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Addressing Technology Issues in M&A Transactions

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Speakers



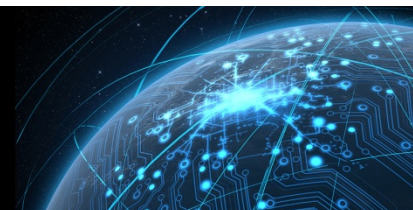
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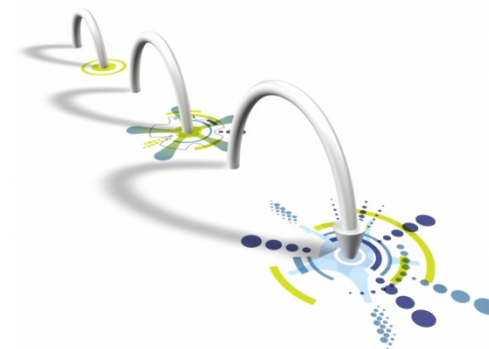
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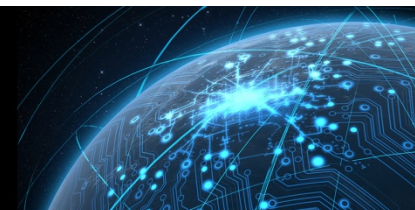
Agenda



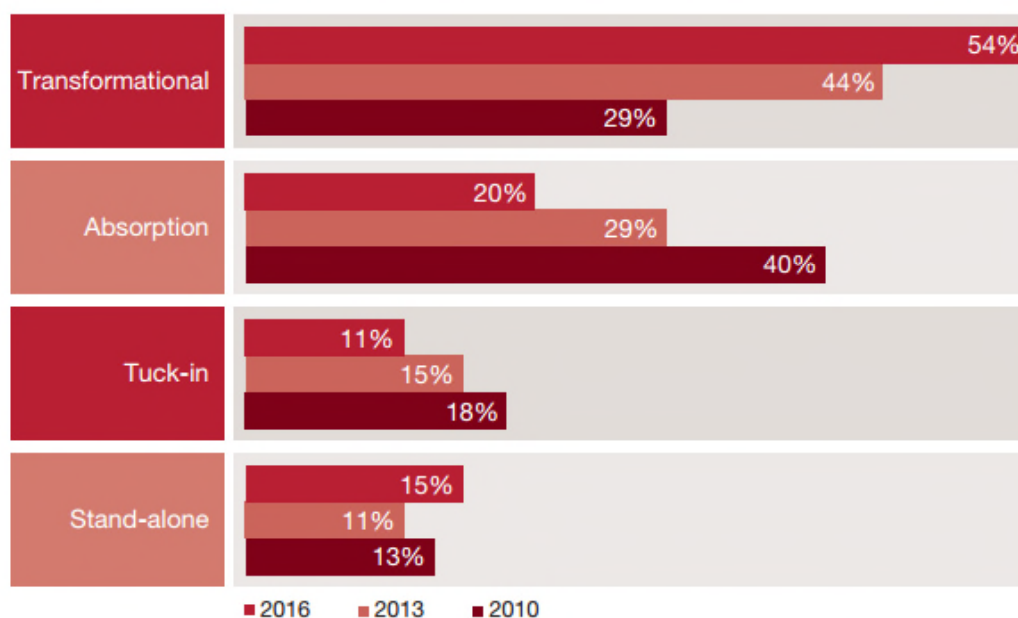
- The changing M&A landscape
- The impact on M&A of the increasingly complex matrix of technology and related contractual relationships that underpin a target's operations
- Key issues to consider when planning for the integration of that complex matrix into the buyer's operations following the acquisition



Changing M&A Landscape



Acquisition type of the largest acquisition in the past three years:



Question: As for the largest merger or acquisition your organization has undertaken in the last three years, how would you characterize it by integration type?

PwC, M&A Integration: Choreographing great performance, p. 6, <http://www.pwc.com/us/en/deals/ma-integration-survey/pwc-m-and-a-integration-survey.pdf>

Importance of Integration

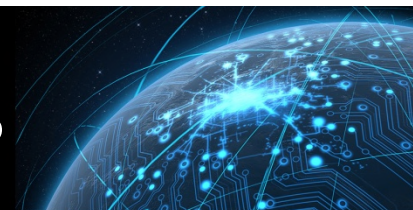


What is the most important factor in achieving a successful M&A transaction for your company?

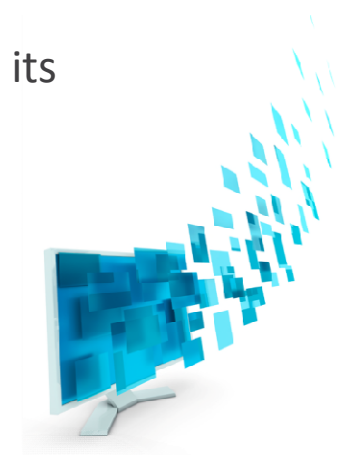


Deloitte, M&A Trends; Year-End Report 2016, p. 17, <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acquisitions/us-ma-mergers-and-acquisitions-trends-2016-year-end-report.pdf>

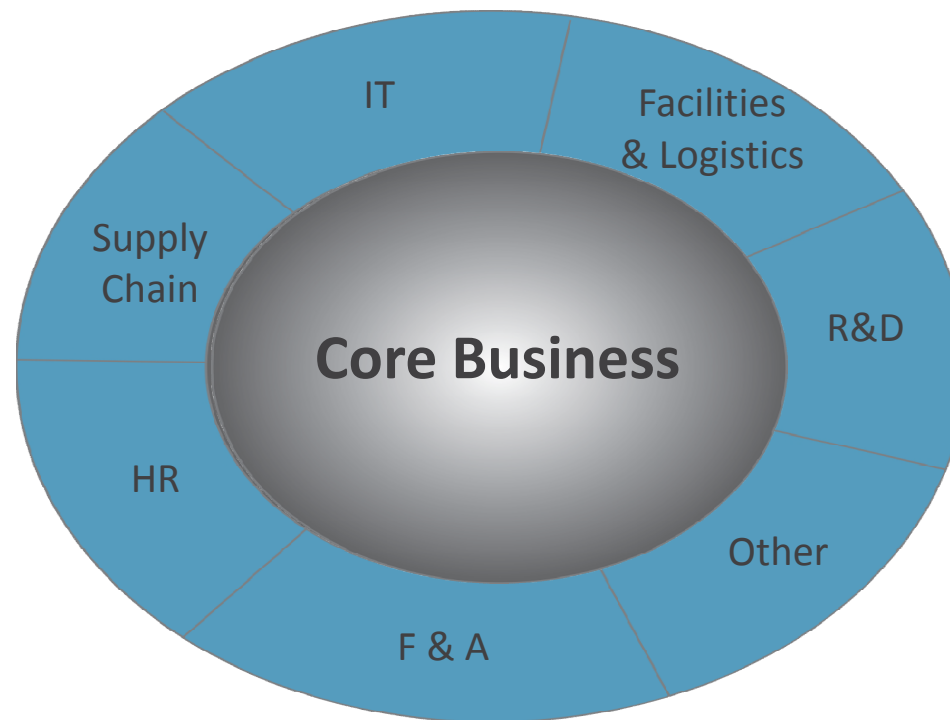
Why Are Technology Issues so Important in M&A?



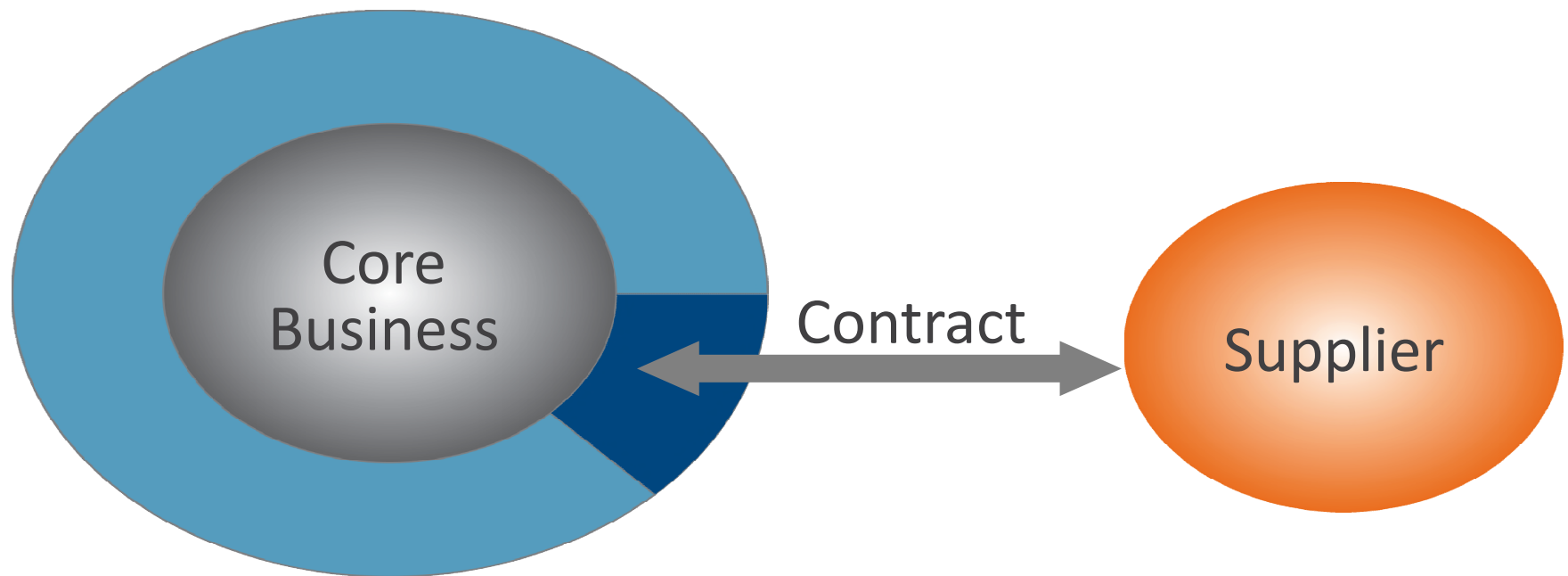
- Technology and related contracts are not an afterthought
 - It is relevant to how a target operates its business.
 - It is relevant to what a seller has to do to separate the target from its wider business.
 - It is relevant to what a buyer has to do to integrate the target into its wider business.



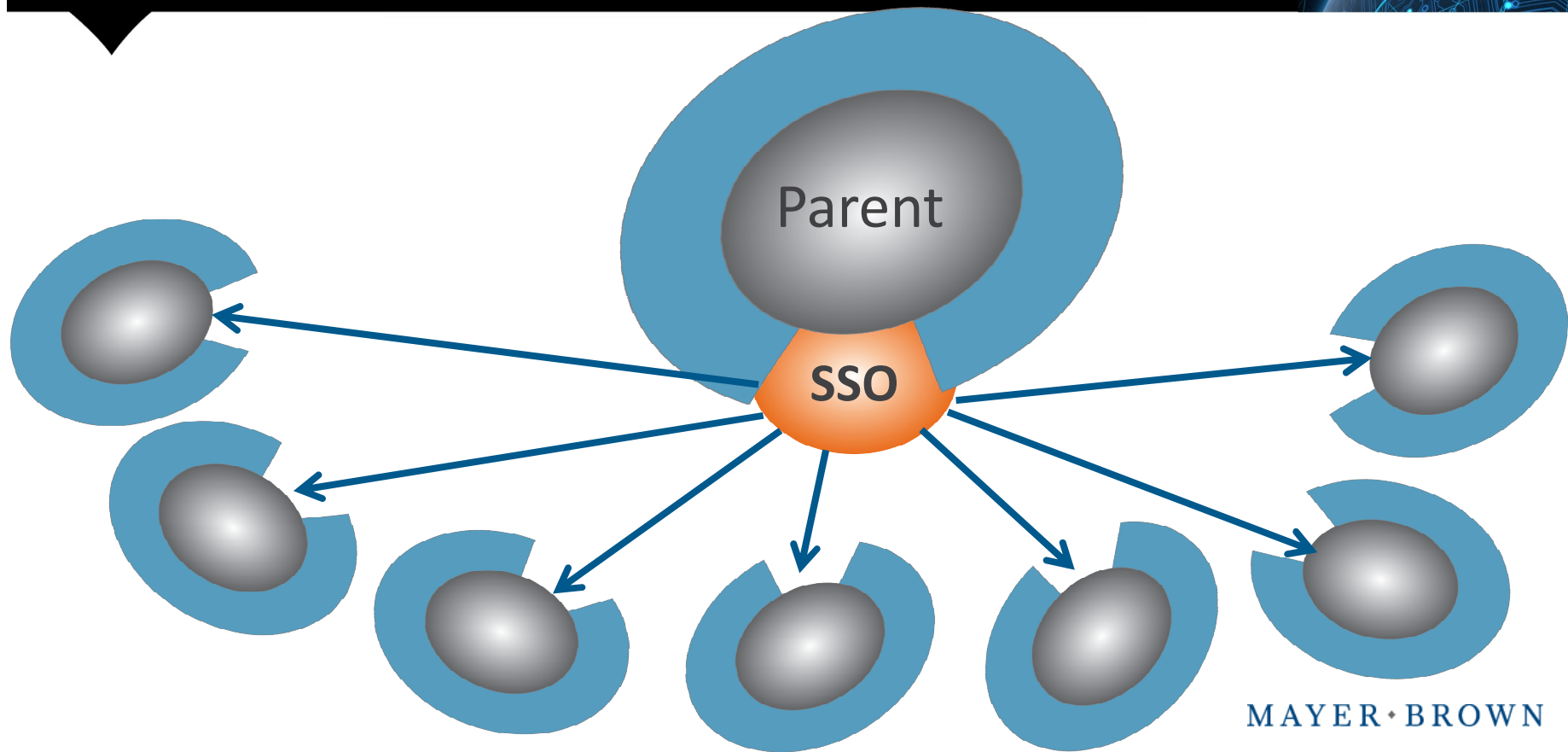
Historical Target Company



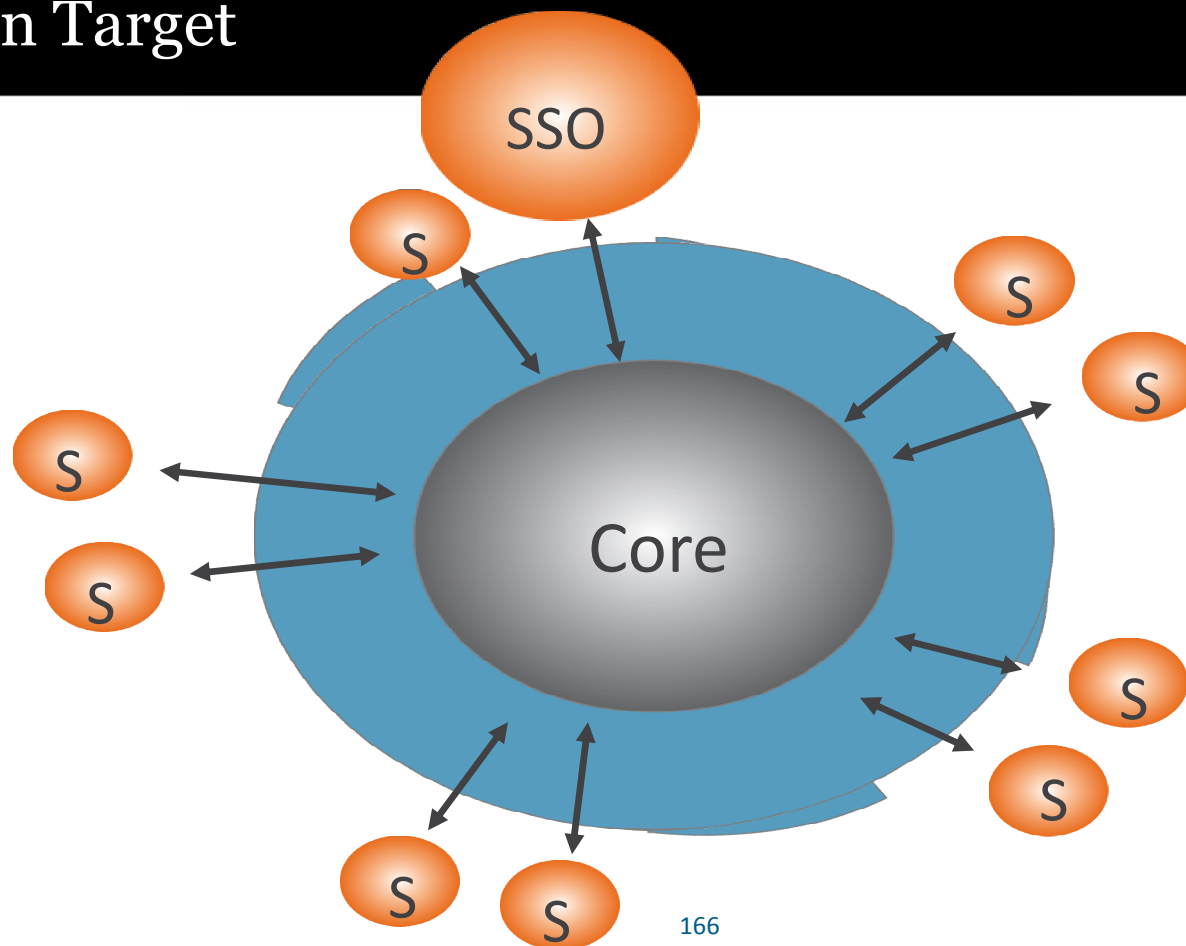
Effect of Outsourcing on Target



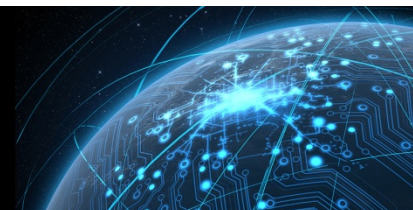
Centralization of Non-core Functions – Further Complexity



Modern Target



M&A Issues for Dedicated Agreements



- What are the obstacles?
 - Prohibitions on assignment and change of control
 - Prohibitions on disclosure
 - Enterprise pricing
- Required consents
 - Allocation of responsibility and costs
 - Timing and workarounds



M&A Issues for Shared Agreements



- Duplicate the existing agreement (“cloning”)
- Divide scope and volume commitments between new and existing agreements (“cleaving”)
- Transition services agreements (TSAs)



What Can Sellers do to Maximize Target Value?



How does a seller increase the attractiveness of the target in this area?

- Standardize contract terms and negotiate M&A-ready agreements
- Maintain a database of agreements
- Analyze the target's internal capabilities and needs
- Structure internal shared services centers to act as if they were outside service providers
- Identify and suspend projects that a buyer may not need

Key Concepts for Making Agreements M&A-Ready



- Permit assignment in connection with M&A activity
- Permit disclosure to potential buyers
- Permit target/buyer to be designated as a service recipient
- Permit continued use by or for target/buyer (at least for a limited period)
- Minimize other restrictions that may impede M&A activity (e.g., use only at named sites or on specific computers)
- Include termination assistance/ramp-down services
- Permit termination without cause (by customer)
- Permit customer to extend or renew
- Permit customer to “clone” or “cleave”



How Far Can a Seller's M&A Planning Go?



- Some sellers looking to ensure the target has contracted for services before sale
- Seller negotiating on behalf of the target with a Service Provider prior to sale
- Implementation of services prior to or close to closing
- Services agreement assigned or novated to the buyer on closing
- Ensuring the seller has a termination right in case the deal doesn't close
- “Hypercare”



Advantages and Disadvantages to Aiming High



- Done properly, it takes another variable out of the M&A equation.
- Costs time and money.
- No two buyers are the same.
 - What if the buyer has an existing setup that it wants to add the new business to?
 - How will the seller know what that is in advance?
 - What if the buyer doesn't like the price (and cynics would say they will claim that in any event in an M&A deal)?
- Flexibility is important.

So What About the Buyer's View of Life in All of This?

- Effective integration is seen as the most important factor in a successful acquisition.
- But several studies indicate that the majority of mergers fail to create significant shareholder value.
- One of the key reasons for this is poor integration in one or more areas;
 - Financial, logistical, cultural, organizational, technological
- Technology is at the core of integration.



Buyers' Integration Needs Will Vary

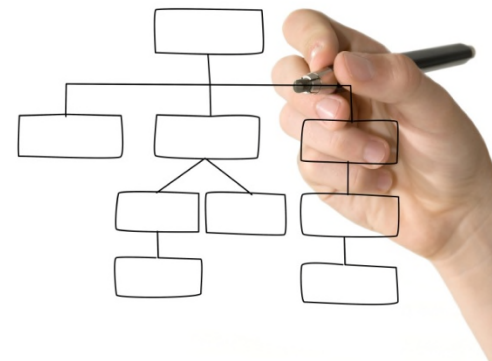


- No two buyers are the same.
 - Financial buyer
 - Operational buyer
- No two targets are the same.
 - Asset purchase of an integrated line of business
 - Stock purchase of a mostly stand-alone company



What Can Buyers do in Advance to Integrate the Target?

- Negotiate expansion and M&A support rights in its own contracts
- Know what its shared services organizations can (and can't) do for acquired businesses
- Ensure there is focused due diligence done during acquisition process
- Assign the right people to the acquisition team
- Have a form of TSA and make it part of its bid
- Have an integration plan



Technology Integration Issues for the Buyer



- How can the buyer maintain flexibility on what services are needed and when?
- How to keep the seller motivated? Remedies for non-performance?
- How will parties allocate costs for new data security reality?
- What if the buyer needs more or less time in transitioning and integrating?
- How to ensure the right technical and operations people are retained?
- What are the performance requirements during the transition period?
- Does the seller have the right to provide the transition services?

Addressing Issues Through TSA Terms



- Term, extension and termination rights
- Right to increase or decrease scope or volume or to modify/customize services
- Commitment of designated key personnel
- Pricing
- Intellectual property rights
- Privacy and data security
- Indemnities and limitation of liability



Key Messages



- Technology and related contractual issues are increasingly important in M&A.
- Sellers and buyers should have technology front and center in their M&A plans.
- Be flexible in M&A planning.
- Negotiating the right TSA has become even more critical.





QUESTIONS?

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