TOP 20 MERGERS AND ACQUISITIONS DUE DILIGENCE ITEMS FOR BANKS AND BUYERS

Below is a list of the top twenty most significant legal and business due diligence items that are typical for a bank and buyer in a merger and acquisitions transaction. If possible, all the documents referenced below should be provided by the seller in an organized online data room to enable the bank and buyer to conduct due diligence in an efficient matter. An organized data room also allows for digital tracking of documents and ease of use for all involved. The bank will require additional documents from buyer which be included in its loan application for buyer. The buyer documents are outside the scope of this article.

1. **Disclosure Schedule.** Review the LOI and Purchase Agreement. The bank and the buyer's counsel should be looking for the following in the disclosure schedule;

2. **Financials.** Seller's historical and current financial statements, as well as seller's projections of its future performance. Review for reasonableness, review for abnormalities, and assess whether cash flow matches accounts and sales. Also, review the EBITDA margin.

3. **Material Contracts.** All material contracts and commitments of the seller are listed and significant time for review has been allotted as this item is usually the most time consuming. It is also necessary to provide enough time to observe any contractual consent time periods for change of control.

4. **Corporate/Entity Documentation.** Complete and current organizational documents and general corporate records of the seller. Review for any risks, requirements or abnormalities.

5. **Compliance.** Seller has accurately provided what it is subject to and has complied with as far as regulatory requirements.

6. **Property.** All property owned by the seller or otherwise used in the business has been accounted for and all title and ownership records have been reviewed.

7. **Insurance.** Review key insurance policies of the seller's business.

8. **Management/Employees.** Seller's management is provided, and employee information is available, and all employee claims (whether current, pending, threatened, or settled) or issues have been disclosed. Review quality of management and risks associated with employee claims or issues.

9. **Arbitration/Litigation.** An overview of arbitration and litigation (whether current, pending, threatened, or settled), or regulatory proceedings involving the seller has been provided. Analyze for risks and do independent searches.

10. **Intellectual Property.** An overview of the quality and breadth of the seller's intellectual property and technological capacity.

11. **Taxes.** Historical and current tax liabilities are disclosed. Review any tax carryforwards and their potential benefit to the buyer and review any tax risks. Also review compliance with IRS Section 409A, IRS Section 280G, and IRS Form 5500 for 401(k) plans.

12. **Environmental Issues.** All potential environmental issues the seller currently has or may face (whether current, pending, threatened, or settled), the depth of which will depend on the nature of seller's business. Also, buyer should have a Phase I and Phase II, if required, completed on any real property prior to the lapse of any due diligence period. Review Phase I and Phase II reports.

13. Owner Transactions. All agreements or arrangements (written and oral) between the seller and any current or former officer, director, stockholder, or employee have been disclosed. Review for risks, responsibilities, and abnormalities.

14. Antitrust and Regulatory Issues. Review of the entire acquisition early on should be done by an experienced attorney to assess whether there will be any antitrust or regulatory scrutiny from third party government entities as well as any compliance requirements prior to finalizing the deal. As an initial matter, the size of the transaction and the nature of the business is usually a good dipstick test as to whether there will be additional oversight or compliance required. For example, the acquisition of a small painting company versus a large securities company. Size also triggers a Hart-Scott-Rodino analysis. In addition, if foreign investment or national security may be impacted an Exon-Florio and Department of Commerce analysis will also come into play.

15. Sales/Customer Lists. Seller's customer base, largest customers, as well as the sales pipeline are disclosed.

16. Suitability. Disclosure of business type and a strategy of how the seller's business will be incorporated into buyer's business.

17. Production Facilities. If seller's business is the type of business that produces physical products, all productions facilities and vendors should be listed and a tour of the production facility and associated vendors should be provided.

18. Marketing. A disclosure of seller's strategy with regard to marketing and announcements regarding the transaction.

19. Competitors. A disclosure of all known competitors. An analysis of any competitive threats (whether current, pending, or threatened) should be also be done independently by buyer.

20. Smaller Transactions. Smaller transactions sometimes involve the SBA. Please be aware that such transactions will need to comply with the SBA requirements and additional due diligence items and closing will take additional time.

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