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## The Importance of Online Data Rooms In Mergers and Acquisitions

An “online data room” or “virtual data room” is an online warehouse of key documents about a company. Online data rooms are frequently used in connection with M&A transactions, to facilitate the extensive due diligence process typically undertaken by buyers.

The online data room is populated with the selling company’s important documents: contracts, intellectual property information, employee information, financial statements, capitalization table, and much more. The online data room allows the selling company to provide valuable information in a controlled manner and in a way to help preserve confidentiality. The online data room avoids the need to have a physical data room where the documents are kept, and helps expedite an M&A process.

The online data room can be established to allow access to all documents or only to a subset of documents, and only to pre-approved individuals. A number of online data rooms allow the seller or its investment bankers to review who has been in the data room, how often that party has been in the data room, and the dates of entry into the data room.

Access to the online data room is made via the Internet, with a secure user identification and a protected password.

The online data room provides the benefit of cost savings over traditional physical data rooms, easy access to documents when needed, a search function, easy updating and adding of new documents, and security of sensitive information.

## Vendors of Online Data Rooms

There are many vendors of online data rooms. Most data room vendors charge based on the amount of storage used and the length of time that the data room will be functioning. Some law firms with sophisticated M&A practices also provide a private online data room for their clients.

## Tips for Preparing the Online Data Room

Preparation of the online data room is extremely important for an M&A transaction. Here are some tips for preparing it:

- The management team of the selling company must understand that a complete online data room is essential to a successful M&A transaction. Knowledgeable key employees have to be given the responsibility to collect the needed documents.
- The preparation of the data room is very time consuming and must be started as soon as possible in the M&A process. Failure to have a complete data room ready will slow up or potentially kill the transaction.
- The online data room should be prepared in conjunction with preparation of the selling company's disclosure schedules attached to the acquisition agreement, as complete and accurate disclosure schedules are key to getting an acquisition completed.

## Problems in Preparing the Online Data Room

Due diligence investigations by buyers frequently find problems in the seller's historical documentation process, including some or all of the following problems that can show up when preparing the online data room:

- Contracts not signed by both parties
- Contracts that have been amended but without the amendment terms signed
- Missing or unsigned Board minutes or resolutions
- Missing or unsigned stockholder minutes or resolutions
- Board or stockholder minutes/resolutions missing referenced exhibits
- Incomplete/unsigned employee-related documents, such as stock option agreements or invention assignment agreements
- Incomplete patent documents
- Incomplete capitalization table
- Missing stock purchase agreements and related investor rights documents

Deficiencies of this kind may be so important to a buyer that the buyer will require certain matters to be remedied as a condition to closing. That can sometimes be problematic, such as instances where a buyer insists that ex-employees be located and required to sign invention assignment agreements.

## What Should Be in the Online Data Room?

Typically, everything material about the business of the selling company will need to be included in the online data room, including key contracts, intellectual property information, employee information, financial statements, and much more. Below is a comprehensive list that sets forth the types of information that may need to be included in an online data room. (See also [20 Key Due Diligence Activities in an M&A Transaction.](#))

Note that this is a sample list and additional documents may be appropriate in the context of a particular company or transaction. Do not include any attorney-client privileged documents into the data room. The information here should generally apply to the company and each of its subsidiaries and predecessors. Also, consider whether any information that is highly confidential (e.g., customer pricing) should be redacted. Consider the sensitivity of any term sheets or letters of intent from potential acquirers.

### 1. Basic Corporate Documents

- Certificate of Incorporation and Amendments thereto
- Corporate Bylaws and Amendments thereto
- List of Subsidiaries and ownership percentage
- Subsidiary Certificates and Bylaws
- Shareholder Minutes and Consents
- Business Licenses
- Business Permits
- Board Committee Minutes and Consents
- List of jurisdictions where Company is qualified to do business, owns or leases real property, or is otherwise operating
- Good standing certificate in jurisdiction of incorporation
- Franchise tax board certificate in jurisdiction of incorporation
- List of current officers and directors

### 2. Capital Stock and Other Securities

- Shareholder List (name, amount, date of issuance, consideration received, common or preferred, etc.)
- Optionholder List (name, amount of options, date of grant, vesting schedule)
- Warrantholder List
- Cap Table

- Convertible Note Register
- Stock Purchase Agreements
- Voting Agreements
- Registration Rights Agreements
- Management Rights Agreements
- Stock Option Agreements
- Stockholder Agreements
- Stock Certificates
- Proxies
- Buy-Sell Agreements
- Securities law filings and permits
- Recap and organization documents, including reincorporations
- Disclosure documents used in private placements of company securities
- Term sheets signed in connection with prior securities issuances

### *3. Financial and Tax Matters*

- Audited Financial Statements
- Unaudited Financial Statements
- Monthly Financials
- Quarterly Financials
- Letters from Auditors
- Projections and Assumptions/Operating Plans (current)
- Federal Income Tax Returns
- State Income Tax Returns
- Foreign Income Tax Returns
- Other Tax Returns/Filings
- Reassessment or deficiency or audit notices
- Banking Accounts and Signatories
- Loans and Promissory Notes
- Capital Leases
- Security Agreements
- Accounts Receivable Aging Schedule
- Accounts Payable Schedule
- Description of any changes to accounting methods or principles
- 409A Valuations
- Guarantees
- Bridge Financings
- Inventories: (i) inventory summary by major product as of most recent practicable date; (ii) schedule of consigned inventory; (iii) copies of the Company's policies for providing for obsolete and slow-moving inventory and summary of obsolescence write-offs and provisions for slow-moving inventory for the last year; and (iv) description of the Company's methods of inventory control

- Schedule of material prepaid expenses and “other assets” as of most recent practicable date
- Schedule of property, plant and equipment, and accumulated depreciation broken down into category (i.e., land, buildings, equipment, etc.) for the last year (indicating beginning balances, additions (or provisions), retirements, and ending balances)
- Cash flow and working capital analysis as of most recent practicable date
- Pricing policies, including commission and rate schedules
- Product return rate analysis for last fiscal year and current fiscal year to date
- Capital expenditure programs for last and current fiscal year
- List and copies of all tax sharing and transfer pricing agreements currently in effect (if there are no written transfer pricing agreements, explain the transfer pricing methodology used between affiliated entities)
- Schedule of the amount, origin, and status of any U.S. net operating losses or credit carryforwards (including information on any ownership changes or other events to date which might affect such items)
- Copy of most recently filed Form 5500 for 401(k) plan
- Agreements waiving statutes of limitation or extending the time during which suit might be brought with respect to taxes
- Correspondence regarding any tax liens

#### *4. Property and Assets*

- Schedule and summary of all owned real property
- Schedule and summary of all leased property
- Real property mortgage and loan documents
- Security agreements, pledges, and encumbrances on assets
- List of material personal property assets
- Documents relating to any environmental matters concerning leased or owned property
- Real property leases and amendments and consents related thereto
- Personal property leases and amendments

#### *5. Intellectual Property (IP)*

- Summary of Patents and Patent Applications
- Patent Applications
- Patents Issued
- Summary of contracts where Company IP is licensed to a third party, and actual contracts
- Software License Agreements summary
- Software License Agreements
- Employee Non-Disclosure and Proprietary Inventions Assignment Agreements

- Consultant Non-Disclosure and Proprietary Inventions Assignment Agreements
- IP litigation summary
- IP litigation case filings
- Claims or communications against the Company for IP infringement
- Claims or communications against third parties for IP infringement
- List of open source software used
- Trademarks
- Service marks
- Technology license agreements
- IP transfer or sale agreements
- IP escrow agreements
- Third party non-disclosure or confidentiality agreements (consider redaction of names)
- Internal policies to protect IP
- List of registered copyrights
- List of domain names, with expiration dates
- Schedule of mask work registrations and applications
- Clinical trial information (for biotech companies)

## *6. Material Agreements*

- Summary of Material Agreements
- Summary of agreements needing consent in the event of change in control
- Material Sales Agreements
- Intellectual Property Agreements (see Section 5)
- Distribution Agreements
- Partnership or Joint Venture Agreements
- Leases (see Section 4)
- Non-Competition Agreements
- Employment Agreements
- Change in Control Agreements
- Inter-company agreements
- Agency agreements
- Prior M&A agreements
- Investment Banker engagement letters
- Indemnification Agreements
- Loan or Credit Agreements
- Mortgages
- Privacy Policy
- Terms of Web Site Use Agreement
- Other material agreements

## *7. Customers, Sales, and Marketing*

- List of customers and key metric information
- Form of Sales Agreement
- Accounts Receivable summary
- Sales Commission Plan
- Sales allowances and return policies
- Reseller information
- Credit and collection policies and processes
- Backlog
- Sales projections and assumptions
- List of products and summary
- Product road maps
- Marketing materials and sales literature
- Product campaigns and launches (summary)
- Industry and analyst reports

## *8. Suppliers and Manufacturers*

- List of key suppliers and products supplied
- Supplier agreements
- Original Equipment Manufacturer (OEM) agreements
- List of key manufacturers and manufacturing summaries
- Manufacturing agreements

## *9. Customer and Product Support*

- Customer satisfaction surveys
- Current sales brochures

## *10. Regulatory Matters*

- Government permits
- Notices of violations from governmental or regulatory bodies
- Government licenses
- OSHA, EPA, ERISA, COBRA, FLSA, EEOC, NLRB, etc., notices

## *11. Litigation/Disputes*

- Summary of any litigation or arbitration matters
- Copies of all litigation complaints
- Copies of all arbitration filings
- List of all orders, writs, decrees, injunctions, judgments, or rulings by any court or agency

- Documents related to any threatened litigation, arbitration, or governmental action
- Environmental claims and actions
- Copies of lawyers' letters to auditors
- Past settlement agreements

## *12. Insurance*

- Summary of all insurance policies
- Copy of directors and officers liability insurance (D&O) policies
- Copy of liability policies
- Copy of key person insurance policies
- Copy of workers' compensation policies
- Other insurance policies
- Insurance claims pending
- Description of any self-insurance programs or captive insurance programs

## *13. HR/Employees/Consultants*

- List of all employees by title, salary, commission, options, non-cash compensation, bonus, date of hire, severance obligations
- Organization chart
- Employment agreements
- Standard offer letter to employees
- Non-competition and non-solicitation agreements
- Benefit plan summary
- 401(k) plan
- Health and medical plan
- Life insurance plan
- Dental plan
- Retirement plan
- Disability plan
- Vision plan
- Childcare plan
- Other benefit plans
- Employee handbook
- Employee policies not reflected in handbook
- Collective bargaining agreements
- Bonus plans
- Profit-sharing plan
- Incentive plans
- Change in control plans or agreements
- Stock option or restricted stock plan
- Listing of consultants and independent contractors and summary of arrangements



- Consulting and independent contractor agreements
- Severance plans
- Description of any pending or threatened labor or employment disputes or work stoppages during the last three years

#### *14. Press and PR*

- Press releases
- Newspaper articles
- Analyst reviews

#### *15. Related Party Transactions*

- Written agreements (and description of oral arrangements) between the Company and any current or former stockholder, officer, director, or employee of the Company
- Description of any direct or indirect interest of any stockholder, officer, director, or employee of the Company in any corporation or business that competes with, conducts any business similar to, or has any present (or contemplated) arrangement or agreement with (whether as a customer or supplier) (i) the Company or (ii) the acquirer
- Documents not covered by the above relating to agreements of the Company in which either current or former stockholders, officers, directors, or employees of the Company are or were materially interested
- List identifying any stockholders, officers, directors, or employees of the company who have an interest in any of the assets of the Company

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