white paper:

Best practices for mergers and acquisitions

Records management before, during, and after

tab

1. Introduction

Corporate mergers, acquisitions and divestitures play an increasingly prominent role in today's business world. Large scale operational assets change hands as corporations realign their organizational structure and operational scope to better meet the needs of customers and shareholders. In acquiring another company's operations, your company will also require recorded evidence of the business activities which kept those operations going. These business records may be in either physical (e.g. paper) or electronic format, and their volume can be enormous.

The acquisition of records from a major business acquisition is often treated as an afterthought to legal, financial and other due diligence exercises, focusing on little more than finding space in shelves, cabinets or file servers. This perspective overlooks the role that records play in a company's business operations. As essential business information, records directly participate in the transactions and decisions which make up the company's daily business activities. Meanwhile, records provide evidence of those same activities, giving them a level of risk or liability comparable to that of the activities themselves. A lack of due care with respect to records, then, can result in significant corporate compliance risks as well as interfere with your company's ability to fully capitalize on an important acquisition investment. It is therefore of the utmost importance that prospective buyers directly address records management issues before, during and after the acquisition.

2. BEFORE: Know what you're getting into

A full audit of the vendor's records holdings and practices reveal previously unseen risks and opportunities for the buyer to better maximize their investment. Such an audit is most effective if performed before the final decision to proceed, though this is not always feasible given the extreme sensitivity which can surround corporate-level negotiations. Some companies therefore perform a records management audit once the major decisions have been made but the final details of the acquisition are still being worked out. With the full cooperation of the vendor, the buyer might choose to engage a third party consultant with no direct interest in the acquisition, allowing them to measure the vendor's records management practices and collections from a position of impartiality in a sensitive and often emotionally charged environment. The following discussion outlines some of the main issues which may be brought to light during a preliminary records audit.

2.1. Documentation and retention requirements

Any business acquired by your company will be subject to a host of legal requirements, ranging from broad-based business laws to detailed technical regulations. Many of these laws and regulations will state which records must be retained and for how long. Others imply a records retention period by limiting legal liability to a certain period of time – records must be retained in case of legal action, which can occur during that time period. Still other requirements may prescribe which documents must be kept on a given file, or even which specific data elements must be included within the individual document. With so many diverse requirements affecting records retention, you should examine whether the records you are acquiring meet those requirements. Look first at overall collections. Do the records of given business activities go back far enough to meet the requirements of laws and regulations affecting those activities? Where records have been destroyed, were they disposed of according to a records retention schedule, with sign-off by designated authorities? Next, focus in on samples from key collections. Are all of the specific documents required by regulators present? If not, can they be recovered with reasonable effort from internal and external sources? What level of risk is associated with not having the missing documents?

2.2. Privacy compliance

Depending on where a company operates, it will need to follow one or more sets of rules for what it does with personal information about employees, customers and other individuals. Canada's Personal Information Protection and Electronic Documents Act, the United States' Health Insurance Portability and Accountability Act, and the European Union's Data Protection Directive are just some examples of recent legislation requiring organizations to protect privacy. Typically, privacy laws set limits on how much personal information a company can collect and how long they can keep it.

Your company may already have strict controls around privacy, but it cannot control what information other companies collect, particularly if they collected it before the advent of privacy laws. Years ago, it was not unheard of for employers to collect detailed medical history as part of pre-employment screening, often involving past conditions or treatments which could not possibly impact on job eligibility or performance. Files containing such unnecessary sensitive information persist to this day. Don't be too shocked, then, if you acquire a large collection of files with many years worth of information which, by today's standards, never should have been collected in the first place.

In acquiring this information, your company also acquires a certain degree of risk. Even when the original collection of the information predates legislation and is covered by a grandfather clause, your company is directly liable for any continued retention of that information, to say nothing of the employee or customer-relations nightmares that can result from a privacy breach. The records audit should therefore locate and identify any inappropriate personal information and plan for its secure disposal at the earliest opportunity during the acquisition process.

2.3. The cost of keeping records

Even when record content and handling practices meet every conceivable requirement, the ongoing maintenance of those records may pose an undue financial burden. Your preliminary audit can help protect your company's investment by analyzing such records management costs as equipment and supplies, systems maintenance, storage services, and staffing.

— Look closely at the physical enclosures and other supplies which the vendor uses for storing records. Are they sufficient to protect the records from loss or damage, optimize storage space, and facilitate easy retrieval? Or would it be more cost effective over the long run to convert the files to a more secure, efficient format?

— Review any service level agreements affecting the storage of those records being acquired. Do commercial records centers or other service providers meet your company's needs? If your company uses a commercial storage provider or its own, how do regular and incidental costs for the newly acquired records measure up to the rates your company normally pays? You may need to plan for transferring the records to your own service provider. That too can bring its own financial risks, as the service level agreement may stipulate hefty relocation fees.

— What electronic systems does the vendor use to capture and maintain records and data? In a perfect world, all of the vendor's hardware and software platforms would be identical to your own. It is seldom that easy in reality. You may need to weigh the relative costs of either maintaining two separate systems or migrating data from one system to the other. This decision should take a long-term view and factor in the ongoing costs of keeping information accessible for the duration of its scheduled life cycle.

— Acquiring a business and its records may also mean acquiring the human resources who maintain those records. Is the number and expertise of the vendor's records management staff appropriate to the volume of records and associated challenges? If staffing appears excessive or insufficiently qualified, then some tough decisions may have to be made prior to merging the two groups. Conversely, the newly acquired staff may bring new efficiencies and innovations. Your audit will identify any opportunities to add value to your existing records management program and better contribute to your company's continued success.

3. DURING: Manage Risk While You Still Can

A preliminary audit of the records being acquired should bring to light any significant risk exposures or business inefficiencies. Once the acquisition has formally begun and the records move into the custody of the buyer, it is time to confront those exposures and inefficiencies head on. In considering records management's place in a corporate acquisition, it is useful to consider both senses of that very term. On one level, acquisition in an abstract legal event, where a mere pen stroke changes ownership of a company or some portion thereof. On a more concrete plane, we see movable assets changing hands. As just one type of movable asset that is exchanged during a legal acquisition, records must be accounted for on both of these levels.

3.1. Legal provisions and records management

An acquisition and divestiture agreement is the legal instrument by which assets (including records) and their associated liabilities pass from one party to the other. If both of these parties have done the appropriate due diligence, the agreement should make clear what level of liability the buyer assumes for activities previously performed by the vendor. The agreement should also stipulate exactly which records are being transferred to the buyer as evidence of those same activities. This direct provision for records management protects both parties. On one hand, it ensures that the vendor will assist the buyer in meeting its newly acquired responsibilities for record-keeping. For the vendor, the agreement may provide for their continued retention of certain records. This is especially important when the vendor retains some liability for activities performed, or if there are laws and regulations stating that it must retain records even after it divests the assets. It is therefore in the best interests of both parties that the agreement specifies exactly which records are being transferred, and who assumes which responsibilities for records retention.

3.2. File acquisition and processing

Your preliminary audit will have brought to light applicable records management requirements and threats to the integrity of newly acquired records. Now that you are actually acquiring these records, it is time to assess individual files and take direct steps to address all gaps. This work may be divided into four stages:

- **Intake assessment:** While the record audit uncovered overall requirements and compliance risks at a collection level, the intake assessment process allows you to examine each file for any compliance gaps. File content should be checked to ensure that all required documentation is present, and any missing documents noted for possible recovery later. Any information which potentially breaches privacy should be flagged for removal.

  At this stage, you can also assess each file in terms of your company's established collections. What activities do each file support? How do these activities fit into your company's own system for classifying records? Do any individual files overlap with files already kept by your company? This is especially useful in natural resources and other sectors where different companies hold joint interest over the same asset. If this situation applies to your company, you should check each acquired file against your company's file collections to see if your company already holds an interest in the asset and therefore has a corresponding file. Information gained at this stage will prove very useful during the actual file conversion, during which time you will need to either merge the content of two files or incorporate the one new file into your company's system.

- **File integrity clean-up:** This physical processing directly addresses any gaps identified in a given file. If documents are missing, all reasonable attempts should be made to recover them. This may range from locating documents which have been misfiled elsewhere in the collection to obtaining copies from such external parties as partners or regulators. Even if responsive records cannot be produced for litigation or audit, the company can at least show due diligence in the form of documented, system-wide efforts to identify and address information gaps during the acquisition stage.

  The clean-up should also remove information which threatens the integrity of a file. Where a file contains information deemed inappropriate under applicable privacy laws, the information should be securely destroyed, subject to documented approval from an authorized stakeholder, or moved to some other file series whose users have a legitimate need for such information. The Clean-up also allows you to address years of bad filing practices by rearranging documents into reverse chronological order, move any documents which are in the wrong section of a file, and discard any obvious duplicate documents or nonrecord material.

- **File Conversion:** TAB recommends that each incoming collection be converted to the same physical filing system which is already in place for the corresponding file collection at your company. In order to make optimal use of shared storage equipment, all file folders should follow the same size specifications and labeling format (i.e. top tab vs. end tab). Label designs, folder color schemes, and tracking controls should be standard across the collection to facilitate fast retrieval for users. Where a collection maintains internal subdivisions using classification folders, those same subdivisions should be applied to all files.

  Alternately, you could decide to convert your company's existing files to match those acquired from the vendor, or even convert both collections to meet some new standard. It all depends on which is the better system in terms of physical protection, security, retrieval and long-term cost, all of which should have been explored in your preliminary records audit.

- **Deployment:** Once a file has been assessed, cleaned-up and converted, it is ready for integration into the corporate filing system. A critical step in this deployment is the assignment of a file number and other attributes which will determine how the file is arranged and stored within the collection, accessed by users, and tracked throughout its life cycle. In the next section of this report, we will consider the continued maintenance and use of records and see that the challenges and decision-making associated with bringing records into a company are by no means over once the acquisition is complete.

4. AFTER: Keeping it all Together

Well after records have been bought into a company and all content or formatting gaps addressed, team members will need to locate and retrieve those records in order to perform their work. Exactly how this happens will depend on how the newly acquired records were integrated into the existing filing system. Are physical file folders maintained as two isolated collections or filed together under one scheme? Are electronic records stored on one or multiple systems? Is there one system which allows users to track the location or signout status of all files?

It is not unheard of for a company to maintain more than one record keeping system after a merger. This may even seem like a good idea at first. Before the acquisition or merger, each company had a system which more or less served its purpose. Why mess with something that was already working?

But even the most subtle conflicts between different recordkeeping systems can work as major roadblocks. Users will now require training on two or more different systems, and it will not always be clear to them which system contains required information. Searching becomes a matter of trial and error, slowing down the very business processes which records are meant to facilitate. Worse still, a user who is accustomed to a faster, more automated system may not account for the time required to find material in a more manual system. Depending on what exactly this user needed the information for, such roadblocks may pose a significant risk to the newly merged corporation's financial and/or legal position.

Conclusion

Records support business, and business is about people. For many of those people, the prospect of a corporate merger, acquisition or divestiture is a source of stress. Individuals may worry about their own job security, the pressure of newly aligned responsibilities, or the adjustment challenges that follow the merging of different corporate cultures.

The goal of effective records management is to alleviate these challenges rather than compound them. Effective synergy between newly merged teams requires fast, efficient solutions which meet the information needs of today and allow team members to look back at past activities. This goal can only be realized by incorporating records management best practices into all stages of the corporate acquisition process.

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