

Merger Investigation Best Practices Recommendations

Submitted By:

Richard Corbett, Esq.
Virginia Llewellyn, Esq.
Applied Discovery, Inc.
136 E. 57th Street, Suite 705
New York, NY 10022
Tel: 212-223-2003

The following information is provided in response to the FTC's invitation to submit written recommendations to assist the Commission in identifying best practices for merger investigation procedures.

On June 3, the FTC will hold a workshop devoted to the issue of management of electronic records in the merger investigation process. The fact that a session is devoted to the topic of electronic records is illustrative of the significant impact electronic document review has had on merger investigations.

Today, more than 99% of all recorded information is created and stored in some electronic format. Any document created on a computer – in a word processing program, on a spreadsheet, in an email program, or with any other application – is electronic in its original form. Electronic documents are an important part of the FTC's document review process because nearly every company involved in a merger now maintains the majority of its business documents in electronic form.

By leveraging the electronic discovery technology available today, the FTC can gain significant advantages in completing the merger investigation process in a drastically reduced time frame, with substantial improvements in the ease and quality of document review. The recommended best practices for electronic record review set forth below are now widely accepted by the legal community. By adopting these practices, the Commission is in a position to benefit from the same advantages already enjoyed by most companies and their law firms involved in mergers and acquisitions practice.

What is Electronic Discovery?

The term "electronic discovery" is commonly used – often incorrectly – to describe a number of different methods of reviewing electronic information. As the volume of electronic documents involved in merger investigations has increased, so has the confusion about what, exactly, electronic discovery is. Comparing two outdated methods of document review – paper review and review of scanned images – to modern electronic discovery technology will highlight the advantages of utilizing electronic discovery best practices in merger investigations.

Paper Review

Some people define electronic discovery as the review of any information that originated from a computer – even when that information is printed from the computer for paper review.

When the FTC issues a “second request” for information, the bulk of documents requested are generally those stored in electronic form – including email messages and their attachments, letters, memos, financial documentation and any number of other kinds of business documents. In response to the second request, the involved parties’ attorneys retrieve the information from the companies’ computer systems – including email servers, networks, hard drives, disks and backup tapes – and review the information in electronic form. Then, either as a matter of custom or in response to a specific directive, the attorneys typically print the information and provide it to the FTC in hard copy format. In many cases, the volume of information provided can exceed hundreds of boxes and millions of pages of documentation.

Once the electronic documents have been reduced to printed form, the FTC loses all the benefits of having the opportunity to review the information in an electronic format. The benefits of electronic review, set forth in detail below, include the ability to search all documents for key words or phrases. Without the ability to search the documents for terms related to the key issues, a manual review of each page of documentation is required. The most significant limitation of paper review, the inability to automatically search paper documents creates significant delays in the investigation process and generates tedious manual work for the FTC’s review team.

There are other notable disadvantages to conducting a paper review of electronic information, including lengthy time delays, the loss of meta data (also known as “data about the data” – information such as original author, document creation and modification dates and hidden details including “blind carbon copies” or bcc’s on email messages), the loss of links between email messages and their attachments and the inability to sort and classify critical information in an efficient, automated manner.

Review of Scanned Images

Some people believe that the use of computer technology during *any* phase of the document review process qualifies as electronic discovery. This overly broad definition includes the practice of scanning and coding, in which an electronic document is first printed from a computer, then electronically scanned to create an “image” of the original document. Imaged documents are typically displayed in a file format called TIFF (tagged image file format) that is essentially a picture of the face of a document. The scanned document then has some of its text “replaced” through an optical character recognition (“OCR”) process and/or subjective keyword coding. The images of the original documents and the re-entered text are then stored in a database that can be accessed only on a computer terminal that has been loaded with specialized software. Limited keyword searching may be conducted on the text that has been OCR’d (the OCR process is about 85% accurate, at best).

While many law firms have embraced modern electronic discovery technology, some are still utilizing this outdated method of document review commonly referred to as “scanning and coding.” These firms may offer to provide the FTC with images of the original electronic documents in response to a second request. While the images supplied to the FTC in this process are electronic files, they have lost all the properties and characteristics of the original electronic documents because they have been reduced to paper format along the way. Scanned images do not retain the look and feel of original documents (for example, text often wraps from line to line without any regard

for paragraphs or page breaks), and OCR'd or coded text does not allow for searching with 100% accuracy.

Review of scanned images can be a tedious process for the FTC's review team. Without accurate search functionality, a manual review of most documents is still required. This outmoded process also requires that the FTC purchase and install specialized software on computers dedicated to this process. Seat licensing fees, training, installation and maintenance charges add up to significant costs.

Review of Electronic Documents in Electronic Form

True electronic discovery means that electronic documents are reviewed electronically – without ever being reduced to paper format. With this method, the documents can be reviewed in a fraction of the time of paper or scanning and coding processes, and the original electronic properties of each document, including the meta data, the full text, and the original formatting, are preserved.

Electronic discovery technology developed by Applied Discovery uploads each original electronic file, such as email messages, letters, memos, or any other document type, into a powerful database on a secure server. Each document is displayed as a PDF (portable document format) file and is accessed via a secure Internet connection. The robust database – which can hold more than 10 million pages of information at any one time – can enable the FTC's review team to conduct searches with 100% accuracy. The entire document collection can be sorted according to date, document author, email addresses, keywords or phrases, or any of a number of other criteria.

Because the database is hosted on a secure server accessed with an Internet connection, there is no software to purchase and there are no add-on costs associated with training, support or maintenance. All fees are wrapped into one simple price based on a per-page or per-gigabyte charge (at the user's choice) as the documents are loaded to the server. Statistics show that the costs of employing modern electronic discovery technology are typically 86% less than paper review costs and 73% less than scanning and coding costs.

Many companies and their law firms are already utilizing this technology to improve and expedite their own document review when a second request is issued. In fact, one of Applied Discovery's clients determined they had saved more than \$2 million and had cut their review time in half by utilizing electronic discovery technology instead of their prior method of review. There is no reason the FTC should not benefit from the same technologies enjoyed by the private sector. The most efficient and effective means of implementing this practice would be a cooperative effort between the producing parties and the FTC. In this process, the producing parties would gather and review the documents in electronic format, and would segregate the responsive documents into a separate collection in the database. With passwords and secure access to only that portion of the database, the FTC could then view the responsive documents from any computer with an Internet connection. Employing powerful search functionality, the FTC's review could be completed quickly and efficiently, with no need to print documents at any stage of the process.

Conclusion

Electronic review provides significant advantages over the outdated processes described above, and is perfectly suited for the high volume, fast turnaround world of merger investigation. The key advantages of electronic discovery are: 1) electronic review saves a significant amount of time in the review process; 2) full text, 100% accurate searching allows key documents to be uncovered instantly; and 3) electronic discovery eliminates difficult manual processes and improves the ease and quality of document review. A comparison of key features and benefits:

Feature	Benefit	Electronic	Scanning & Coding	Paper
100% search accuracy	Find key terms immediately, with 100% accuracy in searching original document text.	Yes	No	No
Review only critical documents	Immediately eliminate documents outside relevant time periods or documents that do not contain key terms.	Yes	No	No
Meta data	Review hidden data about the electronic document, including creation and modification dates and times, original author, and the identity of bcc: recipients on email messages.	Yes	No	No
E-mail conversation threads	Review entire email conversations at once, with no lost threads.	Yes	No	No
Links between email and attachments	Match attachments and original email messages with 100% accuracy.	Yes	No	No
Multi-level search functionality	Search across entire document database, within particular time periods or only through documents gathered from particular custodians.	Yes	No	No
One step search and classification	Search results can be grouped in a document collection with one click.	Yes	No	No

True electronic discovery technology can significantly improve the FTC's document review practices in the merger investigation process. Saving time and improving the ease and quality of document review, services such as those provided by Applied Discovery can significantly impact the efficiency of the process by eliminating outdated document review methods.