

HUNTON
ANDREWS KURTH

Privacy and Data Security in M&A Transactions

Privacy and information security, once overlooked in many corporate transactions, are now taking center stage. Companies that collect, use and store personal data about their customers, employees and others must have the proper safeguards in place. In M&A transactions, it is critical for parties to consider the risks and potential liabilities associated with inadequate privacy and data security practices — whether arising from regulatory violations, actual data breaches or a host of other issues. Even companies that rely less on personal data for their day-to-day operations need to ensure that their company's confidential and proprietary information is well guarded long before an M&A transaction arises.

Privacy and data security due diligence is essential because, left unchecked, vulnerabilities in a company's security posture or noncompliant privacy practices can jeopardize M&A transactions. Buyers need to assess these risks carefully during due diligence because they can be significant and materially affect a buyer's valuation of a seller's business. Moreover, issues that are discovered after an M&A transaction is completed could expose companies to massive liabilities such as expensive consumer class action litigation, intrusive government investigations, hefty remediation costs and other expenses.

In the United States, regulatory agencies such as the Federal Trade Commission, Department of Health and Human Services, Federal Communications Commission and Securities and Exchange Commission are increasingly clamping down

on privacy violators, issuing severe penalties that can cost companies millions of dollars in fines and restrict their ability to use newly acquired personal data. Throughout Europe, and globally, regulatory watchdogs are alert to the misuse of personal information, often penalizing companies for data protection violations. Against this backdrop, companies must be prudent in their approach to M&A transactions and equip themselves with the right legal teams to make sure that M&A deals can be completed successfully, and that no surprises await in their aftermath.

Our Strengths

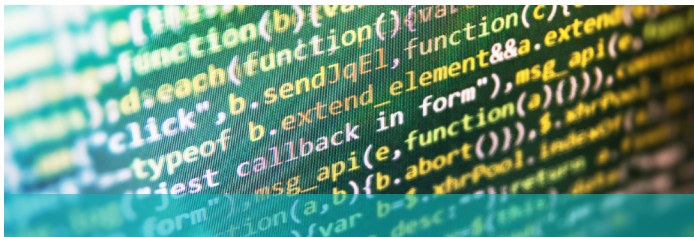
Our renowned capabilities in privacy and cybersecurity, coupled with its recognized strengths in M&A, make it a powerhouse in guiding companies through the potential minefield of a high-stakes corporate transaction.

Our preeminent privacy and cybersecurity lawyers have counseled global technology companies, retailers, financial institutions and other businesses through some of the most significant, high-profile data breaches in M&A transaction history. We also provide comprehensive and coordinated advice regarding cyber attacks on industrial control systems and the compromise of confidential business information (such as critical IP, network diagrams and facility blueprints). We have deep knowledge of the relevant regulatory agencies and corresponding issues, and can help companies navigate their myriad and complex issues.

Our M&A lawyers are highly skilled in virtually every form of complex corporate transaction, including public company acquisitions, going-private transactions, private equity exit transactions, corporate spinoffs and mergers of equals. They are also highly experienced in buying and selling retailers, defense contractors, technology companies and other businesses facing privacy and cybersecurity risks. The team work seamlessly with our privacy and cybersecurity lawyers to deliver to clients optimal advice and sophisticated guidance.

In the time-sensitive environment surrounding an M&A transaction, our combined skills give clients comprehensive coverage over the gamut of privacy and security issues at play in a host of M&A transaction scenarios. We work seamlessly across offices and regions, calling on our colleagues in London, Brussels, Bangkok and Beijing for support on matters relating to Europe and Asia, as well as lawyers in our Latin America practice who are actively involved in international business transactions throughout the region.

Our Services



The privacy and security risks posed in every M&A transaction vary by type of transaction, industry and existing data protection policies and practices for both acquiring and target companies. Our privacy and cybersecurity lawyers have a breadth of experience virtually unparalleled in the industry. They have assisted companies with more than 1,000 data breaches and cyber incidents, including those involving industrial control systems and proprietary business information.

Before the Transaction/Pre-Signing

Our lawyers make sure that companies are adequately covered from the outset of an M&A transaction. They advise on compliance with existing US and international laws governing the use and transfer of data. Beyond complying with regulations, the pre-signing stage is the proper time to lay the groundwork for a successful M&A transaction. At this stage, our lawyers help companies:

- tailor a due diligence plan that recognizes unique risks associated with the target entity

- prepare a comprehensive, customized privacy and data security due diligence checklist to be provided to the target company
- conduct due diligence on the target entity's privacy and data security practices
- identify "red flags" or other concerns that may impact the buyer's valuation or even constitute "deal-breakers"
- assess the strength of the target company's compliance with privacy and data security laws, as well as its vulnerability to cyberattacks and intrusions
- devise appropriate responses to privacy- or security-related information revealed in the checklist and policy documents
- monitor vendors on an ongoing basis to ensure their compliance with privacy and data security laws
- respond to inquiries and probes from regulatory agencies like the Federal Trade Commission, Department of Health and Human Services, Federal Communications Commission and Securities and Exchange Commission
- negotiate appropriate representations, warranties and covenants in deal documents
- where necessary, counsel clients on seeking more stringent privacy and data security protections in the deal documents through indemnities, holdbacks, escrow accounts and insurance

During the Post-Signing/Pre-Closing Integration

Our lawyers help clients prepare for a successful integration during the pre-closing stage, with a focus on protecting clients from unforeseen privacy and data security fallout. Our lawyers help companies:

- review and provide recommendations on improvements to privacy and data security practices
- revise any privacy policies, notices or statements as necessary to comply with privacy laws
- develop and implement administrative, physical and technical safeguards that comply with applicable law or industry standards for information security

After the Transaction/Post-Closing

After the close of an M&A transaction, previously undisclosed data breaches or concerns about data security and privacy can still threaten the strategic or economic basis of the deal. Our lawyers are adept at helping clients move forward in the event of unwelcome privacy and security discoveries. Using their vast knowledge and experience, our lawyers guide clients through the all-important integration phase, helping them make sensible decisions that will protect and grow their assets — information and otherwise — for years to come. They work with clients to:

- devise a strategy for aligning the information security frameworks of the merging entities
- determine whether contracts with vendors, suppliers or others need privacy and data security provisions

- integrate incident response plans and reporting procedures
- make critical decisions about how to use, disclose and protect personal information going forward
- develop or strengthen privacy and security documents to meet current regulatory standards
- assess potential recourse against sellers or other third parties

Whatever the problem, wherever the region, however high the stakes, our privacy and cybersecurity and M&A lawyers can serve as trusted advisers, helping clients understand and meet any privacy and data security challenge occurring before, during or after an M&A transaction. We help clients prepare for and complete M&A transactions with the confidence that comes from having two of the world's leading legal teams on their side.

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