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# THE LATEST WRINKLE IN M&A: IDENTITY THEFT RISK

Sometimes a deep dive can go too deep&mdash;look before you leap

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As I mentioned in various recent blogs, not only has the mood of the industry improved, but so have the financials. Access to capital is getting a little bit easier, and as spring approaches, bankers' minds are turning toward mergers and acquisitions.

What is the difference between a merger and an acquisition?

Answer: Not much really.

Technically, I could fill a few pages about the differences.

But the reality is, if the bank wants to engage in "M&A," it simply means the banker is either considering acquiring another bank or branch, or selling his or her own institution.

A critical two-way street: due diligence

In any merger and acquisition transaction there are numerous moving parts. If you are selling, you need to find a buyer; you need to figure out what your bank is worth; you need to figure out who controls the vote; what the mood of the board is; what the mood of the ownership is; and more.

Whether you are buying or selling, due diligence is often an important piece of the process. If you are selling your bank for stock, you need to do due diligence of the buyer, no matter how large the buyer is, to make sure you have some idea what you are getting. For example:

## 1. Is the stock liquid?

2. Does it have decent investment quality (likely to increase in value rather than decrease)?
3. What will be the tax treatment to the recipient of the stock?

Even if you are a seller selling your bank for cash, you need to do due diligence on the buyer. This is primarily to make sure the buyer has or can get the cash and can get regulatory approval.

If you are a buyer, the need to do due diligence is obvious. Your bank and holding company need to know what it is buying. The buyer's due diligence will be a very thorough test of asset quality, compliance, corporate governance, contingent liabilities, and everything else, since the result of a merger transaction is that all assets and liabilities, known or unknown, contingent or otherwise, pass to the buyer.

Due diligence and a new wrinkle: identify theft risk

Due diligence sounds easy, but often it is not.

I have had several unusual issues arise in due diligence, either on behalf of a buyer or a seller.

We had one large regional object to our desire to do due diligence of the regional when our client was accepting north of \$20 million worth of their stock. Management finally relented and allowed us to do the due diligence that we thought was appropriate, i.e. interview the top six officers, review the minutes, and other documents.

Even though due diligence is always done under a Confidentiality Agreement, the parties need to be careful what documents they are letting out of the bank. It is typically not appropriate to provide the party receiving the due diligence material with account numbers, Social Security numbers, names, addresses, passwords, shoe sizes, and the like.

None of that is necessary for a loan or deposit due diligence. It is not a good due diligence practice to let that information outside the bank. Keep in mind, acquisition due diligence is designed solely to allow the party doing the due diligence to get a comprehensive handle on all relevant risk issues at the bank. Although a party to due diligence under most Confidentiality Agreements has a right to look at everything, with all of the identity theft possibilities available, keep an eye on the specific data provided.

As noted, there are many many moving parts in an acquisition transaction as either the buyer or seller-due diligence is only one. I will cover in additional blogs some other practical issues associated with the upcoming merger and acquisition wave.

If you have specific questions you would like to see addressed along the way, please email them to me as soon as possible. The address appears below

#### About the Author

Jeff Gerrish is chairman of the board of Gerrish McCreary Smith Consultants, LLC, and a member of the Memphis-based law firm of Gerrish McCreary Smith, PC, Attorneys. He is a frequent contributor to ABA Banking Journal and ABA Bank Directors Briefing, and frequently speaks at ABA events and telephone briefings.

Gerrish formerly served as Regional Counsel for the Memphis Regional Office of the FDIC, with responsibility for all legal matters, including cease-and-desist and other enforcement actions. Before coming to Memphis, Gerrish was with the FDIC Liquidation Division in Washington, D.C. where he had nationwide responsibility for litigation against directors of failed banks.

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