Uses and implications of virtual data room features for corporate real estate due diligence

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Abstract

Virtual data rooms (VDRs) can significantly improve the due diligence process for sellers and acquirers of corporate real estate. A seller can easily and confidentially collect and organise sensitive property documents located anywhere in the seller's organisation into a central online repository accessible to acquirers around the world. Such online access brings in more interested acquirers to review a property or portfolio because acquirers initially can rely less on site visits and analyse more property documents in less time. Sellers become more willing to share confidential documents due to the significant security tools that VDRs provide. Ultimately, the analysis facilitated by virtual data rooms helps acquirers by providing more data to clarify and validate key deal components of real property transactions, as expressed in the representations and warranties of a purchase agreement, title policies and property environmental reports.

Keywords: data room, virtual data room (VDR), corporate real estate, merger, acquisition

WHAT IS A VIRTUAL DATA ROOM?

Virtual data rooms (VDRs) have been commonly used in corporate asset transactions for the past ten years.[1] A VDR is a document repository stored in an off-site computer server that enables transacting parties to exchange documents with each other by using an internet browser to upload and download documents.[2] Far from being a consumer-focused file-sharing tool, the VDR marries the security technology needed to exchange sensitive documents between transacting parties with the ease of use and accessibility needed to organise thousands of document pages online, enabling hundreds of reviewers to access these pages on a customised, need-to-know basis.

It is easier to describe a VDR's advantages by examining the physical data room it replaced. Before VDRs were introduced,

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prospective acquirers of corporate assets travelled to a 'data room' at a specific geographic location, typically close to where the seller or the seller's outside counsel was located.[3] The data room itself was a conference room full of boxes of hardcopy legal and financial documents.[4] Typically, someone from the seller's organisation or its advisors had to be in the conference room to let interested parties come in, one party at a time, to review these files. This arrangement presented several challenges that limited the effectiveness of any due diligence. An acquirer often incurred significant expense from sending a 'deal team' of several individuals to a remote location just to view files related to the deal.[5] Also, this visit might last only a few hours because other interested parties wanted to review these documents within the same narrow timeframe. Furthermore, reviewers often could not get copies of the documents because the seller was concerned about keeping these documents confidential. In such a situation, acquirers had to rely solely upon the notes they took during their session. With a physical data room, sellers might not have offered relevant documents that were scattered in remote or unknown locations because of the difficulty of collecting these documents with little advance notice. Even if the documents were eventually found, acquirers had little opportunity to make subsequent trips back to the physical data room. These limitations were also detrimental to a seller, who found fewer acquirers willing to pay higher prices for an asset when many of their concerns were left unanswered by the documents in the physical data room.

By comparison, parties now can avoid the inconveniences of a physical data room by using a VDR. Sellers can quickly collect legal and financial documents from multiple sources and put them in an online document repository. Competing acquirers in a corporate asset sale can simultaneously access just the documents they need from wherever they have an internet connection.[6] When corporate sellers scan their hardcopy legal, financial and operating files and host them in an online repository, it becomes even easier for acquirers to access just the files they need to assess the attractiveness of a target company or asset. Acquirers also benefit because they can access documents without revealing their identity to other bidders.

HOW DO VDRS IMPACT CORPORATE DUE DILIGENCE?

VDRs provide several advantages for both acquirers and sellers of corporate assets (see Figure 1); however, to understand the relevance of these advantages, it is important to discuss the specific due diligence issues that corporate acquirers and sellers face when getting involved in a corporate sale, merger or similar transaction.

VDR SECURITY PROVIDES SELLERS AND THEIR ATTORNEYS WITH GREATER SAFEGUARDS TO SECURE CONFIDENTIAL CORPORATE DATA DURING A TRANSACTION

Data security is critical to corporations using data rooms because of the consequences of any enterprise data breach.[7] For example, these breaches can subject companies to potential suits by customers who entrust their credit card numbers, social security numbers and other personal information with these companies.[8] Likewise, sellers need to mitigate the risks associated with sharing confidential information with competitors during a property sale. When a company puts property up for sale, it carries the likelihood that acquirers who are direct competitors may gain access to the property's lease terms, rent rolls, maintenance costs and other confidential information. While such disclosure is a necessary part of due diligence, sellers first must seek to gauge

Sellers Can:

1. Help ensure that sensitive legal and financial documents shared with acquirers remain confidential
2. Be the masters of their own information by easily gathering, posting, and screening documents distributed to interested acquirers
3. Encourage more prospective acquirers to review a given opportunity by making documents easier to access
4. Share large documents and files without the throughput limitations of email
5. Track acquirer document access to anticipate questions and gauge each acquirer's interest
6. Permit each acquirer to gain greater document access if and when an acquirer's interest becomes more serious
7. Provide a clear record of seller disclosures that accurately and sufficiently support the representations and warranties within a given purchase agreement

Acquirers Can:

1. Locate specific documents in the data room more easily through searching the text of every document
2. Remotely access the data room regardless of whether they are in the office or traveling
3. Inexpensively pre-qualify their interest in a given opportunity
4. Extend document access across a large review team of employees, outside counsel, external vendors, and advisors
5. Easily incorporate data room documents into integration plans after the transaction has completed

Figure 1 Virtual data room advantages

how serious a competitor's interest is before disclosing information that might be used against the company if that competitor does not become the winning bidder in the transaction. Correspondingly, outside counsel must be prepared to take greater steps to secure client information during transactions because the threat of corporate espionage occurring on law firm IT systems has grown significantly over the past few years.[9] For example, unidentified hackers compromised the computer networks of seven different law firms in 2010 in an attempt to disrupt BHP Billiton's US$40bn acquisition offer to Potash Corporation.[10] The threat of cyber hacking is not limited to large transactions, however; all transactional attorneys face some risk of client data breaches with the use of cloud computing growing among businesses and law firms.[11] The consequence of these breaches is significant because attorneys have obligations to protect confidential client information under US state professional responsibility rules.[12] In several states, these rules are beginning to address in more detail the issue of protecting client information in a cloud-computing environment.[13]

Potential VDR solutions

VDRs offer corporations the opportunity to leverage the efficiencies of cloud computing while maintaining a high level of security to keep documents confidential during a transaction. VDRs offer several sophisticated tools to restrict and monitor unauthorised access to these documents:

- password-protected access to the files;
- advanced encryption standards to store and transmit files;
- permissioning tools that allow sellers to grant individual acquirers with progressively greater access to property documents as the seriousness of each acquirer's bid is established more clearly;
- 'watermarks' attached to each page listing the user, project name and date/time when the user accessed the document;
- auditable records of which users have accessed documents, with specifics related to

time/date, pages read, duration of viewing, internet protocol (IP) address and whether documents were printed or downloaded.

All of the above features are commonly incorporated into an overall set of safeguards outlined by one of several industry-wide security standards used by VDR providers. Certification via AT 101 or other security standards is a particularly important feature of data rooms for sellers trying to limit their liability should a data breach occur within a data room. Security standards can become a way to demonstrate that a company has taken reasonable care with customer data despite the breach occurring. For instance, AT 101 is a standard by which accountants can attest to the document controls at firms using cloud-computing services. These controls demonstrate a service's commitment to data security, data integrity, client confidentiality and system availability.[14] A VDR vendor's security precautions are tested by expert third-party organisations (including 'white-hat' hacker organisations and large accounting firms) that certify a VDR platform using internationally recognised standards like AT 101 to ensure data security and data integrity. As the threat of corporate data breaches grows, certification provided by cloud-based computer services should only grow in importance.

VDRS HELP ACQUIRERS BETTER LOCATE RELEVANT DOCUMENTS THAT ADDRESS VALUATION CONCERNS ABOUT PROPERTIES

For acquirers looking at documents in a VDR, finding information that is most relevant to their due diligence on properties is often like looking for a needle in a haystack. This is because:

- sellers can err on the side of providing too many documents to review;
- documents that are most material from an acquirer's perspective are often interspersed with less material documents;
- the material information within specific documents may be limited to just a few pages in a document with hundreds of pages.

Acquirers often have a difficult time reviewing documents because they are not organised in a manner favourable to an acquirer's review. Sellers will set up files in a data room using a set index (ie a set of folders and sub-folders organised by topic); however, the acquirer may have a hard time navigating through the data room documents because the index may have been organised for a prior, unrelated project. The seller also may have organised the index to answer the information requests of multiple bidders, producing an index that is not optimised for any one bidder to review. In addition, acquirers may miss material information in documents that have been uploaded well after the acquirer team has started its review. This might occur because sellers have uploaded documents as soon as they have located them to expedite due diligence. It also might occur when documents are uploaded in response to questions from other acquirer teams and these questions are not disclosed to all bidders accessing the VDR.

All of the above-mentioned challenges are magnified when a transaction includes multiple properties where each property might have different documents reviewed by different subject-matter experts on behalf of the acquirer. Each property might have:

- title documents;
- surveys;
- tenant leases;
- Phase I environmental assessments;
- insurance policies;
- operating cost data;
- maintenance and repair records;
- tax assessments;
- rent roll data.

While representations and warranties serve an important purpose in reducing transaction risk, that risk is never completely eliminated because the success of an acquirer's purchase is still dependent upon a multitude of facts and circumstances not necessarily disclosed in the purchase agreement.[15] Acquirers can overlook important information disclosed by the seller during due diligence because the tremendous volume of disclosed documents makes a thorough review by the acquirer all but impossible, especially when acquirers have a limited time to review the documents and make a bid. An acquirer could easily overlook information, fully disclosed by the seller, that confirms or conflicts with a representation or warranty made in the purchase agreement. Accordingly, acquirers might take on unanticipated costs when overlooking such important property data. This could occur particularly with documents like leases, environmental reports and title documents. For example, acquirers incur significant post-transaction costs when:

- the acquirer has purchased property but has overlooked remediation reports, agency correspondence and other documents that might help to determine the environmental liability of a property;[16]
- title insurers exclude coverage to a given property if the title insurer can cite documents disclosed in the data room to demonstrate that the acquirer had actual knowledge of the encumbrance;[17]
- the acquirer cannot immediately occupy a building it purchased due to a tenancy that was presumed to be ended by the acquisition not ending because the terms of the lease did not expire with a change in control of the landlord.

Potential VDR solutions

Document text search

VDRs have several technologies that allow acquirers to search for just the documents they need in a more efficient manner by searching for keywords in the text of every document. VDR search tools enable users to limit searches by file type, language and date uploaded; users can exclude terms as well. In some cases, search tools will look for synonyms or similar words (eg returning documents using 'asset' when a user searches for 'assets' or including 'turnover' when searching for 'revenue'). Key terms can be highlighted on the pages where they are found, leading reviewers past hundreds of other pages that might not be relevant. As a result of these features, reviewers rely less on how documents are organised in an index of folders. Data room search tools can help to locate detailed records on property conditions that impact purchaser liability. These records include evidence of contamination, title limitations, warranties on building construction and repair work, and maintenance records. For example, VDR search tools allow an acquirer to leverage the expertise of environmental consultants and outside counsel experienced in regulatory matters who can search for key text within each document that might flag property concerns. Information that may raise red flags regarding environmental liability includes:

- standard industrial classification (SIC) data indicating the current or former presence of particular types of operations that are more likely to trigger greater environmental liability;[18]
- descriptions of groundwater monitoring wells installed at a given property that may indicate the type of hazardous substances being monitored;[19]
- site plans and blueprints for areas within a property that may have been used previously for hazardous waste storage;[20]
- regulatory compliance records maintained as a requirement for state or federal regulatory agencies;[21]
- contracts with off-site disposal facilities that indicate potential on-site generation of hazardous waste;[22]
- correspondence with third parties regarding tort claims;[23]

- the dates of older Phase I reports, which may indicate whether a property is in compliance with current or evolving state and federal regulations.[24]

Regarding title limitations for properties in the USA or other jurisdictions where title insurance is obtained, VDR search tools can help acquirers of a property to locate documents referencing property encumbrances not recorded with local authorities that could limit the property's title insurance coverage. For instance, a search of keywords would look into the text of property surveys, utility maps and building plans to help acquirers determine whether boilerplate language in a title insurance policy addressed specific encumbrances referenced in these files.

Document alerts

In addition to the search function, other tools highlight recently uploaded documents by alerting acquirers via e-mail or displaying only those documents that were recently added or have not yet been read by the reviewer. These features are particularly important when document distribution comes in stages and acquirers want to expedite their reviews by looking at documents as soon as they are uploaded. These features also encourage acquirers to request follow-up documents because of how easy it is to know when documents have been added to the data room.

Custom views

VDRs allow acquirers to build custom views into a data room to organise documents in a way that best facilitates the acquirer's review. For instance, the acquirer may organise documents both by subject matter and by specific properties. Acquirers can drag and drop files across the data room index into a virtual folder that they can easily reference to review just the documents they need to see. Acquirers also can bulk download the entire set of files for which they were given access so that they can organise the entire document set offline in a way that optimises their review time. Additionally, acquirers can review a set of properties from multiple angles, where each angle may highlight a different set of risks. For instance, the acquirer can organise documents by subject matter across different properties so that experts can efficiently access the documents relevant to their expertise. So, with 50 properties for sale:

- a financial analyst could analyse the profit and loss statements of all 50 properties;
- an environmental engineer could look at all relevant environmental testing reports across all the properties;
- an attorney could review the language in every lease across all the properties.

In contrast, the acquirer also could organise documents by property to highlight conflicting information between all the documents associated with the property. For instance, surveys and title reports accessible to outside counsel and other consultants may provide the confirmation needed by the acquirer that a seller's representations on property egress and ingress are adequate.[25]

An integrated set of due diligence workflow tools

The tools cited above and others can combine to produce a more efficient workflow when acquirers review property documents. For instance, if a seller of a corporate entity included several hundred office lease interests in the sale and warranted in the purchase agreement that these leases were assignable to the acquirer, a reviewer could search for specific keywords to help better locate assignment provisions in each lease. The reviewer then could tag these documents with comments using a data room's internal note-taking systems, which are typically standalone notes appended to the document in the VDR's index accessed in a separate window later for review. Next, the reviewer could segregate relevant documents into a customised view within the data room for later review and retrieval. Reviewers then could submit to the data room's question and answer (Q&A) module any questions clarifying an assignment clause's applicability. Q&A modules allow reviewers to confidentially transfer questions to data room administrators and documents in the data room. In most VDRs, these Q&As can be exchanged securely within the VDR. The VDR administrator gets a complete record of all questions posed and answers given within the VDR, including who asked the question, what document or folder it related to, and when the question was asked and answered.

The Q&A module provides a confidential, auditable list of questions submitted by reviewers and the answers posted by the seller. These questions might even lead to further disclosures.[26] A seller could expedite further disclosure by providing upload rights to selected folders for whoever has the related documents within its organisation. This individual then could upload these documents quickly from wherever they are, using a web browser and internet connection. This upload then may trigger an e-mail alert to the acquirer's team to locate the new documents and begin the review process anew.

Greater seller assurance that acquirers have reasonable access to documents

From a seller's perspective, VDRs can document that the seller has provided all acquirers with material documents and the tools to get to those documents. Sellers could effectively counter any unsuccessful bidder's claim of difficulty in accessing material documents using detailed reports demonstrating:

- what documents were provided to an acquirer;
- when the acquirer was given access;
- whether and when acquirers accessed these documents;
- whether acquirers were given view, print or save capabilities for specific documents;
- whether and when acquirers were alerted to new or updated documents;
- what tools acquirers had (eg search, custom views etc) to access these documents.

VDR PERMISSIONING TOOLS HELP SELLERS AND ACQUIRERS DISTRIBUTE DUE DILIGENCE FILES ON A 'NEED TO KNOW' BASIS

If a seller provides too little information, bidders may walk away from the deal or, worse, sue the seller post-transaction for not disclosing material information. If a seller provides too much information, the seller unnecessarily discloses confidential company information to an outside party. This is particularly troubling when competitors of a seller make bids on the asset or company being sold. In addition, acquirers might want to restrict documents accessed by their experts and consultants. This is because acquirers might want to balance having enough people to review an opportunity with keeping the deal team small enough for confidentiality reasons. Limiting the deal team to a few individuals protects the confidentiality of the project, but also limits how much information the team can effectively review. This is especially true when team members lack the requisite expertise to examine certain documents.

Potential VDR solution for sellers

VDR permissioning tools allow sellers to control exactly what information is provided to each bidding team. Thus, sellers can grant disclosure on a 'need to know' basis while demonstrating a good faith effort to disclose the information requested by bidders. Additionally, sellers can organise each acquirer team into sub-groups with different access rights to specific folders and documents. These access rights may or may not overlap between groups. A seller will often limit disclosure to a specific deal team based on what information that team has requested through the due diligence request list which they have provided to a seller.

Potential VDR solution for acquirers

Using a VDR, an acquirer can leverage these permissioning distinctions within their team when bringing in experts from outside of the core deal team. Experts can be placed in groups separate from the acquirer's main deal team and given access to specific files in selected folders. For instance, if a data room contains folders on 20 properties and the deal team wants an outside consultant to evaluate only five properties, the seller can parse out access to the consultant for the files on just those five properties. Experts could then get print, download and search rights from the seller as the acquirer progresses to additional stages in a negotiation. For example, an appraiser may have expertise based on certain types of properties or certain geographic areas, so limiting their document access to relevant properties would support a seller's desire to provide access on a need-to-know basis. This role-based permissioning can apply across several foreseeable scenarios for acquirers. An acquirer could provide an environmental engineering firm with access only to environmental documents in the data room that related to a specific set of properties. Additionally, a UK-based acquirer looking to purchase several US and European properties could provide a US accounting firm with access only to tax documents for the US properties. Furthermore, valuation experts hired by the acquirer in the USA and Europe could get access only to diligence files on the specific properties they are reviewing. In all of these scenarios, the risk of unauthorised access to confidential documents is mitigated because these outside experts would have their access limited to just the confidential documents they must review. Most importantly, this access would occur regardless of how the documents are actually organised in the VDR.

VDRS ACCELERATE DOCUMENT DISTRIBUTION ACROSS MULTIPLE GEOGRAPHIC AREAS

The geographical distance between parties has been an historical challenge to 'getting deals done'. In the not so distant past, exchanging information between transacting parties involved the use of not only physical data rooms but the exchange of information by mail, e-mail and extended conference calls. Each of these methods added time and cost for any bidder looking at the opportunity, eg was the opportunity potentially worth the cost of sending a 10–20-person team to a distant location? If not, acquirers could have the documents sent to their offices, but that added time and cost as well. For example, before they could review the first document, an acquirer's deal team might have to spend money shipping hard drives full of files by a bonded courier. The team would then have to spend time organising those files on a local computer server in a way that made it easy for multiple team members to review them. Only then could an acquirer's deal team get down to the essential task of reviewing documents for due diligence. With all these costs, acquirer teams often had to ask whether an opportunity was worth the cost just to review the associated due diligence documents. This necessary calculus by acquirers ultimately meant that sellers looking to get more bidders interested in an asset sale were often limited to parties local to their region or those with the financial wherewithal to access the due diligence documents.

Potential VDR solution for acquirers

With the growth of internet technology commonly known as 'software as a service', sellers and acquirers can access due diligence documents without expensive travel and without re-configuring hundreds of documents onto a local shared server for their review team. As long as the members of an acquirer deal team have an internet connection, they can access documents right away.

VDRs have grown in sophistication so that, no matter what the browser or operating system, reviewers can easily view, print or download documents to review an opportunity in real time. VDRs further accelerate document access because most VDRs require little or no additional software to download locally onto a user's PC. Additionally, access commonly extends beyond PCs because many VDRs offer document access on smartphones and tablet devices. With these advancements in internet-based access, the cost of document access for acquirers is significantly reduced. It does not matter whether the acquirer is looking at real estate locally or halfway around the world.[27] For instance, an acquirer in Asia can do an initial review of properties in North America just as easily as for properties in the acquirer's own region. Parties that might not otherwise travel to a site to pursue a remote deal can better evaluate an opportunity by first remotely viewing maps, rent rolls, labour contracts and other files. Such documents provide greater detail on a prospective purchase to sufficiently inform a 'go/no go' decision on whether to travel to the property for further review.

Potential VDR solution for sellers

On the other side of a deal, the easier access provided by VDRs can help sellers to get higher prices for their properties. A seller can attract more interested acquirers from across the world. More parties reviewing these documents can lead to more bids and more bids can lead to higher prices for a given property. VDRs help to boost final prices for sellers in other ways too, especially when more parties are reviewing an opportunity. The VDR acts as a screening tool to help sellers determine which bidders are more serious and what about a property may be most attractive to bidders. A seller can use VDR reports to help to gauge the interest of any given bidder. These reports detail which individuals on a bidder's team have gone into the VDR and what documents they have accessed. For example, sellers can benchmark a bidder's interest relative to other bidders by noting:

- How many individuals from the bidder's team have entered the room?
- How many documents have these individuals read and not read?
- What properties did they review the most, based on their access to specific folders?
- When did these individuals read the documents — as soon as they were uploaded or much later?
- Who accessed these documents — ie what did members from the bidder's executive team review?

VDR UPLOAD TOOLS HELP SELLERS AND ACQUIRERS GET THE BEST PRICE FOR A PROPERTY BY FACILITATING A QUICKER DUE DILIGENCE REVIEW

No matter what the transaction, acquirers and sellers of corporate real estate strive to perform due diligence quickly to get the best price for a property. Sellers often want to dispose of properties quickly to leverage greater acquirer demand due to favourable real estate market conditions. Sellers also may want to sell a property when favourable financing conditions encourage more parties to bid on a property. Additionally, a seller may want to expedite an asset sale to apply the proceeds to other parts of their business that are currently struggling. Correspondingly, a bidder on corporate real estate may need to make a quick decision on a property to get a favourable price. A bidder also may want to preempt competitors making bids on the related asset. Where a property may have interest from multiple bidders, an acquirer may not get a chance to extend the amount of time that it has to perform its due diligence. This is because other bidders may try to act quickly to make the seller an offer that 'locks up' the property to the exclusion of other bidders. Also, bidders may see operating or financial synergies with other assets for sale by other sellers. Thus, when under such pressure to act quickly, any additional time savings that the data room provides to an acquirer become even more valuable. Acquirers and sellers will have a difficult time expediting due diligence, however, when the logistics of getting material documents into a centralised location are difficult. Files might be spread out across different individuals or departments within the seller's organisation. Files also might be stored across a patchwork of different IT networks retained from the seller's prior acquisitions. Often, advisors outside the seller's computer network may have additional material documents. The task of collecting these files from such multiple sources significantly increases the due diligence period for any given transaction. In the absence of better alternatives, individuals with important documents would have to e-mail them to one central administrator, who would then place these files into a central online place for the acquirer to review. Collecting documents from multiple sources and locations could delay the due diligence phase on any transaction by weeks or months.[28]

Potential VDR solution

A VDR can compress the overall time needed for due diligence by reducing this collection period. VDR upload tools quicken collection by making documents easier to upload for seller employees and external parties that have direct access to these documents. Many VDRs feature 'drag and drop' technology that does not require a user to have special software or any particular technological savvy. As long as these users have an internet connection, they can bypass the need to e-mail documents to a central administrator and upload them directly into the VDR. While sellers must still take the time to vet the uploaded documents before making them accessible, the ability to locate and distribute these documents more quickly before this vetting helps to start the due diligence phase of a transaction much sooner.

VDR FILE MANAGEMENT TOOLS ENABLE ACQUIRER ACCESS TO OVERSIZED FILES THAT MIGHT OTHERWISE NOT BE SHARED WITH ACQUIRERS

When corporate real estate is put up for sale, there may be oversized files describing the property, including scanned maps, surveys, architectural drawings, mechanical drawings, photographs and even videos of property 'walkthroughs'. These files provide acquirers with unique details about the property and help sellers to market the property's attractiveness relative to similar properties. Each of these files often can be several gigabytes in size. The problem with these files revolves around the fact that many corporate IT networks restrict the size of files which can be received by e-mail. The restriction is often deemed necessary to minimise the risk that malicious software programs will enter a firm's IT network and shut down the entire system. To prevent such an attack, IT networks look at the size of any incoming file and prevent users from accepting files when they exceed a pre-determined size. Since many of the files described above are similar in size to the kind of software that gets restricted by IT networks, these files often do not reach their intended recipients. Alternatives to e-mail typically prove equally frustrating to transacting parties — while many of these files can be sent to acquirers in a printed format, this adds time and cost of getting files printed and then distributed to everyone on an acquirer's team who must review them.

Potential VDR solution

With a VDR, acquirers can examine oversized files that sellers cannot easily transfer by e-mail or physical delivery. Acquirers can access oversized files online through a VDR, which often can host and distribute individual files as large as several gigabytes in size. Many VDRs feature advanced document management systems that can coordinate requests from thousands of users accessing several terabytes of documents simultaneously. These capabilities enable fast, reliable distribution of larger files when needed.

VDR DOWNLOAD OPTIONS CREATE A PROPERTY'S 'INSTITUTIONAL HISTORY' FOR POST-SALE INTEGRATION

Once a transaction has closed, an acquirer of a property has only just begun the work of integrating the property into its business. The responsibility for maintaining the property quickly shifts from the seller to the acquirer. Operating personnel must be brought in to take control of the property. Many of these individuals typically have had no prior access to the property's related VDR documents because the confidentiality of the transaction limited document access to only a few individuals within the acquiring company. Once the transaction has closed, however, the acquirer's operating personnel must quickly access the title documents, mechanical drawings, leases, maintenance contracts, tax records and other documents needed to maintain the property.

Potential VDR solutions

To ramp up an integration team's review of a recently acquired property, the team can either keep the VDR open for their exclusive use or rely on DVD archives of all the files and reports from a closed VDR. A data room's property documents can become the critical mass needed to create a permanent record for the property, once the transaction is complete and the acquirer has integrated the property into its business operations. An acquirer also can get a complete report on all user activities and permissions from the data room to determine who from the acquirer's team reviewed specific data room documents during due diligence. This report is helpful after a transaction when the acquirer needs to locate these individuals to help answer questions about an acquired property. This 'institutional history' helps transition the property to the new operating team and allows that team to build upon the detailed records already collected on the property.[29] The effort also allows acquirers to position properties for sale or financing purposes from the time the portfolio is acquired. Once an acquirer gets the data room documents, it becomes easier to re-purpose those documents in new data rooms to support initial public offerings (IPOs), follow-up financings, subleases, regulatory approvals and asset sales because there is less of a need to collect documents from multiple sources.

CONCLUSION

VDR features have evolved to offer greater efficiency in due diligence for purchasing corporate real estate. Security features and upload tools give sellers greater comfort and ease to share more confidential documents with acquirers. Search tools allow acquirers to sift through these documents more quickly and to better validate seller representations and warranties, environmental conditions, the state of a property's title and other details influencing the property's risks and overall value. While by no means exhaustive, this paper provides a good starting point for demonstrating the usefulness of VDRs when corporate real estate is put up for sale as a standalone asset or as part of a larger business merger or acquisition transaction. This paper also offers a framework for future discussions on how data room technologies are most effective depending on the type of transaction, eg real property sales versus the purchase of the corporate owner's stock; negotiated sales versus auctions; and sales to financial sponsors versus sales to strategic acquirers. Additionally, this paper might prompt subsequent discussions about how sellers and acquirers benefit differently from using VDRs. While both sellers and acquirers do benefit, acquirers appear to benefit more when VDRs are used in corporate asset sales. This is probably a natural consequence of the increased disclosure that a VDR helps to facilitate for an acquirer. Nonetheless, for sellers, VDRs are more than just a cost of doing business when selling property. VDRs offer a seller the opportunity to attract more prospective acquirers and to extract more value from a transaction, using detailed property facts to buttress the seller's negotiations with potential acquirers.

NOTE

This paper was adapted from a research paper written by the author when he was a student at New York Law School. The author would like to acknowledge that he is solely responsible for this document and this paper does not represent the opinion of either RR Donnelley or New York Law School.

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