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## **Due Diligence in the Digital Age**

by **Larry G. Johnson and Tim Stevens**

Merger and acquisition ("M&A") transactions occur in a fast paced, time restricted environment. Attorneys on both sides must review vast amounts of information dating back many years and stored in a variety of media and formats. Although businesspeople today create most information electronically, most companies continue to process documents requested during M&A due diligence in the traditional way through paper printing and copying. As the digital glut grows, however, and counsel begin to realize the benefits of electronic data review, this practice is bound to change.

In the near future, you may find electronic due diligence useful only in large M&A transactions, in which the volume of digital data to be reviewed is great and the information is available on different platforms in different locations. Smaller transactions generally require electronic review only on specific matters of concern. Regardless of the size of the M&A transaction, however, you should be thinking about uncovering electronically stored data that could affect the appraisal of the value that each side has to contribute to the deal.

Information crucial to the success of your company's merger or acquisition may be available only in digital form. You also may find extremely useful the capture of electronic file metadata, the data about the data, the telltale background information that is embedded in an electronic file but is not visible in a paper printout of the file. Electronic mail is also a potential source of valuable information.

Collecting and processing digital data for review and organization require both tools and expertise not usually found in or expected from corporate information technology ("IT") departments. Such reviews also demand more server or data repository space than companies may have available. For these reasons, you will likely need to tap the resources of a qualified third party expert to do the work.

Using software that culls information from large digital data mines, electronic processing vendors can enable you to sit at your computer and efficiently and effectively review more documentation in a shorter period of time than a paper review would require. This article will explain how you can get to within a mouse click of a trove of information that will help you to decide whether a merger or acquisition is attractive and/or doable.

According to a University of California at Berkeley study published in October 2000, 93 percent of all new information generated in 1999 was digital.<sup>i</sup> This same study concluded that more than 80 percent of all corporate information exists in digital format. Of this amount, about 35 percent - most notably, email will never be printed.<sup>i i i</sup>

Whereas, in the past, filing cabinets and storage rooms could hold only so much paper and there were only so many staff members available to index and catalog the paper, no such limitations curtail the amount of digital data that can be stored. At today's electronic storage costs currently about \$2 to \$5 per gigabyte (1 billion bytes)<sup>i v</sup> compact hard drives and backup tapes can make digital packrats of everyone.<sup>v</sup> Consider this comparison: A backup tape for an email server may store as much as 70 gigabytes of data or roughly 19 million pages of paper.

Of course, corporate America is awash in digital data because computers have become the dominant means by which business people create and store communications, analyses, and databases. Once you have created digital information, you can quickly and cheaply copy and disseminate it via networked office environments, email, or web pages and download sites on the internet. Data quickly proliferate.

In an M&A context, you may find it daunting to get to the point where you can conveniently search all relevant digital data, whether your own company's or the other company's. With billions, perhaps trillions, of bytes of data sitting on your company's and the other company's servers, work stations, and backup tapes, a cost effective distillation and isolation of truly useful information from the mountains of chaff may seem next to impossible. But with new tools, such as virtual deal rooms on the internet and software that works with internet browsers to sort information from large digital data reservoirs, and with vendor assistance in using these tools, the process can be manageable and productive.

## **ELECTRONIC DUE DILIGENCE**

By the time you are ready to begin the due diligence process, your company and the target will have already established a basis for a relationship. The companies may have had an ongoing partnership or be engaged in related businesses. Executives probably have had a series of meetings over a period of months in which they have talked about combining operations. Once the CEOs have discussed the merger and price, the companies will assemble a transaction team. The team will include in house counsel and outside counsel for both sides, and together, you will determine what information to request and produce during due diligence.

You will find in the sidebar called "[Electronic Due Diligence Request Checklist](#)" a standard list of due diligence requests for information and documents, most, if not all, of which could and should be supplied in electronic format so that you can start building your searchable data fund immediately. You will participate in identifying the data that the technical experts will capture and process for review.

The key point to remember about electronic document review is that you can uncover metadata, which can encompass dozens of background details, such as the electronic file signature (indicating the true file type) and the author, size, name, path, creation date, and modification dates of a document. That information would be lost in a paper copy of the document. Word processed documents, spreadsheets, PowerPoint presentations, and any other electronic files include metadata. With electronic due diligence, you will be able to see digital documents in their native formats, revealing information that would not otherwise be available.

## **Sizing Up the Transaction**

A \$5 million M&A transaction differs from a \$500 million transaction in the scale and the accessibility of information available. It is not usually necessary or cost effective to request a digital audit of data from a company with less than 100 employees. With small companies, you can usually discover essential information and quickly identify problems through interviews with employees. Although a limited review of email may reveal whether a company's culture or practices make it a good fit with your own, you can usually obtain an accurate picture of the personality of the organization by interviewing key managers.

Traditionally in a large transaction, you interview only senior managers, who may or may not be familiar with the minute details of their company's business. You conduct such interviews after an exchange of documents, most of which are obvious and predictable, such as business plans, financials, projections, and contracts. You run into a problem with documents, however, when a company has a vast amount of digital data.

A target company may have thousands of employees and several data centers with dozens of servers, some of which may be dedicated to limited tasks, such as maintaining a huge database or serving as a central post office for email. Indeed, the data repository scheme of some Fortune 500 companies is so extensive that they cannot search all of their data at once because (1) their computers serve different missions and constituencies and are seldom linked in one network and (2) their data consist of output from many different kinds of software and, thus, need to be processed into a uniform, searchable format before they can be searched.

When your transaction involves a vast amount of digital data and complex methods of storage and retrieval, you must use digital tools for access, in much the same way that you search the digital sea of case law and statutes with Westlaw or Lexis Nexis.

### **Negotiating Digital Data Provided**

Because each M&A transaction is a custom made deal, it is difficult to generalize about what information you should or should not include in the due diligence exercise. In general, the parties review a standardized due diligence checklist (see sidebar) and agree on what information will be produced. You improvise the due diligence process, taking different steps in different environments.

As counsel for the acquiring company, you obviously seek access to as much information as possible in order to make an accurate assessment of the target company's value, as well as to identify any potential problems with the transaction. Understandably, lawyers for the target are reluctant to hand over any information that could compromise their company's intellectual property or financial status. They are not inclined to make available all digital data, particularly email. Both sides, therefore, must come to terms on the scope of the information that they will share.

After collecting initial information from the target company, you should review it and determine your next steps. At this stage, you may perceive a potential problem. For example, a target company may have a large cash reserve set aside to litigate a patent infringement claim. This claim could affect the value of the target's intellectual property assets. It would be reasonable for you to request more information and to run a targeted search of digital files, with a focus on email. This search would go directly to the value of the transaction and whether it should proceed.

Even in a targeted search of files, companies must protect confidential and proprietary information. Counsel for the seller should be concerned about trade secrets, intellectual property, and financial information from a nonpublic company. The target company should insist on the use of a neutral third party to review digital files, thus ensuring the efficient capture of data and the preservation of document integrity.

### **Dealing with Email**

An extensive review of email files is uncommon in most M&A transactions. But as noted above, your identification of a potential liability could justify a request to review email files for a specific time period.

You should be as concerned about your own company's email as the target company's email. Even though your company may have policies about confidentiality and the appropriate use of email, internally and externally, it may not be enforcing the policies. Potential liabilities may lurk in your company's files, too.

During due diligence, you may find it offensive to request or to respond to requests for email because this correspondence may be personal or deal with confidential matters. But if you do not

delve into email, you may overlook the most candid and open information likely to be found within the other company. Further, an assessment of how well employees use corporate computer and internet assets can substantially affect the value of the deal. The very fact that a lot of email is personal and private, thus distracting employees from their work, is worthy of at least some assessment of its magnitude.

A neutral third party expert audit of emails and employee internet use can afford a proper balance between your need to know and the seller's privacy and confidentiality concerns. Such an outside audit should observe agreed upon guidelines that include confidentiality safeguards about what is to be reported and how. For example, you could direct the thirdparty expert to isolate only those emails that might create potential liability exposure or that respond to certain keyword searches and make only summary written conclusions as to what is found. Based on the expert's findings, the parties could then decide whether more specific disclosures should be made.

Bear in mind that, just as paper versions of electronic files omit metadata, email printouts leave out critical information that is available only through electronic review. Original email electronic files can reveal blind copy recipients and contain the actual attachments sent. You also may retrieve deleted email messages that still remain on an individual's computer hard drive or in a company's backup media.

Although unfettered access to email files is unlikely during due diligence, even if a problem exists, you and counsel for the other side may agree to a limited search, with the assistance of a neutral third party.

### **Enlisting IT Help**

Depending on how well organized a company's IT department is and the extent of its digital data, the initial identification and marshalling of the data may take from three hours to three weeks. This first step entails creating a map of where all the data reside and the generating sources: servers, workstations, laptops, PDAs, backup media, and archives. Archives are tapes of selected data consciously preserved for specific purposes, such as tax records, R&D information, or company history. Backups are tapes of business critical data maintained for the primary purpose of reinstating a corporate network in the event of a disaster. Because backup tapes are typically recycled in accordance with scheduled backups, archive tapes usually contain a company's oldest information. Your company will most likely have a disaster response plan or Y2K plan with much of this mapping of data sources already available.

A decision then has to be made whether all of the known corporate data need to be subjected to due diligence examination or only subsets of them. Then, in order to assure the integrity of original data and to interrupt daily business activity as little as possible, copies of the data of interest must be made for examination purposes. Backup and archived data can be copied at convenience, but the copying of data from active servers and workstations needs to be scheduled to cause the least disruption of business, often at night or on weekends. This copying process can be accomplished in a few days or weeks, depending upon available personnel and the number of hard drives and backup tapes that need to be copied.

After gathering all the data, the data then need to be processed to cull out only the human readable, computer generated information. This processing requires the use of computers of third party experts who use special software and a lot of server storage capacity to convert the digital data into separate components so that the data can be analyzed by counsel, again using software dedicated to that purpose.

This processing has three parts: (1) extracting the text to ASCII (American Standard Code for Information Interchange, the "plain vanilla" text that all computers can read) for text searches, (2)

converting hundreds of different computer file formats to a uniform format for viewing on a computer screen, such as HTML (Hypertext Markup Language, the lingua franca of the internet) or TIFF (Tag Image File Format, a common graphics image format), and (3) creating a database of the metadata contained in the digital data. Files not containing useful information, such as operating system and program files, are identified and excluded from this processing, distilling the oceans of digital data into manageable lakes and puddles. Duplicates of documents are usually also culled during processing. Processing the data typically consumes one hour for every two gigabytes of data processed.

Given its mission of supporting a company's networks and computer operations, a typical corporate IT staff has neither the tools nor the expertise to do this sort of processing of data for review and analysis. Further, IT professionals are notoriously overwhelmed with the many tasks they have to perform to keep a corporation going, not the least of which is maintaining the networks and intranets. Although IT staff members routinely back up data in order to get it all online again in case of a disaster, rarely are they asked to organize or rationalize all digital data for analytical or archival purposes.

In fact, according to a recent survey by PricewaterhouseCoopers, more than 80 percent of corporate America is unprepared to produce electronic data quickly and efficiently in response to discovery requests in litigation, often involving the same information of interest to M&A lawyers. Further, half of the companies interviewed have no established procedures to ensure security over their trade secrets, a situation that could be remedied with greater information control, an ancillary benefit to be derived from doing electronic due diligence.

In addition, lawyers and IT staff tend to speak different languages. You may not always know how to request the information that you need from the IT department, and IT staff members may not know how to provide the information that you request. An outside vendor can translate your information requests into technology speak, assist with data collection, and organize the data into a searchable format.

Your IT people can help in this process by coordinating with your third party expert to keep costs within budget and by learning to perform many of the routine tasks involved. These tasks include not only copying backup tapes but also exporting data from proprietary software applications custom developed for your company, assisting in maintaining audit trails for documents disclosed during due diligence, and providing overall data security.

## **PROCESSING DIGITAL DATA**

A vendor/third party expert can harness a company's digital data via a series of steps that use state of the art technology. Vendors can organize the collected data into a searchable database that is available on the worldwide web. Such an internet repository allows you to compare content in documents, to "de duplicate" or reduce the number of repetitive files, and to search for specific phrases. By annotating files online, you can alert other members of the transaction team to potential problems. When vast amounts of data are available, an electronic database helps to streamline the review process.

A response to a digital data request involves the following steps:

### **Identifying the potential data universe.**

With the help of IT staff, target company counsel must decide which data sources have the greatest likelihood of containing responsive information, such as the following: the servers and work stations with accounting and financial data; the intranet used by the research and development people; the human resources and payroll data; or the email and other

correspondence of top management. No one is going to be willing to hand over all of a company's digital information because of the threat to attorney client communications, proprietary information, patents, and other intellectual property. But the first step is to identify all of the potentially relevant information and gather it into one place.

### **Capturing the relevant data.**

The vendor and IT staff next copy the relevant data from selected hard drives onto blank new hard drives and back up the data from network servers onto blank backup tapes. They also reproduce copies of existing backup tapes onto blank backup tapes. The vendor can schedule this capture to avoid disruptions of business at hours of peak activity.

### **Processing the data.**

The technical people then transfer all of the captured data to a server or, if need be, a group of networked servers for processing. Processing has the following two stages:

1. The vendor and IT staff distill the raw data by culling all of the data that are not generated by humans, such as software applications and related files, along with duplicates. They also uncompress data that exist in a compressed format, such as in a zip file designed to reduce storage space or time of transmission over the Internet, thus exploding them back to their original size.

2. The experts then process the resulting data to produce the following four things:

- **Viewable image** (graphic) of each document, regardless of its software origin, such as Word document, spreadsheet, database, email, and so forth, which you can read in a secure web application over the Internet (in HTML format) or in a number of document review programs. such as Summation or Concordance.
- **Text**, maintained in a uniform format, such as ASCII, the universal computer format for reading and searching text.
- **Database** with all of the metadata embedded in each electronic file.
- **Index** of each word in the data population, along with the number of times that the word occurs within that population.

### **Searching and annotating the data.**

With an enterprise's data thus processed, you can now sit at your computer and access documents. Through the use of search terms, particularly in combinations that employ Boolean logic to narrow the scope of the search, such as "find all documents that contain the words 'XYZ Corporation' AND 'Mayberry' AND 'Project' AND 'Felix,'" you can isolate documents of potential interest. If there is text responsive to your search terms, your web browser will display the image of that document, along with the hits of the search words highlighted in the document.

You can use various search terms singly or in combination to reduce the size of the potentially relevant subset of documents. You then can individually search the documents in the subset and sort them into categories for ultimate use in the M&A negotiations.

In the case of large document collections, you can simplify the task of testing the efficacy of search terms by trying them out first on a statistically significant sample of data. If you find the frequency of missed documents acceptable, then you can apply your established set of search terms against the entire data collection as the ultimate fishing net to produce successful results with a relatively high degree of confidence.

You also can conduct searches in the metadata database. Suppose you would like to determine whether Felix Windermeyer may have written a certain document. If Windermeyer's name is in a document's metadata, the image of that document will appear on your screen. It does not matter that his name does not appear in the text of the document.

After you have found relevant documents, you can create and organize comments about them that you can share with other designated parties, either on your side of the transaction only or with all interested parties. You also can create and preserve folders or bins of documents according to categories you define so that all documents dealing with a particular subject are in one place. You can create new categories, as needed, and place a document in several category bins at once with just a few clicks of your mouse.

Eventually, using this document review software, you will accomplish two objectives. First, you and other parties to the transaction will have a much better idea of what your company knows and believes and where potential liabilities might exist. Sorting and viewing documents, using a database of a company's metadata, can reveal relationships between documents not readily apparent otherwise. For example, in a recent case involving Fios, we were able to show discriminatory pricing practices by a company in its fuel sales to dealers by taking company invoices and linking them to the creation dates in the metadata. In a matter of seconds, we accomplished with a technological tool what could have taken months or years to plot in paper. Second, you will be able to decide, based on what you are willing to share from this data mine and what you receive in turn, whether the M&A deal is still attractive or doable.

Litigators have used, for example, Fios's program, io™, for digesting electronic documents produced through discovery; but its implications for M&A due diligence are obvious. The costs to process electronic documents for review, organization, annotation, coding, and selection for disclosure (to CD ROM, hard drive, or other media) through io™, are from 60 percent to 80 percent less than what printing, handling, storing, and delivering their paper counterparts would be.

## **PRESENTING DATA IN VIRTUAL DEAL ROOMS**

Another way to respond to a due diligence request using electronic documents is through a virtual deal room website. Such rooms act as digital document libraries and allow multiple parties to access data and leave comments. They facilitate transactions among users in disparate locations. Only authorized users may contribute and annotate documents on the site, and an audit trail tracks changes and annotations.

Three British law firms Allen & Overy; Clifford Chance; and Freshfields Bruckhaus Deringer, and Linklaters created the first deal room websites in 2000. In the year since, U.S. law firms, such as Andersen Legal and the other Big Five, have followed suit with virtual deal rooms for their clients. Commercial sites have also sprung up, including IntraLinks ([www.intralinks.com](http://www.intralinks.com)) and eRoom ([www.eroom.com](http://www.eroom.com)).

Virtual deal rooms are limited, however. They do not allow for global searches across all of the digital documents hosted at the website, nor do they solve the problems of how to assemble, distill, and isolate the other company's (or your own company's) digital data so that you can efficiently organize and review the data.

Fios's io represents a further evolution in web-hosted application. It enables a company to export large and disparate populations of potentially useful data from its computers and backup storage media to a single server or linked servers. Once the massive segments of data exist in one

seamless whole, you can apply search terms across the board and review and organize all relevant information before releasing it to the other side.

## **CONCLUSION**

As more and more information originates, proliferates, and becomes stored in digital form, you will increasingly need to have M&A transaction relevant documents technologically captured and processed. You will need to conduct electronic due diligence, which will enable you to access and use more information than a paper review would permit and in a much shorter period of time.

The technology for mining digital data is already familiar to you: computers with lightning fast search capabilities; software that culls useful, human generated information from masses of data; and the internet accessible worldwide web, which can store all of the useful data in one secure place and permit many people to collaborate from anywhere in the world. With the help of an electronic processing company and your IT staff, you can distill a company's digital data glut to a manageable amount for your analysis.

Counsel for acquiring companies, in particular, need to understand the limitations of paper based due diligence and become familiar with methods for managing and reviewing electronic data.

Time being of the essence in most M&A negotiations, you will require the speed and efficiency of digital tools to handle digital data. Although only the most tech savvy M&A practitioners employ virtual deal rooms and web review applications today for finding and organizing digital data, the ubiquitous use of these tools is destined to become inevitable in the information driven economy.

## ***ELECTRONIC DUE DILIGENCE REQUEST CHECKLIST***

*Use the following due diligence request checklist to obtain the M&A information you need in electronic form:*

### ***BASIC CORPORATE INFORMATION***

- Articles of incorporation, including all amendments.
- Bylaws, including all amendments.
- Minutes of all meetings and written consents of directors, committees of directors, and stockholders, including copies of any written notices (if given) or waivers thereof.
- List of all cities and states where property is owned or leased or where employees are located, with approximate size, number of employees, and services performed at each location.
- List of all states in which the Company contemplates undertaking business operations, either directly or through other parties.
- List of all states in which the Company is qualified to do business.

### **SUBSIDIARIES**

- List of all subsidiaries.
- Same documents for each subsidiary as those requested above under basic corporate information.

### **STOCKHOLDER INFORMATION**

- List of all current stockholders, including addresses, number of shares owned, and types of shares owned. Indicate dates when the stock issued and was fully paid.
- List of outstanding options and warrants, including date of grant, exercise price, vesting date, number of shares subject to option, and names and addresses of option holders.
- All communications with stockholders.

## **SECURITIES ISSUANCES**

- Copies of form of common and preferred stock certificates and copies of all warrants, options (employee stock options and other stock options), debentures, and any other outstanding securities.
- Stock option plans and stock purchase plans.
- Any other agreements relating to the sale of securities by the Company, including any private placement memoranda or other offering circulars.
- Any agreements and other documentation (including related permits), relating to repurchases, redemptions, exchanges, conversions, or similar transactions involving the Company's securities.
- State permits, notices of exemption, and consents for issuance or transfer of the Company's securities and evidence of qualification or exemption under applicable blue sky laws.
- Forms D or any other forms filed to qualify for an exemption under the Securities Act.
- All voting trust, Stockholder, or other similar agreements . covering any portion of the Company's stock.
- All agreements containing registration rights or assigning such rights.
- All agreements containing preemptive rights or assigning such rights.
- Documents relating to any conversion, recapitalization, reorganization, or significant restructuring of the Company.
- Schedule of dividend declarations, associated record dates, and payments.

## **CORPORATE FINANCE**

- Documents relating to any convertible debt financings. Bank line of credit agreements, including any amendments, renewal letters, notices, waivers, and so forth.
- Documents relating to any equipment lease financings.
- Other agreements evidencing outstanding loans to or guarantees by the Company. All material correspondence with lenders, including all compliance reports submitted by the Company or its accountants.
- Agreements with respect to obligations or liabilities as guarantor, surety, cosigner, endorser, co-maker, indemnitor, or otherwise in respect of the obligations of any other person.

## **FINANCIAL INFORMATION**

- Financial statements, including historical quarterly financial statements.
- Financial, operating, and marketing plans. Management letters or special reports by auditors and any responses thereto.
- Description of and reason for any change in accounting methods or principles.
- Explanation of change in auditors since inception.

## **OPERATIONS**

- List of major suppliers, showing total and type of purchases from each supplier during the last and current fiscal years with an indication of which are sole sources.

- List of contact manufacturers showing totals and types of purchases from each contract manufacturer during the last and current fiscal years
- Forms of agreements relating to the sale or lease of any equipment.

## **SALES AND MARKETING**

- List of major customers showing total and type of sales during the last and current fiscal years and geographic location.
- All customer agreements (sale, license, professional services, development, and so forth).
- Lists of resellers and distributors, showing total and types of sales during the last and current fiscal years and including copies of any written agreements.
- List of original equipment manufacturers ("OEMs") showing total and types of sales during last and current fiscal years, including copies of any written agreements.
- All press releases issued by the Company.
- Marketing agreements and arrangements, including joint marketing agreements with customers and business partners.

## **EMPLOYEES AND CONSULTANTS**

- Organizational charts by department and by legal entity.
- Number of employees by department and by functional area.
- For each current and former employee of the Company, a copy of his or her employment agreement or offer letter, employee confidentiality and inventions assignment agreement, and resume. If any current or former employee has not signed a confidentiality and inventions assignment agreement, please so indicate.
- For each current and former consultant of the Company, a copy of his or her consulting agreement and confidentiality and inventions assignment agreement. If any current or former consultant has not signed a confidentiality and inventions assignment agreement, please so indicate.
- Employee benefit, pension, profit sharing, compensation, bonus, 401 (k), and other plans. Collective bargaining agreements or other material labor contracts.
- Description of any significant labor problems or union activities that the Company has experienced, including any collective bargaining agreements.
- Description of any severance plans or change of control payments or plans.
- Indemnification agreements with any employee or consultant.

## **OFFICERS AND DIRECTORS**

- Founders agreements, management employment agreements, and indemnification agreements, if any.
- Bonus plans, retirement plans, pension plans, deferred compensation plans, and profit sharing and management incentive agreements.
- Agreements for loans to and any other agreements with officers or directors, whether or not now outstanding, including loans to purchase stock and consulting contracts.
- Description of and copies of any documents evidencing any transactions between the Company and any insider, such as any officer, director, or owner of a substantial amount of the Company's securities, or any associate of an insider or between or involving any two or more such insiders.

## **INTELLECTUAL PROPERTY**

- List of all foreign and domestic patents and patent applications held by the Company.

- List of any trademarks, trade names, service marks, or copyrights.
- Description of origination of technology that would answer such questions as the following: Were products developed solely by employees? Were material components licensed from a third party?
- Copies of all license agreements (inbound and outbound).
- Name of the law firm that handles patent, trademark, or copyright matters for the Company and the contact person there. Any correspondence from third parties regarding potential infringement of intellectual property rights of others.
- List of third party sources of funding for the Company's projects, if any, and documents or contracts relating thereto.

## **TANGIBLE PROPERTY**

- List of real and material personal property owned by the Company, along with documents of title, mortgages, deeds of trust, leases, and security agreements.
- All outstanding leases for real and personal property to which the Company is either a lessor or a lessee.
- List of any security interests in personal property, including any UCC filings.

## **LITIGATION AND AUDITS**

- All letters from counsel sent to auditors for year end and current interim audits, such as litigation letters.
- Complaints, orders, or other significant documents in pending or threatened matters.
- Active litigation files, including letters asserting claims, complaints, answers, and so forth.
- Any litigation settlement documents.
- Any applicable decrees, orders, or judgments of courts or governmental agencies.
- Description of any warranty claims that have been made against the Company, any subsidiary, or any partnership or joint venture and the resolution of any such claim.
- Information regarding any material litigation to which the Company is a party or in which it may become involved.

## **INSURANCE**

- Schedule or copies of all material insurance policies of the Company covering property, liabilities, and operations.
- Schedule of any other insurance policies in force, such as key person policies, director indemnification policies, or product liability policies.

## **PARTNERSHIP OR JOINT VENTURE AND MANAGEMENT AGREEMENTS**

- List of partnership or joint venture or management agreements, if any.
- Collaborative agreements, if any.
- Partnership roll up documents, if any.

## **FOREIGN OPERATIONS**

- List of foreign countries where the Company is doing business.
- List of foreign countries (if any) in which qualified to do business.
- Description of business activities carried out in foreign countries.

## **GOVERNMENTAL REGULATIONS AND FILINGS**

- Summary of all OSHA inquiries, if any.
- Summary of all EPA, EEO, Toxic Substances Control Act, Resource Conservation and Recovery Act, and so forth inquiries, if any.
- Any citations or notices received from government agencies.
- Copy of federal, state, local, and foreign income tax returns for last three fiscal years and their status, such as whether all returns have been filed, whether all taxes have been paid, and whether there are any audits by taxing authorities.
- Permits, licenses, and so forth for conduct of business.
- Any pending or threatened investigations and governmental proceedings.
- Any material reports to and correspondence with any governmental entity, including filings and correspondence with any federal or state agency regulating the research or operations of the Company.

#### **OTHER MATERIAL AGREEMENTS**

- Materials relating to any planned acquisition, disposition, reorganization, or other extraordinary corporate event of material significance to the Company.
- Copies of any other material agreements not covered in any category above.

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#### **ONLINE:**

The Berkman Center for Internet & Society, Harvard Law School, at <http://cyber.law.harvard.edu/digitaldiscovery/library.html>.

Christopher Davis, **DUE DILIGENCE LAW AND PRACTICE** (Sweet and Maxwell, London, updated annually), review and purchase available at <http://davisco.net/ddbook.html>.

*Cross Border Transactions: Calculating the Risk: Insurance Due Diligence*, GLOBAL COUNSEL 1997, available through ACCA's Virtual Library, <http://www.acca.com/vl>.

**DIGITAL DISCOVERY AND E EVIDENCE** newsletter, published by Pike & Fischer, Inc., at <http://www.pf.com/>.

*Due Diligence: Intellectual Property: Not just an Intellectual Exercise*, GLOBAL COUNSEL 1997, available through ACCA's Virtual Library, <http://www.acca.com/vl>.

*Due Diligence on Acquisitions: Environmental Due Diligence: Ignore at Your Peril*, GLOBAL COUNSEL 1997, available through ACCA's Virtual Library, <http://www.acca.com/vl>.

*Due Diligence Tips for Acquiring and Disposing of IP Assets*, Program Material, at <http://www.acca.com/education99/cm99/801.html>.

*An Environmental Due Diligence Checklist for Real Estate Transactions* at <http://www.acca.com/protected/pubs/docket/jj00/diligence.html>.

*International Alliances: A Guide to Due Diligence* at <http://www.acca.com/protected/pubs/docket/nd97/diligence.html>.

Alan M. Gahtan, **ELECTRONIC EVIDENCE** (Carswell 1999), at <http://www.gahtan.com/alan/>.

George D. Guillory, CPP, "Electronic Evidence Discovery" website, at <http://www.blkbox.com/quillory/electron.html>.

*IT Due Diligence in Corporate Transactions*, GLOBAL COUNSEL 1998, available through ACCA's Virtual Library, <http://www.acca.com/vl>.

Jan Davis Tudor & Karin Mohtadi, *Sources of M&A Data for Business Valuations: Print or Electronic?* at <http://www.itresearch.com/resources/article01.html>.

Ken Withers, *Computer Based Disclosure and Discovery in Civil Litigation*, Commentary, FED. COURTS L. REV., at <http://www.fclr.org/2000fedctslrev2.htm>.

## **ON PAPER**

Michael R. Overly, **E POLICY,. HOW TO DEVELOP COMPUTER, E POLICY, AND INTERNET GUIDELINES TO PROTECT YOUR COMPANY AND ITS ASSETS**, (Amacom, 1998).

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