FINANCIAL SERVICES M&A 2022

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LEXOLOGY
Getting the Deal Through

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Lexology Getting The Deal Through is delighted to publish the first edition of *Financial Services M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Introduction

David L Portilla and Minh Van Ngo

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Global M&A activity in the financial services sector remained strong through 2021 and bank M&A is also on track to hit record highs, although a number of announced deals have yet to close as of year-end. The amount and type of acquisitions reflect an industry that is emerging from the covid-19 pandemic and encountering a changing business and regulatory landscape driven by technological innovation. Regulatory developments over the course of 2021 will continue into the new year and may potentially have an impact on attaining regulatory clearance for the significant volume of deal activity that is still pending.

According to data from Bloomberg, globally completed M&A deals in the financial services sector totaled over $554 billion in 2021, a 7.9 per cent increase from 2020. The number of deals rose over 42 per cent from 2020, totalling 8,733 completed deals for the year. In addition, there were 3,145 pending deals totalling approximately $456 billion as of year-end. The value of completed global M&A activity in the bank sector slowed down this year with over $25 billion of deals, a more than 73 per cent decrease compared to 2020. The number of completed deals fell approximately 3.4 per cent to 112 in 2021. However, as of year-end, there were 152 deals totalling over $73 billion that have been announced but have not yet closed

In the United States, M&A activity in financial services also rose, totalling over $284 billion for 2021, an increase of over 38 per cent from 2020. The number of completed deals rose approximately 57 per cent, to 4,972. As at year-end, there were 691 deals still pending, totaling approximately $195 billion. As with global bank M&A activity, US bank M&A activity also fell in 2021, with approximately $11 billion completed deals, a 54 per cent drop compared to the prior year. As of year-end, 52 deals were completed, a drop of approximately 7 per cent compared to 2020. However, there were 82 deals totalling approximately $45 billion that have been announced but have not closed as at year-end.

In the fintech market, venture capital and private equity investment continued to be robust through the first half of 2021. According to the Pulse of Fintech report published by KPMG, during the first half of the year, global fintech investment rose to $98 billion and deal volume hit a new record of over 2,400. Private equity firms invested roughly $5 billion to fintech companies during the first half of 2021, beating the previous high of $4.7 billion in 2018. Geographically, the United States accounted for $42.1 billion of the total venture capital and private equity investment in fintechs during the first half of the year.

The financial services sector is currently undergoing rapid technological transformation, driven by shifting consumer demand for digital financial services and investor demand for digital assets as the effects of the global covid-19 pandemic continue. Companies are increasingly interested in building platforms and super apps with embedded financial services, and technology companies continue their push into the financial services sector, seeking to improve friction points for consumers. With the rise in the number of digital transactions, there is also growing focus on cybersecurity, fraud detection, KYC and B2B services such as banking-as-a-service. These changes in the private sector have greatly accelerated the innovation agenda of the public sector as regulators around the world are gaining a heightened awareness of gaps in the regulation and oversight of new digital services and products and the new competitive landscape that is emerging.

In the United States, the growth of the fintech industry challenges traditional banking models and has led to an increased focus on competition issues more broadly by regulators and lawmakers alike. In November 2020, under the Trump administration, the Department of Justice's Antitrust Division announced that it was seeking public comment on whether its bank merger review guidelines should be revised to reflect emerging trends and whether it should modernise its approach under US antitrust laws. Under the Biden administration, a more lenient review of merger activity is likely to give way to greater scrutiny under US antitrust and bank merger standards. For example, in July 2021, President Biden signed an Executive Order affirming the administration's policy to enforce antitrust laws in a number of major industries, including the banking sector. Among other things, the Executive Order directed US federal agencies to consider using their authorities in furtherance of the administration's policies, calling for the Consumer Financial Protection Bureau to consider rulemaking to facilitate the portability of consumer financial transaction data and for the federal banking agencies to revitalise competitive review of bank mergers under US banking laws. In the coming years, we may see regulatory changes with respect to the factors used by US bank regulators when evaluating bank mergers.

Interest from the private and public sector in blockchain and cryptoassets has also increased dramatically in 2021. The growth of investor interest has also led regulators around the world to focus their attention on blockchain and cryptocurrency technology. In June 2021, the Basel Committee on Banking Supervision issued a public consultation on preliminary proposals for the prudential treatment of banks' cryptoasset exposures. After receiving a number of comments from the banking industry, the Basel Committee on Banking Supervision announced that it will issue a new consultative document by mid-2022 that would further specify the proposed capital requirements. Regulators have also been closely watching the development of stablecoins, which are are cryptoassets designed to have their value pegged to an external reference asset, such as a fiat currency. In October 2021, the Committee on Payments and Market Infrastructures and the Board of the International Organization of Securities Commissions published a consultative report providing guidance for regulators on the application of the Principles for financial market infrastructure to stablecoin arrangements that are systemically important.

In the United States, federal financial regulators and the Treasury Department have been working together on a set of policy frameworks for regulating cryptoassets. Interagency coordination is key in the United States because the federal agencies each have relevant and potentially overlapping authority. The Securities and Exchange Commission and Commodity Futures Trading Commission generally oversee the securities and commodities markets, and the federal bank regulators together exercise broad authority to decide which cryptoasset-related technologies and services US banking organisations may use and offer. Moreover, access to the Federal Reserve's payment system is generally limited to traditional banks. The financial agencies issued a report in November 2021 setting forth certain recommendations for the regulation of stablecoins, focusing on arrangements that are pegged to a fiat-currency. Among other things, the report recommended for the US Congress to 'promptly' pass legislation to require stablecoin issuers to be insured depository institutions and to provide federal agencies with significant regulatory authority over custodial wallet providers and other key participants in stablecoin arrangements. In the absence of congressional action, the report recommended that the US Financial Stability Oversight Council pursue its authority to designate certain activities conducted within stablecoin arrangements as systemically important payment, clearing and settlement activities. In November 2021, the federal banking agencies also issued a brief statement outlining cryptoasset-related issues that the agencies will continue to address throughout 2022, including the safety and soundness expectations with respect to such activities. These recent actions, as well as recent remarks from SEC Chair Gary Gensler analogising the cryptoasset market to the 'Wild West', make clear that cryptoassets and blockchain are at the forefront of the minds of US regulators and that they are focused on the risks that cryptoassets pose to financial stability, investor protection and market integrity.

In summary, developments in this space over the next few years will determine how emerging technologies and partnerships will be integrated into the regulatory agendas of lawmakers and regulators around the world. The policy process is likely to take some time but, ultimately, conclude with more regulation of non-bank actors and more clarity about how and under what conditions banks may engage in cryptoasset activities. Where those lines will be drawn, however, remains up in the air, and could impact the competitive landscape for years to come. Increased M&A activity has also caused regulators to focus on competition issues more broadly, and there could be changes to decision-making processes of regulators that lead to greater scrutiny and review of merger and consolidation activity in this space. It remains to be seen if and whether this will have an impact on the clearance process for bank mergers and mergers of other companies seeking to provide financial services. Finally, we may see M&A activity driven by incumbents that seek to acquire talent and technology in emerging areas, such as cryptoasset-related businesses, and challengers seek to find scale and grow their businesses to compete with established firms.

United States

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MARKET AND POLICY CLIMATE

Market climate

1 How would you describe the current market climate for M&A activity in the financial services sector in your jurisdiction?

The current market climate for financial services M&A is very active. It is not only driven by the usual catalysts such as scale and efficiency, but also by two increasingly important strategic dynamics: (1) many incumbent financial players are trying to introduce the right products and services for their consumer base; and (2) there is emerging a transition during which traditional financial service companies are exploring and expanding their product and service offerings to pre-empt entry by non-traditional companies.

Illustrating the robustness of the market, in the United States financial services M&A totalled over $284 billion for 2021, an increase of over 38 per cent from 2020. The number of completed deals rose approximately 57 per cent, to 4,972. As of year-end, there were 691 deals still pending, totalling approximately $195 billion. On the other hand, US bank M&A activity fell in 2021, with approximately $11 billion completed deals, a 54 per cent drop compared to the prior year. As of year-end, 52 deals were completed, a drop of approximately 7 per cent compared to 2020. However, there were 82 deals totalling approximately $45 billion that have been announced but have not closed as of year-end.

The political and regulatory environment for financial services M&A, and M&A for large banking organisations in particular, may create some headwinds leading into 2022. For example, the administration of President Biden generally speaking is seeking more robust enforcement of antitrust laws, which may deter or present challenges for some deals. In the banking sector, the federal banking agencies are re-evaluating the standards that are used to review bank mergers. Furthermore, the DOJ Antitrust Division in the fourth quarter of 2021 announced it was seeking additional public comments on whether and how the division should revise the 1995 Bank Merger Competitive Review Guidelines. This announcement followed a call for public comment made by the DOJ Antitrust division in September 2020, at the end of the Trump administration. In its most recent announcement, the DOJ said, 'division will use additional comments to ensure that the Banking Guidelines reflect current economic realities and empirical learning, ensure Americans have choices among financial institutions, and guard against the accumulation of market power.' As a result, there may be some period of uncertainty regarding the standards that need to be met for a transaction to receive regulatory approval and that uncertainty may deter or delay some deals.

Government policy

2 How would you describe the general government policy towards regulating M&A activity in the financial services sector? How has this policy been implemented in practice?

Financial services M&A, and in particular M&A by large banking organisations, is highly regulated. Determining whether any particular transaction is subject to a regulatory approval requirement requires analysing the facts about that particular transaction, such as the identity and activities of the buyer and target. The administration of President Biden has signalled a more stringent approach to competition reviews of M&A generally, and the federal banking agencies also have indicated they are reviewing their merger review standards more generally (eg, all factors that govern merger approvals, not just competition). As a result, there may be some period of uncertainty regarding the standards that need to be met for a transaction to receive regulatory approval and that uncertainty may deter or delay some deals.

LEGAL AND REGULATORY FRAMEWORK

Legislation

3 What primary laws govern financial services M&A transactions in your jurisdiction?

Laws that govern financial services M&A include:

- The Bank Holding Company Act;
- The Bank Merger Act;
- The Change in Bank Control Act;
- The Home Owners' Loan Act;
- The Securities Exchange Act;
- The Investment Advisers Act;
- The Investment Company Act;
- The Hart-Scott-Rodino Antitrust Improvements Act;
- state banking laws; and
- state lending, money transmitter, trust and similar laws.

Regulatory consents and filings

4 What regulatory consents, notifications and filings are required for a financial services M&A transaction? Should the parties anticipate any typical financial, social or other concessions?

Regulatory notices or approvals may be required for M&A involving insured depository institutions, depository institution holding companies, investment advisers, broker-dealers and entities holding certain state licences, such as state lending licences. Whether any particular transaction requires approval will depend on the nature of the buyer and target and the structure of the transaction.

Ownership restrictions

5 Are there any restrictions on the types of entities and individuals that can wholly or partly own financial institutions in your jurisdiction?

Generally speaking, there are no restrictions on the types of entities and individuals that can wholly or partly own financial institutions in the United States. However, in many cases the regulatory application process for a transaction requires significant shareholders, officers or directors to submit background check materials to the relevant regulator, including materials for a background check and to verify the financial wherewithal of the applicant. An applicant could be disqualified based on the results of such a background check. For example, an individual with a history of personal bankruptcy or who was an executive of a company that became insolvent may face challenges in obtaining approval to be a significant shareholder, officer or director of a target company. The same may be the case for an individual that previously was subject to a regulatory enforcement action or was a senior executive of a company at the time the company was subject to a regulatory enforcement action.

Directors and officers – restrictions

6 Are there any restrictions on who can be a director or officer of a financial institution in your jurisdiction?

Generally speaking, there are no restrictions on the types of individuals that can be directors or officers of financial institutions in the United States. However, in many cases the regulatory application process for a transaction requires officers or directors to submit background check materials to the relevant regulator, including materials for a criminal background check and to verify the financial wherewithal of the applicant. An applicant could be disqualified based on the results of such a background check. For example, an individual with a history of personal bankruptcy or who was an executive of a company that became insolvent may face challenges in obtaining approval to be an officer or director of a target company. The same may be the case for an individual that previously was subject to a regulatory enforcement action or was a senior executive of a company at the time the company was subject to a regulatory enforcement action.

In addition, directors of national banks are required to be US citizens, although the Office of the Comptroller of the Currency has some discretion to waive this requirement. State banking laws may have similar requirements.

Directors and officers – liabilities and legal duties

7 What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of financial services M&A transactions?

The duties and liabilities for directors and officers in financial services M&A transactions are similar to most other M&A transactions: to achieve the best outcome for their constituents, which, in most cases, are the shareholders. Directors also are subject to obligations under federal banking law and supervisory guidance. Although the relevant standards are not squarely addressed in M&A transactions, a director nevertheless would need to meet those standards when evaluating an M&A transaction, such as by exercising effective challenge of management and considering whether and the extent to which the transaction is consistent with the company's strategy and risk tolerance.

Foreign investment

8 What foreign investment restrictions and other domestic regulatory issues arise for acquirers based outside your jurisdiction?

The Committee on Foreign Investment in the United States (CFIUS) has the authority to review certain foreign investment transactions to determine the effect of such transactions on the national security of the United States. CFIUS can review any transaction that could result in foreign control of a US business, certain types of non-controlling but non-passive investments by a foreign person in a US business and certain real estate transactions. With limited exceptions, filing with CFIUS is voluntary, although closing a transaction that is within CFIUS's jurisdiction without its approval entails the risk that CFIUS subsequently imposes conditions or, in extreme cases, forces a divestiture. Certain transactions that involve (1) a US business that deals with critical technology or (2) a foreign investor that is substantially owned by a foreign government must be notified to CFIUS at least 30 days prior to closing. CFIUS regularly reviews financial services M&A transactions, particularly where the US business in question deals with large amounts of sensitive personal data or is considered to be critical infrastructure.

In addition, in the United States, there is a specialised regulatory framework that applies to foreign banking organisations. Generally, a foreign banking organisation is any non-US entity that controls a US-insured depository institution or has a branch or agency in the United States. This framework generally does not apply US law to activities conducted outside the United States, but in some cases there can be nuance and complexity regarding certain non-US activities that are subject to US law. In addition, notice to the Federal Reserve (and potentially state regulators) can be required if there is a change of a control of a foreign banking organisation that has a branch or agency in the United States. Further, in some cases, as part of reviewing a transaction, the Federal Reserve or other regulators may need to analyse whether the law of the jurisdiction of a foreign acquirer imposes consolidated comprehensive supervision or includes certain reciprocity for US firms acting in that jurisdiction.

Competition law and merger control

9 What competition law and merger control issues arise in financial services M&A transactions in your jurisdiction?

In the United States, certain acquisitions by or of banking organisations require banking agency prior approval and such approval includes a review of the competitive effects of the proposed transaction. If banking agency approval is not required, then a filing to the Federal Trade Commission and the Department of Justice (DOJ) Antitrust Division under the Hart-Scott-Rodino Act (HSR Act) is required. If only a portion of a transaction requires banking agency prior approval, an HSR Act filing may be required for the remaining portion of the transaction. Certain transactions that require banking agency approval due to the size of the parties in the transaction can require an HSR filing even though the transaction in its entirety is subject to prior banking agency approval. Bank M&A transactions are reviewed from a competition perspective concurrently by the DOJ Antitrust Division and the relevant banking agency. Generally speaking, the DOJ will furnish a report to the relevant banking agency on the competitive factors regarding bank M&A transactions. The DOJ and the federal banking agencies have issued guidelines regarding how they evaluate bank mergers from a competition perspective. Furthermore, the DOJ Antitrust Division in the fourth quarter of 2021 announced it was seeking additional public comments on whether and how the division should revise the 1995 Bank Merger Competitive Review Guidelines. This announcement followed a call for public comment made by the DOJ Antitrust division in September 2020, at the end of the Trump administration. In its most recent announcement, the DOJ said, 'The division will use additional comments to ensure that the Banking Guidelines reflect current economic realities and empirical learning, ensure Americans have choices among financial institutions, and guard against the accumulation of market power.' Applicants generally may not consummate the transaction within 15 days of receiving the banking agency's approval; if the DOJ has provided adverse comments, that waiting period can be extended to allow the DOJ time to exercise its authority. In addition, state banking agencies often require prior approval or notice of transactions affecting regulated institutions within their jurisdiction. Financial services transactions outside of the banking sector generally are subject to the HSR Act process.

DEAL STRUCTURES AND STRATEGIC CONSIDERATIONS

Common structures

10 What structures are commonly used for financial services M&A transactions in your jurisdiction?

For public companies, the structures commonly used are mergers, tender offers or asset sales. Tender offers are theoretically faster than the merger process but the timeframe is driven by the time frame for obtaining regulatory approval – which will depend on each particular company, but generally will take three months or longer. In a merger, the risk of an interloper bid is eliminated once the target holds a shareholder vote. This risk persists until closing for a tender offer. Asset sales may provide more flexibility in terms of what assets are desired and what liabilities to leave behind for any particular transaction. However, asset sales may also require more third-party consents than a merger or tender offer.

For private companies, the structures commonly used are mergers, stock purchases or asset sales. The advantage of stock sales is that they give rise to direct contractual privity with the buyer and selling shareholders. It is also more common to have indemnification rights. However, one consideration to a stock sale is that every shareholder must sign up for the deal, which could be difficult for companies with a broad shareholder base. Private mergers do not give rise to direct privity between the acquiror and the target's shareholders, but generally only require that shareholders representing a majority of the voting interests of the target support the merger (the approval threshold may be higher depending on state law or the target).

Time frame

11 What is the typical time frame for financial services M&A transactions? What factors tend to affect the timing?

Generally speaking, under normal circumstances, a transaction involving review by a banking agency requires several months to obtain approval. Statistics published by the Federal Reserve state that the average processing time for M&A proposals is over 70 days and the median time is 47 days. If the proposal receives adverse public comments, the average processing jumps to 232 days. In 2022, the banking agencies are undertaking a re-evaluation of their merger review standards. Furthermore, the DOJ Antitrust Division in the fourth quarter of 2021 announced it was seeking additional public comments on whether and how the division should revise the 1995 Bank Merger Competitive Review Guidelines. This announcement followed a call for public comment made by the DOJ Antitrust division in September 2020, at the end of the Trump administration. In its most recent announcement, the DOJ said, 'The division will use additional comments to ensure that the Banking Guidelines reflect current economic realities and empirical learning, ensure Americans have choices among financial institutions, and guard against the accumulation of market power.' As a result of this review, processing times may exceed historical averages, both because of the uncertainty created by the re-evaluation and because the staff may take longer to review transactions under new standards (once adopted). A change of control application for a broker-dealer must be submitted to the Financial Industry Regulatory Authority (FINRA) at least 30 days prior to closing of a transaction. Technically, a transaction may close after this 30-day period has expired, provided that FINRA has neither rejected the application or prohibited the transaction from closing. Closing a transaction prior to obtaining approval, however, entails the risk that FINRA subsequently imposes conditions or rejects the application.

Tax

12 What tax issues arise in financial services M&A transactions in your jurisdiction? To what extent do these typically drive structuring considerations?

There are several tax issues particular to financial services M&A that can affect structuring. First, domestic tax-free rollover transactions often require the target bank to be initially situated as a first tier subsidiary of the acquiror, and subsequent repositioning of the target bank (which usually is permissible for tax purposes) is sometimes problematic under the relevant banking laws. Second, taxable acquisitions of US financial institutions by non-US acquirors often are accompanied by the introduction of intercompany debt, which usually is permissible for tax purposes but is sometimes problematic under the banking law requirements applicable to intermediate holding companies. Third, banks often hold material amounts of tax-advantaged life insurance on their executives, and the merger of a target bank into an acquiror bank can undo those tax advantages if not structured properly. Finally, the tax information reporting required of financial institutions is often quite onerous, and acquirors in carve-out transactions may need to craft special indemnities for post-closing reliance on target reporting systems pending the ability to integrate (and re-verify) customer data.

ESG and public relations

13 How do the parties address the wider public relations issues in financial services M&A transactions ? Is environmental, social and governance (ESG) a significant factor?

In the context of transactions that require banking agency review, there is no explicit review of ESG factors. However, the banking agencies could take the position in the future that they have the authority to consider ESG factors. For example, one of the factors the agencies are required to consider is the convenience and needs of the community to be served. Historically this factor has been analysed by reference to the acquiror's performance record in meeting its Community Reinvestment Act obligations. However, it is feasible for the banking agencies to take into account a wider range of considerations when analysing this factor. Moreover, ESG factors may be necessary to address to build public support for a transaction from shareholders and other stakeholders. For example, to avoid attracting adverse public comments on an application for a banking organisation transaction, community groups and other public interest groups may seek for the acquiror to make certain ESG commitments. A failure to make those commitments could lead to adverse public comments on the application, which can delay or derail an approval process.

Political and policy risks

14 How do the parties address political and policy risks in financial services M&A transactions?

Political and policy risks are largely addressed through the contractual standard that governs the level of efforts the acquiror must apply to obtain regulatory clearance. For example, an acquiror may be required to apply reasonable best efforts, with this term defined to exclude any actions that have a material adverse effect on the assets or financial condition of the acquiror or the target business. This standard can be adjusted to allocate risk between the parties. As an example, the acquiror could be required to take any and all actions necessary to receive regulatory clearance, irrespective of the effect those actions would have on the acquiror or target business. Another way that political and policy risks are managed is through the 'material adverse effect' (MAE) provisions in the agreement and through closing conditions. For example, MAE provisions, which are linked to closing, often carve out changes in law. Thus, a change in law would not, on its own, be sufficient for an MAE to occur, such that closing conditions are not met. In addition, transactions typically have an 'outside date', by which all closing conditions must be met, including obtaining regulatory clearance. If regulatory clearance is not obtained by such date, the parties would not be required to close. In this way, the outside date can shift the risk of a delayed regulatory review processing to the seller.

Shareholder activism

15 | How prevalent is shareholder activism in financial services M&A transactions in your jurisdiction?

There has not been a substantial change in the prevalence of shareholder activism in financial services M&A in the United States. However, activist investors have been increasingly targeting technology, media and telecom companies, followed by industrial services and healthcare and life sciences companies. While the overall number of activist campaigns slightly declined in 2021 compared to 2020, the number of ESG-related campaigns, and in general the impact and success of activist campaigns, has marginally risen, with one prime example being Engine No. 1's recent successful activist campaign against ExxonMobil. From January to August 2021, 13 per cent of activist campaigns were successful compared to the 11 per cent for the same period in 2020.

Third-party consents and notifications

16 | What third-party consents and notifications are required for a financial services M&A transaction in your jurisdiction?

In an asset sale, third-party consents may be triggered to assign contracts. In a stock sale or merger, there may be contracts with anti-change of control provisions, but this is generally less common than anti-assignment provisions.

DUE DILIGENCE

Legal due diligence

17 | What legal due diligence is required for financial services M&A transactions? What specialists are typically involved?

Legal due diligence for financial services M&A transactions is similar to due diligence for all other transactions, with incremental diligence to address regulatory compliance issues. Specialists that help with regulatory compliance diligence include experts in bank, securities, asset management and digital asset regulation. In the context of banking organisations, regulatory diligence is important to help ensure that the target does not face any issues that would imperil regulatory clearance of the proposed transaction. When conducting due diligence with respect to a banking organisation, it is important to be sensitive to restrictions on the sharing of 'confidential supervisory information' (CSI). CSI includes exam reports and other communications between a banking organisation and its bank regulator. This material may not be shared with a third party, subject to limited exceptions or the approval of the relevant regulator. Sharing with a potential transaction counterparty is not such an exception and the regulators typically would not provide approval for sharing CSI with such a party. As a result, the parties need to work collaboratively for the acquiror to be able to understand the business and its regulatory posture without sharing CSI.

Other due diligence

18 | What other material due diligence is required or advised for financial services M&A transactions?

For financial services M&A transactions, cybersecurity and data privacy have become priority diligence issues. In addition, for technology-related companies, it is important to diligence the actual business conducted (especially as it relates to consumers and regulations). For example, in the payments space, whether the target is a merchant of record is an important fact that can give rise to issues depending on the circumstance.

Emerging technologies

19 | Are there specific emerging technologies or practices that require additional diligence?

Yes, blockchain and cryptoasset activities require specific diligence to help ensure that the target is conducting the activities in compliance with applicable regulations and with due regard for data privacy and intellectual property standards. In addition, because of the novelty of some cryptoasset-related activities, it may be necessary to confirm whether the target has been resolving legal ambiguities consistent with the acquiror's risk appetite and more generally has been applying risk management practices consistent with the acquiror's standards. The due diligence for cryptoasset activities, therefore, involves business due diligence, risk and operational diligence, and legal diligence.

PRICING AND FINANCING

Pricing

20 | How are targets priced in financial services M&A transactions? What factors typically affect valuation?

In financial services M&A transactions, the pricing depends on the target. For bank deals, value is often expressed by the ratio of the price to tangible book value. For branch deals, value may be expressed as a premium to deposits assumed by the buyer. For financial technology companies or financial services companies, often the pricing will involve a multiple on revenue or EBITDA. For whole bank acquisitions, pricing will typically include a multiple on the tangible book value.

Purchase price adjustments

21 | What purchase price adjustments are typical in financial services M&A transactions?

Earn-outs may be available as a way to bridge valuation gaps. For traditional bank deals, there is typically a net asset adjustment. For many deals, there may be a traditional working capital adjustment.

Financing

22 | How are acquisitions typically financed? Are there any notable regulatory issues affecting the choice of financing arrangements?

Bank deals have limits on their ability to incur debt due to regulatory ratios. Any debt must be within certain limits pursuant to applicable regulatory guidance or rules. Otherwise, consistent with other industries, debt financing may be accomplished through debt commitment obligations at signing that ensure the required debt will be available at closing.

DEAL TERMS

Representations and warranties

23 What representations and warranties are typically made by the target in financial services M&A transactions? Are any areas usually covered in greater detail than in general M&A transactions?

For financial services deals, targets are expected to make customary representations. In addition, there has been significant focus on representations with regard to compliance with laws and regulations such as the Foreign Corrupt Practices Act of 1977, data integrity and privacy and intellectual property.

Indemnities

24 What indemnities are typical for financial services M&A transactions? What are typical terms for indemnities?

Financial services deals have customary indemnities for breaches of representations and covenants, customary survival periods from 12 to 24 months, and caps ranging from 5 to 20 per cent. In addition, certain key areas of focus such as compliance with laws and regulations, intellectual property, data integrity and privacy may have longer indemnity durations (such as five years or a statute of limitations) and a higher cap ranging from 30 to 40 per cent of the purchase price. As with other industries, the use of representation and warranties insurance has become popular in financial services M&A, but the parties should be attentive to exclusions in the representations and warranties insurance that are specific to financial services industries (eg, exclusions for cybersecurity).

Closing conditions

25 What closing conditions are common in financial services M&A transactions?

For acquisitions of banking organisations or broker dealers, a common closing condition may be regulatory approval. For acquisitions of investment advisers, a common closing condition may be client consents and there also may be closing conditions related to minimum assets under management.

Interim operating covenants

26 What sector-specific interim operating covenants and other covenants are usually included to cover the period between signing and closing of a financial services M&A transaction?

Transactions involving banking organisations may have interim operating covenants regarding making loans to certain borrowers (such as loans that would present single counterparty credit risk concern or loans that are subject to regulatory focus due to the lack of creditworthiness of the borrower). In addition, for depository institutions, the typical covenant to avoid incurring debt and liens normally would include carveouts for deposit liabilities and certain wholesale borrowings. To the extent the target has particularly important customer relationships, the buyer may seek an interim operating covenant that limits the ability of the target to modify the terms of those relationships (an example would include important advisory clients for an investment adviser) or to introduce the buyer to those clients for purposes of integration planning.

DISPUTES

Common claims and remedies

27 What issues commonly give rise to disputes in the course of financial services M&A transactions? What claims and remedies are available?

Common issues that may give rise to disputes include issues around regulatory compliance, data integrity and privacy and cybersecurity. Remedies differ based on the timing of the issue's discovery. If issues are discovered between signing and closing, and those issues may give rise to disagreements, then the target may be requested to take corrective action or, if the issue is sufficiently severe, the buyer may refuse to close. If the issue is discovered after closing and target shareholders have granted indemnity to the buyer, then the buyer's recourse will be that indemnification. In public M&A, it is typical for the buyer to not have any post-closing recourse.

Dispute resolution

28 How are disputes commonly resolved in financial services M&A transactions? Which courts are used to resolve these disputes and what procedural issues should be borne in mind? Is alternative dispute resolution (ADR) commonly used?

Generally, Delaware and New York law, applied by Delaware and New York courts, are the two most popular governing laws because of their maturity with respect to commercial transactions. Alternative dispute resolution is not commonly used; instead, it is more common to rely on the courts, especially in Delaware and New York, since the courts can act very quickly and the judges are often highly experienced in commercial law issues.

UPDATE AND TRENDS

Trends, recent developments and outlook

29 What are the most noteworthy current trends and recent developments in financial services M&A in your jurisdiction? What developments are expected in the coming year?

In the United States, there has been a wave of recent transactions in the banking industry, with some firms seeking to acquire targets to achieve scale and other firms (particularly non-US banks) seeking to sell assets to align with a strategic decision about the US market. Some observers believe even more consolidation is necessary as a matter of industrial logic, particularly for regional banks that are on the smaller end of the size spectrum. At the same time, there is increasing concern from the banking agencies and other policymakers about concentration and its effect on competition. In addition, given the growth of cryptoasset markets, there remains an open question of how those activities will be incorporated into the regulatory perimeter and, for example, whether banking organisations may seek to buy cryptoasset companies, rather than build the capability on their own. Over the coming year, the banking agencies are expected to continue their re-evaluation of their merger review standards and they could implement changes to those standards. In addition, the banking agencies also provide more clarity on the scope of cryptoasset activities that are permissible for regulated banking organisations. Each of these actions has the potential to have meaningful effects on the financial services landscape and what deals are palatable from a regulatory perspective for firms of all sizes.

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