Remaining Issues
3.7	Has the RIM Program been considered for repositioning with respect to reporting relationships?			
3.8	Is additional funding available for increases in RIM Program activities?			
3.9	Are plans in place for adding effort to current RIM activities if needed?			
3.10	Are internal Due Diligence Team operational records worthy of capture and retention?			
3.11	Are there specific MADC business transition documents that specify records management needs or actions?			
3.12	Which RM Programs exist and what is their level of acceptance?			
3.13	What is the organizational scope of each Program?			
3.14	What is the volume of records, boxes, or data within the scope of the Programs?			
3.15	What records format (paper, microfiche, electronic) does the program address?			
3.16	Is the program of high quality and well implemented?			
3.17	Are they in compliance with policy and procedures, internally or globally?			
3.18	Are there RIM recordkeeping systems in effect or being used?			
3.19	Is system documentation available on any RIM systems being used?			

Issue No.	Description	RIM Team Member Responsible	Date Completed	Remaining Issues
3.20	Who is the contact for the RIM recordkeeping			
	system?			
3.21	Is there a Retention Schedule?			
3.22	Are organization charts available?			
3.23	How many staff members exist?			
3.24	Has a records inventory been performed?			
3.25	Should differing organizational policies, procedures, standards and practices be integrated or adopted?			
3.26	Do records storage facilities exist in the other organizations?			
3.27	Will these storage facilities be used or closed?			
3.28	How might records storage facilities be used?			
3.29	Do outsourced contracts exist for currently			
	operating record storage facilities?			
3.30	What is to be the new RIM Program's staffing levels and duties?			
3.31	Are staff members available for M&A			
	activities?			
3.32	What document destruction services or providers are being used?			
3.33	Is the other organization's RIM Program supporting an M&A Team?			
3.34	Are the Due Diligence records of the other organizations of interest internally for retention?			
3.35	Is the other organization's staff available for			

Issue No.	Description	RIM Team Member Responsible	Date Completed	Remaining Issues
	RIM coordination meetings?			
3.36	Buying other companies means acquiring records?			
3.37	Does a remaining company have records responsibilities?			
3.38	How long does one retain closure records?			
3.39	Is retention research required for new records?			
3.40	Is collaboration with other RIM Programs required?			
3.41	Are there standards or best practices followed by any organization that need to be adopted?			
4.0	Electronic Records Issues			
	affecting MADC transitions			
4.1	Have the functional business units (or A&M team member) been established that are responsible for coordination of e-records related decisions with the RIM Program and overall M&A activities?			
4.2	Have the points of contact with business units that may engage in e-records deliveries or transfers been identified?			
4.3	Does a strategy exist for decision-making regarding e-records retention for M&A activities and long term?			
4.4	Have points of contact been created with IT personnel in MADC organizations to facilitate			

Issue No.	Description	RIM Team Member Responsible	Date Completed	Remaining Issues
	decision-making and the receipt of transfer of e-records specifically?			
4.5	Has a strategy been created for the integration of paper and e-records receipt, tracking, and management?			
4.6	How will the default retention period for retention of e-records following MADC activities ceasing be determined?			
4.7	Have the IT processes required to "accept" or "acquire" records been determined?			
4.8	Are the internal systems defined that will serve to accept and load data from external applications?			
4.9	Have the data and media formats acceptable for receipt of information in M&A actions been established?			
4.10	Are system backups or data archives of native application formats differentiated?			
4.11	Have the physical repositories or vaults to be used to store e-records disks, tapes, and other media received been identified?			
4.12	Have the e-records types that may be covered by litigation holds, regulatory mandates, or other compliance related issues been agreed upon?			
4.13	Which systems contain records of interest? Will systems inventories of e-records need to be performed?			

Issue No.	Description	RIM Team Member Responsible	Date Completed	Remaining Issues
4.15	Are systems administrators known?			
4.16	Have personnel been identified to perform inventories of e-records?			
4.17	Are systems specifications and functions identified that may impact records being created?			
4.18	What documentation is available on systems?			
4.19	Will some systems be closed down, soon, or later?			
4.20	Will records be imported and integrated from one system into another?			
4.21	Is a dedicated IT systems and e-records transition team needed?			
4.22	Who is the contact for any human resources databases being used with human resources records?			
4.23	Who is the contact for any accounting, tax, of other financial system databases being used with financial records?			
4.24	Who is the contact for any backup systems operated by IT that may have copies of records?			
4.25	Does the organization created unique records of interest as intellectual capital including patents, copyrights, engineering drawings, etc. and who is the contact for such records repositories?			

Records Checklist for

Item No.	Record Description	Requeste d By/For	Requested From	Record Date	Storage Location	Original Records	Software Application	Data Format
1,00		<i>a 25</i> /1 01	11011	Duce	20000001	Owner	11ppicuusus	2 02 2240
1.16	Project plan and goals							
1.17	Timelines and deadlines							
1.18	Transaction timetable for team							
	milestones							
2.0	Records Requested							
	During Due Diligence							
2.1	Accounting policies and procedures							
2.2	As Built Drawings							
2.3	Asset purchase agreements							
2.4	Bankruptcy filings							
2.5	Bylaws							
2.6	Cash management reports							
2.7	Certificates of Incorporation							
2.8	Compensation Agreements							
2.9	Contracts							
2.10	Contracts specifically related							
	to the business transition							
2.11	Copyrights							
2.12	Credit and background checks							
2.13	Documentation about							
	employee benefits and plans							
2.14	Documentation of key							
	contractor personnel							

Records Checklist for

Item No.	Record Description	Requeste d By/For	Requested From	Record Date	Storage Location	Original Records Owner	Software Application	Data Format
2.15	Documentation of pricing policies							
2.16	Documentation on employees that are foreign nationals							
2.17	Documentation on government reporting activities							
2.18	Documentation regarding pending litigation							
2.19	Documentation regarding recent audits – internal and external							
2.20	Employment and Consulting Agreements							
2.21	Engineering reports							
2.22	Expense itemizations							
2.23	Financial forecasts							
2.24	Human resources information on key officers							
2.25	Import/Export related documentation							
2.26	Insurance policies							
2.27	Inventory status documentation							
2.28	IT documentation on financial and HR systems							

Records Checklist for

Item No.	Record Description	Requeste d By/For	Requested From	Record Date	Storage Location	Original Records Owner	Software Application	Data Format
2.29	Labor Contracts					0 11101		
2.30	Leases							
2.31	Leasing agreements							
2.32	Legal or regulatory documents affecting financial status							
2.33	Letters of credit							
2.34	Letters of intent							
2.35	License and Franchise Agreements							
2.36	Licenses							
2.37	Lien Searches							
2.38	Listings of banking institutions and other financial accounts – chart of accounts							
2.39	Lists of suppliers and distributors							
2.40	Loan Agreements							
2.41	Market Studies							
2.42	Minutes of Executive Meetings							
2.43	Mortgages							
2.44	Patents							
2.45	Payroll management reports							
2.46	Pending litigation documentation							

Records Checklist for Mergers, Acquisitions, Divestitures, and Closings (MADC)

Record Description Requeste Original Item Requested Record Storage **Software** Data d By/For From No. Date Location Records **Application Format** Owner 2.47 Pension Plans 2.48 **Permits** 2.49 Personnel listings 2.50 Product inventory listings 2.51 **Product Warranty Agreements** 2.52 Real Estate Deeds 2.53 Sales Agreements 2.54 Sales documentation 2.55 Sample monthly closing and reporting system outputs SEC Filings 2.56 2.57 Securities Agreements 2.58 Shareholder Agreements Shareholders equity 2.59 documentation 2.60 Signed Merger, Acquisition, Divestiture or Closing Agreement legally binding documents Stock purchase/option 2.61 agreements Supplier and distributor 2.62 related agreements 2.63 Target company SEC filings 2.64 Target's information

Records Checklist for Mergers, Acquisitions, Divestitures, and Closings (MADC)

Item No.	Record Description	Requeste d By/For	Requested From	Record Date	Storage Location	Original Records	Software Application	Data Format
						Owner		
1.0	Due Diligence							
	Process Team							
	Activities Records							
1.1	Acquisition or Merger							
	Agreements dictating							
	processes							
1.2	Confidentiality agreements							
1.3	Conflict of interest forms							
1.4	Consultant engagement letters							
1.5	Consultant reports to Due							
	Diligence Team							
1.6	Document requests lists							
1.7	External contact listing							
1.8	External contacts organization							
	chart							
1.9	Field trip notes							
1.10	Forms sent to outside contacts							
1.11	Internal contact listing							
1.12	Internal team correspondence							
1.13	Internal team organization							
	chart							
1.14	Interview notes							
1.15	Meeting notes							

Records Checklist for Mergers, Acquisitions, Divestitures, and Closings (MADC)

Item No.	Record Description	Requeste d By/For	Requested From	Record Date	Storage Location	Original Records	Software Application	Data Format
						Owner		
	management policies							
2.65	Target's IT architecture							
	diagrams and documentation							
2.66	Target's records retention							
	policies							
2.67	Tax related documents and							
	filings							
2.68	Technology research							
	agreements							
2.69	Terms of offers							
2.70	Terms sheets							
2.71	Title search or lien documents							
2.72	Trademarks							
2.73	Tradenames							
2.74	Transaction fee documents							
2.75	Year-end financial statements							