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Managing Data in a Divestiture or Merger: Addressing Unique Challenges

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Data that is potentially responsive and must be preserved and eventually collected and produced in an active litigation is typically tied to individual employees who are custodians of the data. If an employee leaves the company tomorrow, what will happen to the data controlled by the employee?

L-R: Tara Lawler, William Childress, and Aurora Hartwig de Heer of Morgan Lewis & Bockius. Courtesy photos

More than half of Fortune 500 companies from the year 2,000 no longer exist, at least not in the same form they once did. In today's dynamic economy, companies regularly rebrand, merge, acquire smaller companies, or spin off divisions into separate legal entities.

For each of these corporate changes, data must be preserved and remain accessible to meet anticipated or ongoing litigation obligations. This process is separate from due diligence performed as part of a corporate structure change and, instead, is focused on the identification, continued preservation, and management of data necessary for litigation. This work can be especially challenging due to complex and ever-evolving technologies and company data systems. For pending and anticipated litigations, how do the parties to these transactions ensure that they have the data they may need in the future?

Divestitures and mergers present unique data challenges. A divestiture, for example, is complex because it requires people and data to be untangled between two entities that will operate as separate entities. Following a divestiture, to meet ongoing discovery obligations, it is common for one party to the transaction to need data that is in the possession, custody, or control of the other party. This requires the divesting company to continue to preserve data while also creating a process to allow for the divested entity to make litigation-related data requests.

Although data will not become legally inaccessible as a result of a merger, data must be adequately preserved during the consolidation process and kept available for discovery purposes.

Despite differences in these types of transactions, there are processes common to both. In this article, we will discuss these key considerations and offer guidance on how companies should approach data management and preservation for ongoing litigation needs during divestitures and mergers.

Advanced Planning With Key Stakeholders Is Critical

For any corporate change, advanced planning is central for proper data management and preservation. This allows the resulting entity or entities to be able to identify, locate, and track data that is subject to ongoing preservation obligations. This process is often overlooked or underappreciated, but planning should start as soon as the decision is made to move forward with a divestiture or merger.

The first step is to assemble the key stakeholders who can help to plan and execute. The final closing of a transaction may take months or, in some instances, years, because of the regulatory clearance process. However, it is never too early to plan. Key stakeholders should include the following, where available: the corporate team with knowledge of the deal structure and negotiations including post-change data access rights; information technology (IT) personnel involved in any data migration, decommission, or merger; human resources (HR) personnel to help identify individuals who will be exiting, joining, or otherwise have their data implicated in the change; the privacy team, if there is data located outside the United States or applicable sector or state privacy laws; and the legal department and the Ediscovery team, who can help to identify ongoing litigation and related preservation needs.

As part of the planning process, gathering key information about legal holds, impacted data and company systems is important.

Gather Information on Active Litigations and Legal Holds

During the planning phase, all data, systems, and individuals that are subject to ongoing preservation obligations should be identified and properly tracked prior to a corporate change. Specifically, as the planning phase moves toward execution, it is critical that data transfers are documented and tracked. Without tracking where and when data is moved, as well as its final location and accessibility, it will be difficult to locate data when it is needed for future discovery. In a divestiture, data is split and potentially shared between two entities. In a merger, data from multiple entities is consolidated and managed by a single entity. Each of these data changes must consider ongoing discovery obligations. In planning for these transactions, the following checklist of information should be gathered relating to active litigations and legal holds: Identify relevant pending litigation and investigations (active or anticipated) and make explicit which entity will be responsible for each. Included in this should be the identification of any outside counsel or discovery vendor involved to-date.

Identify all active legal holds or any other nonspecific preservation instructions such as suspension of janitorial or auto-purge functions.

Identify custodians, IT stewards, and data sources that are subject to each legal hold. For the active legal holds, determine which entity will be responsible for the hold (if a divestiture) or how to consolidate legal holds from another company into a new company (if a merger). For the holds, identify how the holds were issued and gather all tracking documentation, including dates issued and custodian acknowledgments.

Procure Information on Technology, Data and Related Policies

Information about company data-related policies and sources is important, especially for ongoing discovery purposes. First, identify all data sources that will be implicated in the corporate structural change, then determine whether and to whom the data is being transitioned. Finally, ensure all data

that is subject to an active legal hold is not lost, destroyed, or otherwise made inaccessible, even if inadvertent, during a divestiture or the consolidation of data sources during a merger. Considerations include the following:

- Gather information regarding the technology landscape involved, including the infrastructure, applications, data storage locations, user-specific equipment, and any other data sources.
- Gather bring your own device (BYOD) policies.
- Are users taking mobile devices with them?
- Are users keeping laptops and taking data with them?
- Identify what data will be migrated and how.
- Evaluate whether any data is at risk of loss due to migration.
- Identify sources of knowledge for IT infrastructure and other data systems; are there discovery responses, including depositions, from ongoing litigation that would help identify additional sources?
- Will the mailboxes of the two companies or the acquired company be merged into one system?
- If so, how will the new system affect retention settings, and do employees need to be notified of the changes?
- If mailboxes are preserved on the back end, is there a list of mailboxes that are subject to legal hold so the preservation settings can be continued?
- How will emails not being migrated to a new system be preserved and tracked if they are subject to an ongoing preservation obligation?
- Will employees be using the same laptops, or will new laptops be issued? Are users able to store data on the laptop hard drives?
- If new laptops are provided, there must be instructions given to migrate all user data that is subject to an active legal hold to the new laptop.
- If during the transition, employees leave either company, it is important to ensure that any data that is subject to preservation in those employees' possession is identified and collected.

Obtain Critical Information for Impacted Employees

During any corporate change, employees may be laid off, depart on their own accord, or move to the new entity or into a new role. For the employees who are subject to an active legal hold, it is important to track those who may be implicated by the change. Some key steps that entities should consider are outlined below:

- Identify the individuals (employees and others using company resources, such as contractors) affected by the change.
- Identify obligations related to the locality of the individuals (for HR and privacy reasons).
- Identify processes for dealing with data of individuals who are departing. For further reading on this issue, see our recent article on potential pitfalls related to departing employees: [Departing Employee Preservation Program: Understanding Potential Pitfalls](#).

A Data-Sharing Agreement Is Critical for Future Data Management

Divestitures often create data-sharing dilemmas for all involved parties. Companies involved in divestitures often develop data-sharing agreements to meet their future business needs and obligations. Key stakeholders in a divestiture should obtain a copy of the master transfer agreement, transition service agreement, or other governing documents prepared for this corporate change. Review of these documents and any underlying documents, such as information management and post-transaction cooperation obligations, should inform whether a specific data-sharing agreement is necessary for litigation and discovery purposes.

A data-sharing agreement is an arrangement between the original entity and the divested entity that outlines how data may be accessed and exchanged in the future. It specifies the type of data available for sharing, how long it may be shared, any limits on its utilization, which entity will pay for collection of the data, and a process for requesting and transferring data. The form of the agreement will vary depending on the size and intricacy of the data implicated, but the agreement should set forth access as well as restrictions that are binding on both entities.

To prepare an adequate data-sharing agreement that includes a process for data needed for discovery purposes, it is critical to understand existing and potential company liabilities, what data relates to those liabilities, and which company will retain the potentially relevant data, whether in the short term or not. In some instances this is clear, while in others it will be quite murky, given the information and data systems involved.

For situations that are straightforward, ensure that steps are taken to move the data to the right side of the deal. This means, in advance of the deal closure, collecting data from the employees and company systems and moving applicable data to the opposite side of the deal. While time does not always allow for collections to occur prior to closure, or when it is unclear what data needs to be collected and moved, it is critical that a data-sharing agreement is made part of the transaction.

The Bottom Line: Plan and Prepare to Manage Data for the Future State

Approaching data management and preservation for ongoing litigation needs during a major corporate structural transaction such as a divestiture or merger can be daunting. Preservation obligations relating to known and anticipated litigation can change rapidly. Employees switch roles or companies, types of data and data systems evolve, and company policies relating to data retention can be revised. It is never too soon to start coordinating key stakeholders, gathering information on legal holds, centralizing data sources and the policies governing them, and identifying impacted employees.

For divestitures, using this pool of knowledge will inform the creation of a data-sharing agreement, which is critical to defining the boundaries of access and restriction to data potentially needed in the future. For mergers, understanding how to marry different data systems while maintaining access to data from those that may be retired is crucial. Whether two companies are combining into one or a single company is splitting into multiple new companies, understanding the full data landscape and legal obligations related to that data will aid in a smoother transition and protect the legal interests of all involved parties.

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