

A photograph of a chessboard with a vertical line down the center. The left side of the board is dark, and the right side is light. Chess pieces are visible on the board, including a king, queen, and knight on the right side, and a king and queen on the left side. The pieces are made of wood and have a natural finish.

Morgan Lewis

M&A ACADEMY: BE PREPARED- AND WHY DISCLOSURE SCHEDULES ARE SO IMPORTANT

Todd Hentges and Allison Gargano
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What We Plan to Cover Today

- Data Room Preparation
- Importance of Due Diligence Process
- Preparing Disclosure Schedules
- Buyer's Comment Process

Data Room Preparation and Process

Be Prepared

- Throughout ownership process of Company, keep accurate records leading up to sale
- Maintain central repository for all company documents
 - Organize, collect, and maintain all contracts
 - Clean up and verify capitalization (particularly options, warrants, and any other securities)
 - Gather all board of director and shareholder minutes, including all board packet and shareholder communications
 - Organize financial statements and supporting files
 - Gather subsidiary information and major contracts

Data Room Preparation and Process

Setting Up a Data Room/Site

1. Pick a vendor that is appropriate for the size of the deal

- Work with investment bankers (if available) to choose provider
 - Consider both security and product functionality
 - E.g., Merrill Datasite, Intralinks, Dropbox, Box.net

2. Search capabilities of data room

- Ensure that searching is enabled and efficient
- Consider printing enablement and/or downloading enablement
- Alerts

Data Room Preparation and Process

How to Best Provide and Organize Contracts

1. Work with business team and counsel to prioritize material or critical information for buyer

- More than 30/60/90-day notice to terminate, restrictions on operation, key in-licenses, etc.

2. Group contracts in logical sets based on type using a form diligence request

- Financial and Tax Information
- Licensing/Intellectual Property
- Customers/Vendors
- Leases, Mortgages, and other Real Property
- Credit and Other Financing Arrangements
- Customers/Vendors
- Labor and Benefits

Data Room Preparation and Process

How to Best Provide and Organize Contracts

3. **Work with business team to discuss any commercially sensitive information that will not be provided up front or will be provided pursuant to special procedures**
 - E.g., sensitive commercial agreements or those with strict restrictions on confidential information
4. **Address any antitrust issues raised by sharing contracts and bids with competitors**
5. ***Note for transactions with international components:** Consider whether foreign contracts need to be translated or if local counsel needs to review

Data Room Preparation and Process

Once Negotiations Are Underway

- Buyer typically offers up a relatively standard list of requested documents
- Appoint one or two people to manage incoming requests, communicate with appropriate internal teams, and coordinate external responses
- Be internally prepared with messaging on any problematic items before they are presented to the other side; there should not be any surprises—find them yourself first

Monitor What is Provided

1. Take care with employee and customer information

- If necessary, include in folders with privacy settings (be aware of, and confirm, state law privacy requirements)
- More stringent requirements for sharing employee data in transactions with international components

2. Board minutes that discuss current deal or other deals

- Redact minutes but indicate what is being withheld

3. Confidential contracts and unnecessary documents

- If necessary, prepare anonymous summaries or redact certain provisions
- Must take care in what is provided; not just a “data dump”

Monitor What is Provided ... (cont.)

4. Competitively sensitive information

- Consider antitrust issues around providing certain types of information to competitors

5. Attorney/client privileged documents

- Consult counsel on these materials

6. Diligence logs and issues trackers

- Sharing issues lists with the other side should be approached with caution

Why Do Disclosure Schedules Matter?

1. Relationship to representations and warranties
2. Closing requirements and certainty of closure
3. Risk-shifting and post-closing indemnification

Importance of Disclosure Schedules

1. Key to signing—all too often ignored until later in process

- Aim to prevent any surprises for buyer
- Socialize sensitive issues with management

2. **Key component of risk allocation:** Robust disclosure schedules can be a defense to demands to renegotiate

3. ***Note for international transactions:** in US-style international transactions, reference to a data room is not customary; detailed disclosure schedules are generally expected. In some instances, copies of documents will need to be specifically attached.

Preparing Disclosure Schedules

What to Include

Limitations contained in introduction to Schedules

- Incorporation by reference: “reasonably/readily apparent on its face”
- Not basis for interpreting materiality
- Represent a determination that such item is not in ordinary course
- Do not expand the scope
- Do not constitute an admission
- Not an admission that a consent is required
- Not an agreement that such disclosure is required under the definitive agreement

Preparing Disclosure Schedules

Preparing Disclosure Schedules

- 1. At a minimum, all business people within “knowledge” definition need to review the current representations, warranties, and schedules (schedule must not simply be left to the lawyers).**
 - Know who to call for confirmation of certain items
 - Limitations contained in introduction to Schedules
- 2. Ask lawyers to prepare an annotated list based on current representations and warranties (those will be a moving target)!**
- 3. Cross-referencing approach (use defined terms for items that need to be referenced in multiple places)**
- 4. Information must be responsive to representations and warranties in the agreement**

Buyer Comments

Interaction with Buyer

1. Initial comments
2. Calls to discuss comments are often more efficient
3. Buyer will request documentation for each item disclosed
4. Changes based on representation and warranty negotiations

Key Takeaways

Key Takeaways

1. Be ready; do not wait to get organized
2. Designate clear leads on the internal and external teams
3. Set up systems to organize production and tracking of diligence materials
4. Robust, thoughtful disclosure schedules, and getting prepared early, are important advantages to the deal process

Biography



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Todd A. Hentges has two decades of experience representing clients' interests in a broad variety of corporate-based matters and in a broad variety of industries, ranging from technology through manufacturing and healthcare to sports and entertainment. Todd's specific areas of experience include private equity and strategic entity mergers and acquisitions; initial public offerings; real estate acquisitions and financings; commercial contracts; securities exchange periodic reporting compliance; private placement investments; corporate formation and organization; borrower-side loans; and general corporate representation.

Biography



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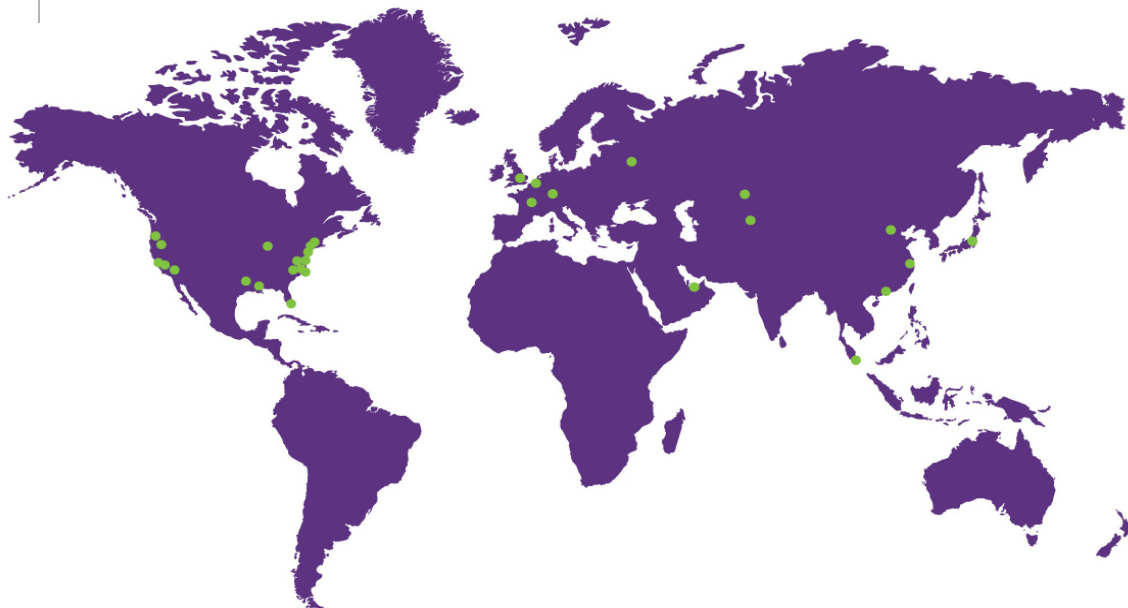
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