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Digging Deep on M&A

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Session Takeaways

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In this session, we will help you understand:

- The shortcomings of the “traditional” approach to privacy/security M&A diligence
- Risks of a cursory review of an acquisition target’s data practices and infrastructure
- When and how to deep dive into an acquisition target’s data practices and infrastructure – without boiling the ocean
- Strategies and tactics for collaborating with technical consultants

Define the End Goal

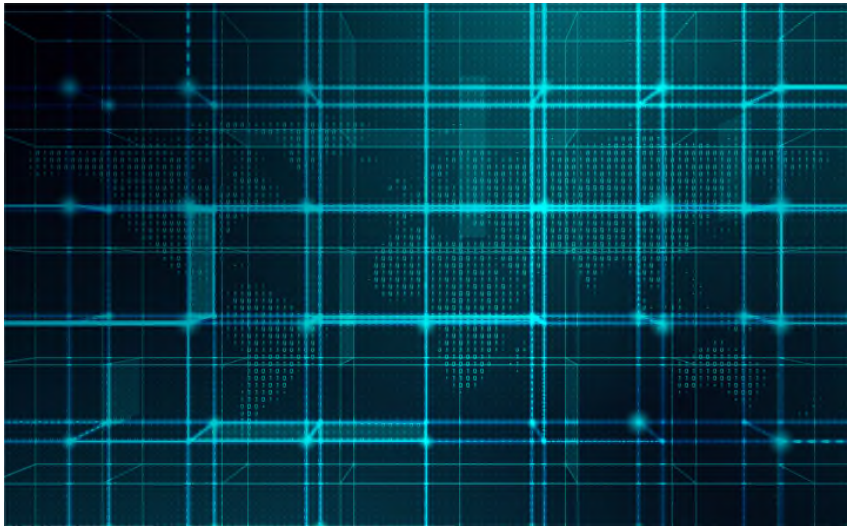
- **Define the M&A diligence objectives at the outset to ensure you are asking the right questions and identifying the key risks.**
  - Data rights
  - Source code/IP
  - Infrastructure
  - Security vulnerabilities

- **A practical consideration: to what extent may privacy and security considerations drive this transaction?**

Common Considerations

M&A privacy/security diligence goals may include identifying or assessing:

- Noncompliance with laws, regulations, or widely adopted practices
- Operational and reputational risks
- Data access and use rights
- Effort to integrate the Seller into existing compliance frameworks
- The value of the Seller as an entity versus its individual assets



Digging Deep: Legal & Regulatory

- **“Comprehensive” state privacy laws: California, Virginia and Colorado (and now Utah?)**
- **State data breach laws**
- **State data security laws**
  - General requirements: “Reasonable and appropriate”
  - More specific: Massachusetts, New York, Oregon, etc.
- **FTC enforcement activity, consent orders and guidance**
- **Sectoral laws** (GLBA, FCRA, HIPAA, TCPA, CAN-SPAM, COPPA)
- **Industry standards** (PCI DSS, ISO 27001/27701, NIST CSF, SOC)
- **Contractual commitments – frequently overlooked, but often most critical!**

Traditional Due Diligence Approach

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- **Questionnaire-based/Check-box driven**
- **High level, on the papers**
  - Have you reported a data breach?
  - Have you been sued or investigated for privacy or security issues?
- **Requires cooperation, candor and sometimes significant effort from many stakeholders within the target company**
  - **Does little to account for risks unknown to Seller**
- **Much effort spent fighting about overbroad representations requested by Buyer and what to do with Seller's material disclosures**

Digging Deep: Traditional Approach Limitations

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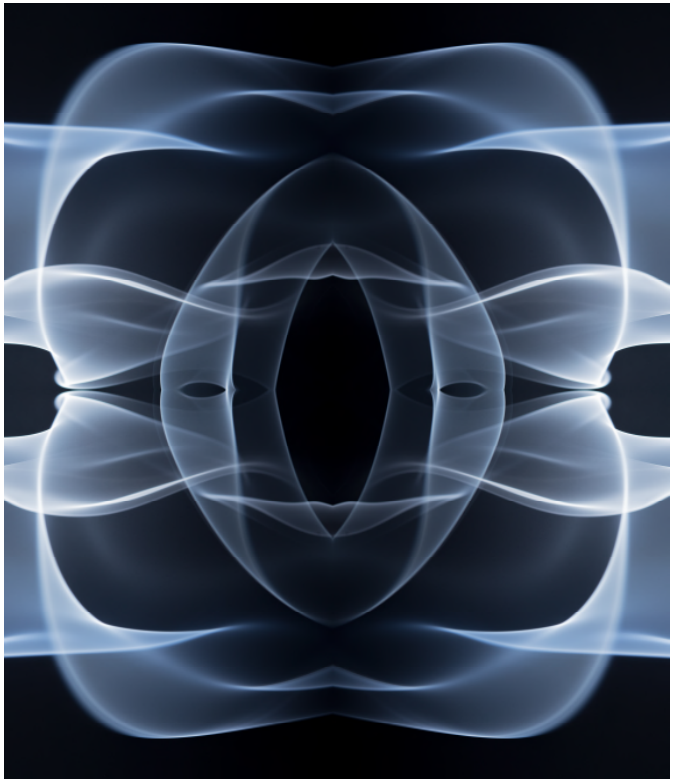
- **Smoke and mirrors**
  - Even if the policies look good, are they actually implemented or enforced?
- **Determining compliance with "comprehensive" privacy laws is difficult (e.g., CCPA, CPRA, GDPR)**
- **Actual risks – especially operational and reputational – may go undetected**
- **Often not well-suited to consumer technology companies, where network and product security overlap heavily**

Third-party assessments can supplement this approach, but be sure to understand their scope and value



Different Perspectives on M&A

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BUYER	SELLER

• What post-acquisition limitations exist on disclosures and use/processing of data maintained by the seller?
  ▪ Privacy policies (note FTC enforcement activity)
  ▪ Contracts
• Will newly acquired data be subject to new laws or policies?
• What restrictions should be imposed between signing and close?
• How do you handle mid-transaction or post-signing security incidents or privacy violations?
	• What policies, procedures, or documentation will be shared?
	• What third-party assessments can be disclosed?
	• What representations are you prepared to make?
	• What restrictions can you live with if the close date is pushed by weeks/months?
	• How do you disclose “gray area” issues and concerns?

Digging Deep: Assessment Tools

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- **Framework-based** (NIST CSF, ISO 27001/27701, etc.)
- **Penetration (internal/external) or application security testing**
- **Vulnerability scanning**
- **Architecture/configuration assessments**
- **Data mapping**
- **Review of technical procedures, reports, designs, etc.**
- **Interviews with key business process and operational stakeholders**

Call for Reinforcements: Technical Consultants

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- **Consider engaging through outside counsel to preserve attorney-client privilege and work product; the consultant's work informs your legal strategy**

- **Think in terms of questions, not services—is this the right consultant to address these questions? How will they do it?**
  - Good consultants can think outside the box and across service offerings to customize a solution

- **Discuss your questions and strategies for answering them ahead of time**

Digging Deep: Critical Questions (1)

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- **What is the timeline for the transaction?**
  - How will privacy and security reviews be prioritized within the transaction timeline?
- **Where do privacy and security fit into the overall risk profile of the transaction?**
  - What is the end game for the target's privacy and security programs?
- **Are privacy or security closely tied to the transaction's value?**
  - Should they be? Does the target company maintain a substantial amount of consumer data?
- **What are the expectations for the target's current, transitional, and long-term IT environment?**

Digging Deep: Critical Questions (2)

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- **What are the target's biggest risks?**
  - Do the determined assessment tools and approach identify/address these?
- **Do previous assessments already give you what you need?**
- **What questions can be addressed without an additional assessment?**
- **How will identified issues and risks be addressed?**
  - Will risks be managed, mitigated, or accepted?
  - What is the timeline for addressing the identified risks?

Questions + Contact

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Additional Resources

- **IAPP's "Privacy in M&A: The Playbook"**
  - https://iapp.org/resources/article/privacy-in-ma-transactions-playbook/
- **California privacy laws**
  - https://oag.ca.gov/privacy/privacy-laws
- **Massachusetts data security regulation**
  - https://www.mass.gov/regulations/201-CMR-17-standards-for-the-protection-of-personal-information-of-residents-of-the
- **NY data security law (SHIELD Act)**
  - https://ag.ny.gov/internet/data-breach
- **FTC consent orders and enforcement activity**
  - https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/privacy-security-enforcement
- **FTC guidance**
  - https://www.ftc.gov/tips-advice/business-center/privacy-and-security