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Financial Institutions' Legal Obligations under ADA Article III

by Chase Stoecker

Title III of the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability by places of public accommodation. It directs businesses to make "reasonable modifications" to standard business practices when serving people with disabilities. Under Title III of the ADA, the definition of "public accommodation" includes banks. As such, banks, credit unions and other financial institutions must give equal treatment to all customers, with and without disabilities.

Obligations of Covered Entities

Covered entities are required to provide aids and services unless doing so would result in an "undue burden," which is defined as a significant difficulty or expense. However, if a particular aid or service would result in an undue burden, the entity must provide another effective aid or service, if possible, that would not result in an undue burden.

In determining whether a particular aid or service would result in an undue burden, a covered entity should take into consideration the nature and cost of the aid or service relative to their size, overall financial resources, and overall financial picture. Denials due to cost are often difficult cases to defend. However, covered entities are not required to provide any particular aid or service in those rare circumstances where it would fundamentally alter the nature of the goods or services they provide to the public.

Common Situations Faced By Financial Institutions

1. Use of Auxiliary Aids and Services to Facilitate Communication

On Jan. 31, 2014, the Department of Justice Office of Civil Rights published a guide to help meet the communication requirements of those individuals who have vision loss, hearing loss, or speech disabilities. (Under these guidelines, it is noted that the ADA places responsibility for providing effective communication directly on covered entities.)

Some examples of ADA compliant methods of communication with someone with vision loss include: (1) providing information in large point or in Braille; and (2) providing information electronically for use with a computer screen-reading program.

Examples of ADA compliant methods of communication with someone with hearing loss include: (1) providing a qualified sign language interpreter; and (2) providing written materials and printed script of stock speech.

Examples of ADA compliant methods of communication with someone who has speech disabilities include: (1) providing a qualified speech-to-speech transliterator; (2) keeping pencil and paper on hand so the person can write out the words that staff cannot understand; and (3) allowing more time to communicate with someone who uses a communicating board or device.

Ultimately the goal is to provide an aid or service that will be effective given the nature of what is being communicated and the customer's method of communicating.

2. ATM Machines

The 2010 ADA Standards for Accessible Design lists the traits of ADA-compatible ATMS in minute detail (for example, voice guidance and tactile buttons). After a financial institution fits its ATMs to comply with such rules, the machines must remain compliant. However, periodic hurdles may arise not as a result of negligent or bad intent (for example, the voice system may occasionally malfunction and require maintenance). The ADA regulations permit isolated or temporary interruptions in service or access due to maintenance or repairs as long as the interruption does not persist beyond a reasonable period of time.

3. Teller Counters

The ADA guidelines note that teller counters in stores, banks, and hotels that lack an ADA compliant counter are permitted to have a folding shelf attachment that allows a disabled person to write and handle materials that are exchanged back and forth.

4. Websites

Courts are split regarding whether the definition of "public accommodations" is limited to physical spaces. In those cases in which a website has been considered a public accommodation, courts have required websites to comply with Web Content Accessibility Guidelines 2.0. There are three different levels of conformance within the WCAG 2.0 guidelines :

- Level A: minimum level of conformance
- Level AA: level relied on by the courts and the Department of Justice
- Level AAA: maximum level of conformance

The current trend in the district courts is that websites fall within the ADA's definition of "public accommodation," regardless of their connection to goods or services provided by the entity. For example, the Eleventh Circuit recently ruled in Gil v. Winn-Dixie Stores, Inc., that a website is not a place of public accommodation. However, in this same opinion the Court acknowledged that a website can still violate the ADA if it presents an intangible barrier to someone with a disability. The cost for a financial institution to bring their websites in conformity with WCAG 2.0 could be far eclipsed by just a handful lawsuits filed by savvy individuals benefiting from the current uncertainty within the courts.

5. Mobile Applications

There is only one circuit court of appeals opinion regarding ADA accessibility to a mobile application: Robles v. Domino's Pizza, LLC. In Robles the Ninth Circuit ruled that the ADA applies to a pizza chain's mobile application because it connected the pizza chain's customers to the goods and services of its physical restaurants. Other district courts have also extended the ADA to mobile applications. It is likely that other jurisdictions will eventually follow the Robles opinion and expand the ADA to mobile applications.

Compliance with Title III of the ADA involves multiple factors. The size of the covered entity, the level of accommodation requested, and burden to the entity all must be considered when developing policies and procedures to reasonably accommodate individuals who are considered disabled under the ADA.

Chase Stoecker is an associate in McGlinchey's Ft. Lauderdale office. He defends employers in a wide range of employment matters, including cases brought under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. He also represents financial institutions in a variety of consumer financial litigation matters.

Fair Lending, CRA, Diversity and Inclusion in Bank M&A

by Wes Scott and Richard Hills

As a result of the COVID-19 pandemic, bank merger activity in 2020 was down substantially from the previous year. However, a significant change of course is expected in 2021 and 2022 based upon the general health and capital strength of the industry at large.

Once deal volume begins to increase, a host of novel issues will require the attention of parties to a transaction that were not as prominent (or nonexistent) in the days before COVID. In addition to the traditional economic and management variables involved in the analyses of bank merger transactions, 2020 witnessed the emergence of new criteria unrelated to COVID that must be seriously considered by potential acquirers before entering the M&A market in 2021. These factors include issues related to fair lending and diversity, climate change, and the process undertaken by the Department of Justice in reviewing specific transactions as discussed below.

As part of their review of a bank merger application, the applicable regulatory agency is required to consider “the convenience and needs of the community to be served.” The “convenience and needs” consideration includes an analysis of relevant banks’ records of compliance with fair lending laws and records of serving low-to-moderate income communities under the Community Reinvestment Act.

Accordingly, compliance with fair lending laws is a necessity for institutions seeking to grow through acquisitions. In previous years, potential acquirers have been placed in a regulatory “penalty box” for fair lending compliance violations. Financial institutions involved in mergers or acquisitions need to pay particular attention to their CRA and Fair Lending compliance, including disparate impact. Disparate impact occurs when a neutral policy causes a disproportionate negative impact on a prohibited basis group that is not supported by a valid business justification or necessity. Merger activity will lead to closer scrutiny of compliance performance by regulators and the public. Compliance violations will, at a minimum, delay consummation of a merger and could result in disapproval of a transaction by regulators.

In August, the Consumer Financial Protection Bureau issued a request for information seeking public and industry input related to the Equal Credit Opportunity Act and Regulation B. The CFPB submitted this request in an effort to create a regulatory regime that expands consumer access to credit while ensuring that consumers remain protected from credit transaction discrimination. The CFPB presented 10 questions in its request related to: disparate impact; Limited English Proficiency products, special purpose credit programs; affirmative advertising to disadvantaged groups; small business lending; sexual orientation and gender identity discrimination; scope of federal preemption of state law; public assistance income; the use of artificial intelligence and machine learning; and ECOA adverse action notices.

The CFPB sought comments on the actions it can take or should consider taking to prevent credit discrimination, encourage responsible innovation, promote fair, equitable, and nondiscriminatory access to credit, address potential regulatory uncertainty, and develop viable solutions to regulatory compliance challenges under ECOA and Regulation B. As a result, potential acquirers are encouraged to take proactive measures to address the 10 questions raised by the CFPB, as they are likely to be considered in evaluating fair lending compliance in connection with an application to approve a merger transaction.

The importance of addressing these questions was highlighted by Congresswoman Maxine Waters, chairwoman of the House Financial Services Committee, who said in a press release regarding the recently announced merger between PNC and BBVA: “The DOJ and relevant regulators must fully scrutinize this proposal and assess the merger’s potential impact on the banks’ customers, workers at the banks, and communities served by the banks, especially communities of color that have been hardest hit by the pandemic."

She emphasized that regulators need to stop "rubber-stamping bank mergers" without an stringent, multifaceted review. "Regulators must also evaluate whether the banks are making diversity and inclusion an intentional priority, and must rigorously review whether the proposed merger truly satisfies all relevant requirements and creates a public benefit."

In addition, on Dec. 2, Nasdaq submitted a proposal to the SEC to adopt new rules for companies listed on the stock exchange that would require them to publicly disclose diversity statistics regarding their boards of directors. Under the proposal, most Nasdaq-listed firms would be required to demonstrate - or explain why they do not have - at least two board members who represent Nasdaq-designated categories, including at least one individual who self-identifies as female and at least one who self-identifies either as a member of a racial or ethnic minority or as LGBTQ+.

Companies would have to disclose this information within one year of the SEC's approval of the rule, and all companies will be expected to have at least one diverse director within two years of the SEC's approval of the listing rule. Companies that are not in a position to meet the board composition objectives within the required timeframes will be required to provide a public explanation of their reasons for not meeting the objectives.

Mergers and acquisitions have always drawn attention to the importance of Fair Lending and Community Reinvestment Act compliance. Given the focus of the Biden administration on addressing diversity, equity and inclusion issues ("DEI"), potential acquirers should be similarly ready to address DEI issues in connection with an application for approval of a merger transaction.

Given the historically low level of merger activity and the likelihood that deal volume is not expected to increase until the second half of 2021, now is the time for potential acquirers and sellers to take a closer look at these issues. Those financial institutions that plan and prepare will be well-positioned to execute on accretive acquisition opportunities that loom on the horizon.

If your management team and board of directors are interested in or are actively exploring M&A opportunities, or if you have questions about the article, please contact either of the article authors.

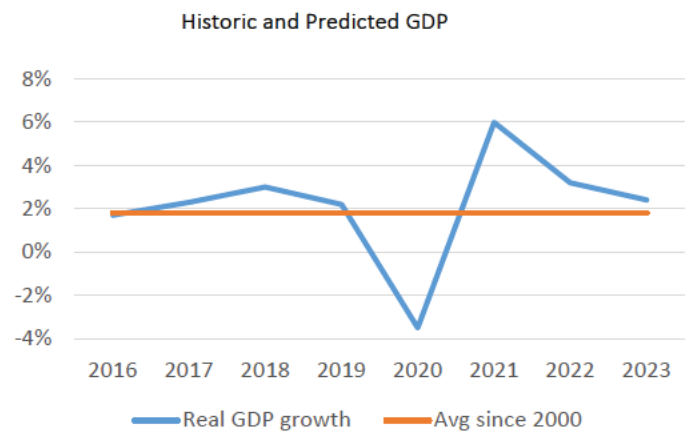

Wes Scott is a partner at Waller. Public and private financial institutions, including banks, bank holding companies and investment banks, as well as healthcare companies, including clinical trial and medical device companies, rely upon Scott's experience, judgment and business acumen to close their capital market transactions. Richard Hills is also a partner at Waller. Helping financial institutions reach their goals is the singular focus of Hills' legal practice. Whether representing a de novo community bank or a well-established bank holding company with regional operations, he has earned a reputation for his ability to solve problems for financial services clients with unique needs and specific strategic objectives.

It is Time to Think About M&A

by Michael S. Murphey, Porter White & Company

M&A is Back

Say what you will about 2020, Alabama's banking system changed on a dime to meet the needs of our clients and local economies. Think about it. Branches closed, digital services grew, employee and customer health needs were addressed, a whole new class of loans was created, delivered, and monitored, all the while working in an environment with record low interest rates, record high unemployment, and the most dramatic inflow of deposits our industry has ever seen. No wonder M&A stopped in 2020. But it's back. This article will discuss what may drive buy side, sell side or merger of equal activity in coming months.



Source: Federal Reserve Bank of St Louis and WSJ Economist Survey, April 2021

Your Bank will Probably Have a Good 2021 with or without M&A

At its heart, banking is a pretty simple business. When the economy does well, banks do well. For reasons we already know, 2021 and probably 2022 will be strong economies.

So why think about M&A? COVID changed everything, including some basic components of the community bank business model. Some are listed to the right. It's incumbent on boards and management to consider these issues in their strategic discussions and make judicious capital decisions to maximize shareholder returns. Ongoing strategy may include acquisitions or mergers to address these issues, or perhaps a board may decide selling is the best option. The good news is bank valuations are returning to levels where all options are on the table.

COVID Related Issues

Issue	Industry Impact (red impacts costs)	Timing
Branch utilization	Potential urban closures, not impact rural	Permanent
Digital	Technology & HR Investments	Permanent
FinTech popularity	Increased competition	Permanent
Ultra-Low Rates	NIM compression, overhead reductions	2-3 years
Massive economic subsidies	Industry positive, deposit growth	2-3 years
Significant deposit growth	Stimulus & QE in 2021, QE in 2022	2 years
SBA Programs	Industry positive, operational challenge	????
Slowing Loan growth	NIM compression, overhead reductions	1 year
Slowing Mortgage Refis	Less loan sales, overhead reductions	now
Higher Corporate Taxes	Significant return impact	Permanent
Regulation	Additional costs, M & A scrutiny	4 years???
Capital Gains & Estate Tax	Impact wealthy shareholders	Permanent

The Economics of Community Bank M&A

Two fundamental drivers of M&A pricing are the economy and stock valuations of regional banks. Regional banks are big acquirers of community banks; they set a floor on deal pricing. Bank stocks are highly correlated to the economy, and the interplay of these factors is reflected below. The chart on the next page covers 348 community bank (banks under $1 billion) M&A transactions since

2019 (the blue dots), as well as the Price Tangible Book of 49 publicly traded bank stocks with assets between $10B-$25B (orange line). Pre COVID, regional banks were trading just below 2x book, and a lot of deals were being done around that benchmark. COVID hit in early 2020, bank values fell by nearly 50%, and M&A dried up. Recent months reflect a strong comeback in bank values, nearly equaling the prepandemic level, which in turn is driving an uptick in M&A activity and pricing. That is why M&A is back.

Buy, Sell or Merge?

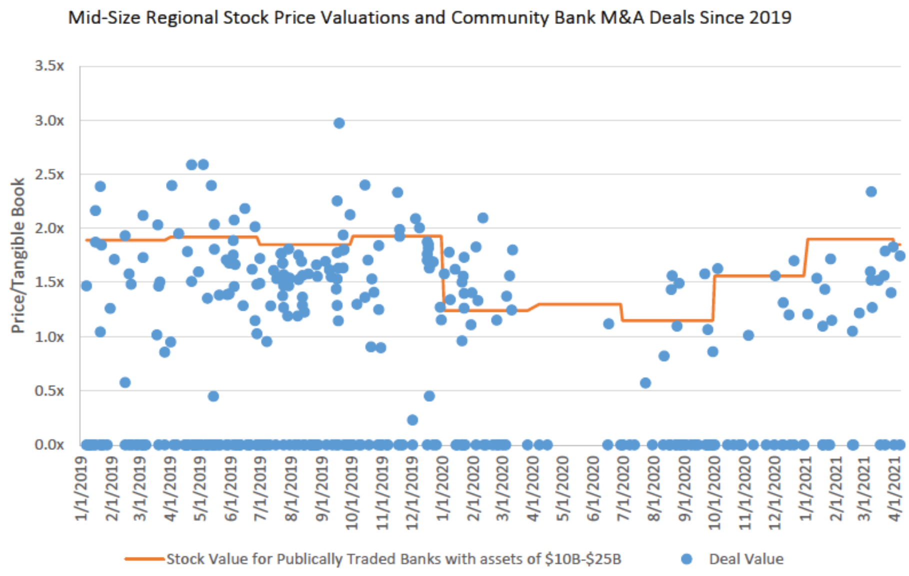
So what does your bank do? The graphs in the box to the right tell a compelling story. The first two graphs say bigger is better from a valuation, return and efficiency perspective. Graph three says acquiring banks can generate significant cost saves from acquisitions. Add these findings in with the "red letter" issues outlined above, and you can see cost pressures may force boards of smaller banks to consider a sale or a merger of equal strategy to build scale, reduce costs and enhance shareholder value and return.

From the buy side, larger community banks or public regional banks are natural acquirers of smaller banks in a similar locale, as they have the valuation and capital to fund accretive acquisitions through cost cuts shown in graph three. Additionally, it's worth using stock as consideration in small bank acquisitions, as it provides selling shareholders a potential tax-free exchange as well as stock in a larger bank that may sell for 2x+ multiple down the road.

Conclusion

The Alabama community banking market consists of 95 banks totaling $26.5 billion in assets who participate in a $225 billion economy. Given current trends, the next several years will likely play a critical role in determining the structure of banking in our state.

Michael S. Murphey is a vice president who supports Porter White's Community Banking practice. He has spent forty years in the southeastern US banking industry in various capacities related to commercial lending, including relationship management, underwriting, credit, and portfolio management. Mike's background includes working with companies of all sizes, from small business to large corporate



Source: S&P Global Market Intelligence

Deal Value to Tangible Book Equity for M&A Transactions by Asset Size of Acquired Bank

Asset Size	Deal Value/Tangible Book
<$100m	1.23x
$100m-$250m	1.44x
$250m-$500m	1.63x
$500m-$750m	1.81x
$750m-$1B	1.78x

Source: S&P Global Market Intelligence

2020 Return on Equity and Efficiency Ratio by Asset Size

Asset Size	Return on Equity	Efficiency Ratio
<$100m	6.0%	78.4%
$100m-$250m	9.9%	68.7%
$250m-$500m	10.3%	65.6%
$500m-$750m	11.1%	63.7%
$750m-$1B	11.7%	62.0%

Source: S&P Global Market Intelligence

Estimated Cost Rationalization at Acquired Banks

Year	Cost Savings at acquired banks
2016	32.5%
2017	34.2%
2018	34.1%
2019	34.9%
2020	32.2%

Source: S&P Global market Intelligence