

Bank Mergers – Overview and Issues for Potential Acquirees

**Bank Director Workshop
NACD and AABD
Fort Lauderdale, Florida**

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I. Starting Point – What is strategic vision of your bank and its future?

- A. How is the bank doing as an independent institution?
 - B. Has the bank played out its vision/story so that being acquired is more attractive than remaining independent?
 - C. How does the current turmoil in the banking industry change things?
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II. Creating a Structure Within the Bank To Act On The Strategic Objectives

- A. It means educating the Board and senior management as to fiduciary duties and procedural matters to ensure that contacts are handled appropriately and insider trading laws and rules are adhered to
 - B. It also means having a structure at the Board of Directors level that makes sense
 - C. It means identifying and retaining qualified outside experts to assist the bank
 - D. That means having dedicated personnel to carry out an acquisition or sale
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III. How to Manage the Process

- A. Which is better – being controlled by outside parties or controlling the process yourselves?
 - B. How to plan for different eventualities
 1. How to respond to unsolicited inquiries
 2. How to respond to a call from the media or a shareholder
 3. How to decide whether to remain independent or sell to another institution?
 4. What to plan for before marketing the bank for sale?
 5. How should the bank be marketed for sale?
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IV. Fiduciary Duty Standards for Boards

- A. Duty of Care
 - B. Duty of Loyalty
 - C. Business Judgment Rule
 - D. Importance of Process
 - E. Situations Triggering Higher Court Scrutiny
 - F. "Just Say No" and Defensive Measures
 - G. Circumstances Requiring Negotiation of Sale Price
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V. Forms of Acquisitions

A. Mergers & Consolidations

B. Purchase & Assumption Transactions

C. Tender Offers

VI. Definitive Agreements, Letters of Intent, and Indications of Interest

- A. Why avoid letters of intent?
 - B. Use of confidentiality agreements to facilitate the due diligence process
 - C. Using “indications of interest”
 - D. The importance of due diligence before the definitive agreement is executed
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VI. Definitive Agreements, Letters of Intent, and Indications of Interest (cont'd)

- E. Anatomy of a definitive agreement
 1. Prefatory material
 2. Description of form of acquisition and form and amount of consideration to be paid by acquirer
 3. Timing and mechanics of closing
 4. Representations and warranties
 5. Covenants
 6. Closing conditions
 7. Termination Rights
 8. Post-closing matters
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VI. Definitive Agreements, Letters of Intent, and Indications of Interest (cont'd)

- F. The eight most common provisions negotiated in definitive agreements
 1. Amount and form of consideration, use of collars, consideration adjustments, and when and how consideration is paid
 2. Reps and warranties as to allocation of risk between the parties
 3. The extent to which the targets is limited in activities during the covenant period
 4. Fiduciary outs and break-up fees
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VI. Definitive Agreements, Letters of Intent, and Indications of Interest (cont'd)

5. Definition of “material adverse change” and other rights of termination by acquirer
 6. Non-compete and employment agreements for key target employees
 7. Indemnification provision protecting target directors
 8. How to handle stock options that are vested or will vest upon the effectiveness of the merger
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VII. Regulatory Approvals of Merger

VIII. Special Issues with Sub S Banks

IX. Public Company Issues

- A. When and What to Disclose
 - B. Representations and Warranties of Public Companies
 - C. Insider Trading Issues
 - D. Certifications Post-Closing – Sec. 404
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