

THE REVIEW OF
**SECURITIES & COMMODITIES
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 57 No. 10 May 22, 2024

ADDRESSING REGULATORY RISK IN M&A AGREEMENTS

The impact of regulatory approvals in M&A has increased in recent years as governmental reviews have become more unpredictable and review periods have lengthened. This has resulted in enhanced focus on these matters at the outset of transactions and during the negotiation of the transaction documentation. In this article, the authors discuss approaches for assessing and understanding regulatory risk at the outset of the transaction. The article then outlines various agreement provisions that parties use to allocate and limit regulatory risk in transactions, particularly with respect to antitrust and U.S.-regulated utility matters.

By Katherine Ashley, David Wales, and Erik Elsea *

In recent years, regulatory reviews of M&A transactions have become even less predictable, as regulators have become more aggressive and review timelines have expanded. Advising clients on how to successfully navigate regulatory risks in an M&A transaction in this environment presents a number of challenges. While both buyers and sellers should be focused on safeguarding the benefit of the deal and devising and implementing an approach to regulatory risk that optimizes the likelihood of a successful closing, they sometimes face very different risks and benefits from the regulatory outcome — as such, their approach to addressing regulatory risks in the transaction documents may diverge. Sellers are typically focused on achieving closing as rapidly as possible at the full negotiated deal price. Buyers are typically focused on minimizing the concessions made to regulators to obtain the required regulatory approvals, including protecting the acquired business and the buyer’s existing business. This article discusses various considerations that may impact M&A

transaction agreements, particularly with respect to antitrust and U.S.-regulated utility matters.¹

PREPARATION IS KEY: KNOW YOUR RISK

When considering a potential M&A transaction, analyzing the regulatory risks of a transaction should be one of the first considerations for both buyers and sellers. When a seller is exploring potential strategic alternatives and preparing to market a transaction,

¹ This article is adapted from a Practising Law Institute webinar entitled “Regulatory Risk in M&A Agreements” presented as part of the “Mergers and Acquisitions 2024: Advanced Trends and Developments” program on February 2, 2024. The authors would like to acknowledge the contributions of Valarie Ney, partner at Hunton Andrews Kurth LLP, Laura Turano, partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, and William Regner, partner at Debevoise & Plimpton LLP, for their contributions to the webinar discussion and therefore to this article.

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