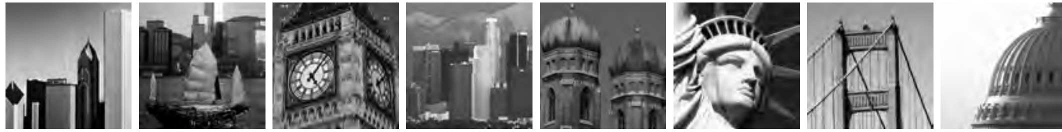
KIRKLAND**PEN**

March 20, 2008



KIRKLAND & ELLIS LLP

Private Equity Newsletter

To File or Not to File... Proper Records Retention and Destruction Policies

PENpoints

Successful handling of records retention obligations reduces legal risks and creates opportunity for cost savings.

The question of what to do with the stacks of paper and gigabytes of data a company's employees generate has vexed managers since Xerox and IBM became household names. Even small firms must address what to do with all of the paper and electronic records that its employees produce every day.

Private equity firms face these same challenges. Improper handling of records not only increases the cost of doing business, but also heightens risks related to litigation and investigations. On the other hand, a well-designed and implemented records retention policy reduces those risks and creates opportunities for cost savings and operational efficiency.

Having a good records policy is essential for practical and legal reasons, including:

- ensuring access to the firm's accumulated knowledge,
- providing a means for recovery after disasters or computer network outages,
- reducing paper and electronic storage costs and facilitating document retrieval,
- minimizing costs related to misplaced or lost documents (including reducing costs of electronic discovery),
- complying with any applicable statutory or regulatory document retention requirements,
- avoiding sanctions and managing the risks associated with mandatory document production for litigation and government investigations, and
- satisfying ongoing obligations and risks associated with confidentiality and nondisclosure agreements.

At its heart, a records retention policy defines categories of records that are required to be retained, provides the time period each category of records should be retained and provides for the destruction of documents after they have been held for the required time period (as long as there is no active or reasonably foreseeable litigation or investigation).

A typical records retention policy describes the Who, What, Where, When and Why of proper handling of all private equity firm records (see inset on following page).

To be successful, a private equity firm's records retention policy must be practical and tailored to fit the firm's needs and operational realities, such as the firm's typical deal process, information technology infrastructure, litigation status, foreign affiliates, etc. The policy should not establish unrealistic mandates.

Effective implementation of a records retention policy requires senior-level support and the cooperation of all firm employees. A designated person at the firm should assume responsibility for the dissemination, implementation and enforcement of the policy. Once adopted, the policy must be followed because failure to follow one's own policies can create new risks, not to mention increased storage costs.

It is critical that every private equity firm establish a system and policy for the suspension of records destruction when litigation or an investigation becomes reasonably foreseeable – not just when litigation or an investigation is commenced. All firm personnel should be required to inform the designated records manager at any time they learn of facts that would make

Attorney Advertising

HOW IT WORKS: Records Retention Policy for a Private Equity Firm

WHO
- Establishes responsibilities for all partners, principals and employees
- Designates a "Records Manager" with overall responsibility for the firm
- Requires transaction teams to designate a "Deal Record Keeper"
- Defines role of the IT manager (or equivalent) regarding electronic records

WHAT
- Establishes two basic categories: Firm Records (for further categorization and retention/destruction) and Convenience Records (items like extra copies)
- Categorizes different types of Firm Records
- Establishes retention periods for the various categories
- Sets up special rules to handle confidentiality obligations
- Establishes audit protocol and other controls
- Sets up special rules for litigation/investigation "holds"

WHERE
- Determines which paper records to store onsite vs. offsite
- Determines location of electronic record storage (e.g., file servers, backup servers)

WHEN
- Requires Firm Records to be categorized annually or at conclusion of a deal
- Establishes routine, periodic purging of records, subject to litigation and investigation holds
- Mandates annual acknowledgments of the policy from each employee (including partners and principals)

WHY
- Protects security of records
- Provides cost-effective availability of records
- Ensures legal and regulatory compliance
- Retains records in reasonable anticipation of litigation or governmental investigation
- Protects confidential information
- Provides routine destruction of records when no need to retain

litigation or a governmental investigation reasonably foreseeable, so that the records manager may consult with counsel to determine whether to institute a "records hold" and suspend the destruction of records. A firm that continues to destroy records (including the automatic deletion of e-mails) may become subject to serious court and government sanctions. On the other hand, the retention and destruction of documents after proper retention periods in compliance with a policy helps protect against allegations in litigation or by the government that the firm has recklessly or intentionally destroyed important records.

An effective records retention policy can lead to cost savings. Documents will not linger indefinitely in expensive warehouse or office storage space or on electronic systems. Rather, documents will be destroyed at the conclusion of their specified retention periods (unless subject to a records hold), freeing up valuable real and virtual space. Also, documents retained after proper categorization may be retrieved more efficiently.

A good records retention policy also covers electronic records, including e-mails and voicemails. E-mails are frequently casual and conversational in nature, and e-mail authors often fail to contemplate that their next reader may be a plaintiff in a lawsuit or a government prosecutor, possibly taking language out of its original context. As part of a records retention policy, firm personnel should be reminded that virtually all communications, including e-mails and voicemails, are subject to production in litigation or an investigation and that personnel should prepare any communication, whether oral or written, with corresponding caution.

In light of the tremendous volume and often short useful life of e-mails, firms should

consider whether to establish a reasonably short retention period for e-mails (e.g., 30-90 days) before they are automatically deleted (often permitting personnel to save or archive specific e-mails they do not want automatically deleted).

Automatic e-mail deletion likely will need to be suspended (just like any other records destruction) if the firm establishes a "records hold" as described above. Appropriate handling of voicemails, including their automatic deletion or preservation, should also be a part of the private equity firm's records management policy. This is a complex and evolving area that requires a specific plan that takes into account the unique circumstances of the firm, its litigation history and exposure, and its IT infrastructure.

As private equity firms grow, the creation of a document retention policy becomes essential to provide efficient access to firm knowledge and to manage the demands of litigation and regulation. In addition to the potential cost savings, a well-implemented, routinely followed policy may help to convince courts and regulators that the firm is acting in good faith when it responds to information requests, lessens the chance of being subject to discovery-related sanctions, and prepares the firm to more efficiently meet deadlines when subject to litigation.

Kirkland has prepared a form of records retention policy designed specifically for private equity firms.

If you are interested in having a policy prepared specifically for your firm, please contact the following Kirkland authors or your regular Kirkland contact.

Margaret A. Gibson, P.C.
Partner
mgibson@kirkland.com
+1 (312) 861-2223

Brian C. Van Klompenberg
Partner
bvanklompenberg@kirkland.com
+1 (312) 861-3217

Marjorie M. Zander
Of Counsel
mzander@kirkland.com
+1 (312) 861-2255

Revised Hart-Scott-Rodino Act Thresholds

PENpoints

The HSR filing thresholds have been increased.

The Federal Trade Commission recently announced revisions to the Hart-Scott-Rodino ("HSR") filing thresholds. The HSR Act requires annual adjustment of the jurisdictional thresholds based on the change in the U.S. gross national product.

Thresholds

Effective February 28, 2008, a Notification and Report Form must be filed when, as a result of an acquisition, the buyer will hold voting securities or assets valued in excess of $63.1 million, if the transaction involves parties with net annual sales or total assets valued at more than $12.6 million and $126.2 million, respectively. If the value of the transaction exceeds $252.3 million, the size of the parties is irrelevant and a Notification and Report Form must be submitted. Last year's and the new thresholds are summarized below.

	2007 Threshold	New Threshold
Size of Transaction	$59.8 million	$63.1 million
	$239.2 million	$252.3 million
Size of Person	$12 million	$12.6 million
	$119.6 million	$126.2 million

Filing fees have not changed and apply to the new thresholds as follows:

Transaction Value	Filing Fee
Greater than $63.1 million but less than $126.2 million	$45,000
Greater than or equal to $126.2 million but less than $630.8 million	$125,000
$630.8 million or more	$280,000

City of Chicago Citing Firms Lacking a Business License

PENpoints

Business licenses are required for "doing business" in the city of Chicago.

A company operating in the city of Chicago must obtain a business license from the city. Periodically, city inspectors visit downtown office buildings looking for unlicensed businesses. A company without a license is typically given a summons like a traffic ticket and an order directing it to obtain a license within a specified period of time (usually 30 days).

Kirkland has learned that city inspectors have, in recent office building sweeps, cited private equity and other firms for failure to have a business license. If your firm is located in Chicago and doesn't have a business license, it should obtain one from the Chicago Department of Business Affairs and Licensing. If your firm has already been cited, it must pay a fine (usually small) and apply for a license before the deadline set forth in the citation. The department's Web site contains detailed information about how to apply for a license and respond to a summons.

Getting a license or even responding to a citation is a fairly simple administrative task. However, if you have questions or need help, please don't hesitate to reach out to your regular Kirkland contact.

PENnotes

Kellogg School of Management Private Equity Conference
Evanston, IL
April 2, 2008

Kirkland partner Margaret A. Gibson will moderate a panel on the Convergence of Private Equity and Hedge Funds at the Kellogg School of Management's annual Private Equity Conference. Kirkland is also a platinum sponsor of this event. For more information, please contact Courtney Hudson at +1 (312) 649-3837 or chudson@kirkland.com.

13th Annual Japanese Reception
Chicago, IL
April 23, 2008

The 13th Annual Japanese Reception will be held in Kirkland's Chicago office on Wednesday, April 23, 2008. The Japanese Reception is an opportunity for clients and Japanese visiting attorneys to share Japanese cuisine and participate in an informal business discussion with Kirkland's Japan client practice group. For more information, please contact Katherine Peters at +1 (312) 616-2934 or kjpeters@kirkland.com.

Fourth Annual Cocktail Reception and Cinco de Mayo Celebration
New York, NY
April 30, 2008

Kirkland's Restructuring Practice will hold its Fourth Annual Cocktail Reception and Cinco de Mayo Celebration for clients and friends of the firm in Kirkland's New York office on Wednesday, April 30, 2008. For more information, please contact Janet Sandridge at +1 (312) 616-2991 or jsandridge@kirkland.com.

Chicago-Kent College of Law Federal Tax Institute
Chicago, IL
May 1-2, 2008

Nationally recongnized tax advisors including Kirkland partner Todd Maynes, who will moderate the opening session, will provide comprehensive updates on recent developments and their impact on tax planning, compliance and controversy techniques. For more information, please contact Janet Sandridge at +1 (312) 616-2991 or jsandridge@kirkland.com.

Chicago
Kirkland & Ellis LLP
Aon Center
200 East Randolph Drive
Chicago, IL 60601
+1 (312) 861-2000
+1 (312) 861-2200 fax

Hong Kong
Kirkland & Ellis LLP
8th Floor, ICBC Tower
3 Garden Road
Central
Hong Kong
+852-3761-3300
+852-3761-3301

London
Kirkland & Ellis
International LLP
30 St Mary Axe
London, EC3A 8AF
United Kingdom
+44 (0)20 7469 2000
+44 (0)20 7469 2001 fax

Los Angeles
Kirkland & Ellis LLP
777 South Figueroa Street
Los Angeles, CA 90017
+1 (213) 680-8400
+1 (213) 680-8500 fax

Munich
Kirkland & Ellis
International LLP
Maximilianstrasse 11
80539 Munich
Germany
+49 (0)89 2030 6000
+49 (0)89 2030 6100 fax

New York
Kirkland & Ellis LLP
Citigroup Center
153 East 53rd Street
New York, NY 10022
+1 (212) 446-4800
+1 (212) 446-4900 fax

San Francisco
Kirkland & Ellis LLP
555 California Street
San Francisco, CA 94104
+1 (415) 439-1400
+1 (415) 439-1500 fax

Washington, D.C.
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
+1 (202) 879-5000
+1 (202) 879-5200 fax

Kirkland & Ellis LLP's Private Equity Practice

Kirkland & Ellis LLP's private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms in every major market around the world.

Kirkland has been widely recognized for its preeminent private equity practice. Kirkland ranked first among law firms for Private Equity Buyouts and Private Equity Fund Formation in the United States by Chambers & Partners in its *The World's Leading Lawyers for Business 2008*. Mergermarket ranked Kirkland first among law firms for both Global and North American Buyouts in its *League Tables of Legal Advisors to Global M&A for Full Year 2007*. In 2007, Kirkland received a first-tier ranking in Private Equity from the *International Financial Law Review* magazine and was named the "International Law Firm of the Year" by *The Lawyer* magazine.

Subscribe to Kirkland PEN

To subscribe to Kirkland PEN, please e-mail kirklandpen@kirkland.com.

KIRKLAND & ELLIS LLP

This publication is distributed with the understanding that the author, publisher and distributor of this publication and/or any linked publication are not rendering legal, accounting, or other professional advice or opinions on specific facts or matters and, accordingly, assume no liability whatsoever in connection with its use. Pursuant to applicable rules of professional conduct, this publication may constitute Attorney Advertising. Prior results do not guarantee a similar outcome.

© 2008 KIRKLAND & ELLIS LLP. All rights reserved.

www.kirkland.com