Managing Regulatory Risk in Bank M&A

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We expect the slowly developing but increasingly perceptible trend toward community and regional bank consolidation in the United States to continue in 2015. In connection with growing bank M&A activity, closing risk in the current bank regulatory environment has become a top-of-mind issue for senior executives and boards of directors of banks mulling potential M&A transactions. For those institutions looking to enter the bank M&A fray, a proactive strategy for managing regulatory risk will be key to successfully executing bank M&A transactions in 2015.

However, significant delays in transaction closings due to regulatory concerns or issues in well-publicized situations such as M&T/Hudson City, Cullen/Frost/WNB Bancshares and BancorpSouth's pending acquisition of two community banks in Louisiana and Texas, among others, have made an impression in the minds of many bank executives. Indeed, perceptions of the regulatory climate for bank M&A remain a significant chilling factor for a resurgence in deal activity in the banking industry. Both buyers and sellers are concerned about "hanging out there in the market" for prolonged periods of time due to difficulties in obtaining regulatory approvals, which create potential franchise disruption and instability as well as openings for market/shareholder criticism. As a result, boards of directors of potential sellers are requiring a more comprehensive understanding of the buyer's regulatory standing in earlier stages of transaction discussions, while buyer executives considering an acquisition are seeking greater comfort from regulators prior to any deal announcement regarding the prospects for timely transaction approval.

We believe understanding and managing regulatory risk will remain a dominant theme for bank M&A in 2015. In particular, bank executives and boards will need to focus on the following three areas of managing regulatory risk to successfully navigate bank M&A discussions in 2015:

- **Regulatory Reverse Due Diligence—**Reverse due diligence on a buyer's regulatory standing must be among the top priorities of seller boards from the outset of transaction discussions. Navigating regulatory reverse due diligence frequently involves thorny issues, including the limitations involved in communications around confidential supervisory information, but now has become a critical step for potential sellers in identifying regulatory concerns in connection with a transaction.

  Likewise, potential buyers increasingly are called upon to proactively provide sellers with comfort regarding their regulatory standing and "approvability" and will face many of these same issues in seeking to meet these seller requests, particularly at the early stages of a deal when a buyer is not yet in a position to obtain from the target bank the confidential financial and operating information necessary for the buyer to adequately assess the facts relevant for regulatory approval of the deal.

- **Pre-Announcement Regulatory Strategy—**Virtually no bank M&A transaction in today's environment is getting signed without significant pre-announcement discussions with the regulators. A considered pre-announcement regulatory strategy is essential to putting the proposed transaction in the best position to close without significant delays. A successful pre-announcement regulatory strategy requires balancing the risks of meeting with the regulators too early in the process when the parties do not yet have the requisite facts in place to properly respond to regulators' questions about the transaction with the potential costs and delays in transaction timing if regulatory conversations begin too late in the process.

  In addition, appropriate sensitivity to the regulatory dynamics in pre-announcement discussions is critical to accurately gauging regulatory receptivity to the transaction while remaining realistic about the degree of comfort that can be gained from such discussions.

- **Regulatory Risk Allocation—**Deal parties increasingly are focusing on the regulatory provisions in transaction agreements, including the covenant to seek regulatory approvals, the definition of a "burdensome regulatory condition" exception to the buyer's obligation to obtain regulatory approvals and complete the deal, and termination rights that affect risk allocation relating to the regulatory process (including the "drop-dead" date). These provisions form the backdrop for post-announcement deal dynamics in the event regulatory concerns or issues arise while the deal is pending.

  In addition, deal parties have considered other contractual provisions to further address regulatory risk allocation, including regulatory reverse termination fees, ticking fees in the event of regulatory delay, covenants restricting preclosing activities of a buyer that would impede or delay regulatory approval, and provisions that permit a seller to explore alternative third-party proposals if the transaction closing is delayed due to buyer regulatory issues. On the whole, these other risk-allocation provisions have not become a part of the final transaction documentation with any regularity or frequency, but they increasingly form part of the toolkit of deal makers during transaction negotiations.