M&A compliance considerations for title companies

Saul Ewing Arnstein & Lehr Partner Francis X. “Trip” Riley III has seen a big trend in mergers and acquisitions of title agencies over the past 18 months.

Whereas in the past, much of his practice has involved compliance counseling on affiliated businesses or marketing services agreements (MSAs), Riley is increasingly being asked to help put together merger and acquisition (M&A) deals and apply his compliance expertise in the due diligence process.

“There’s a tremendous amount of activity in the market, and it’s coming from those who are looking to sell and those who are looking to buy,” Riley said during a recent spring virtual RESPRO session detailing business and legal considerations for title company M&As.

Riley was joined by Howard Turk, founder and managing director of Howard Turk & Co., an M&A firm focused on the title industry, and Turk & Co. Managing Director Steve Donelson. Chuck Cain, senior vice president of FNF’s National Agency Division, moderated the session. Turk gave an overview of who is buying title companies – and why there is a new shift toward a seller’s market.

“We’re seeing an abundance of activity at different levels of the market, whether it’s a lower-level market or even a larger sense of the market,” Turk said. “Different people are buying title companies for different reasons.”

Turk said there are two main groups of entities looking to buy title companies, namely strategic and financial.

Strategic buyers are these ‘in the industry,’ whereas financial are investors.

Strategic buyers include title underwriters, big agencies sitting on cash looking to acquire or roll up smaller agencies as well as lenders, Realtors, homebuilders, tech companies and more.

Strategics typically seek to take a title agency to the next level.

Private equity is very interested in title these days and seeks to acquire agencies where they can help grow - sometimes via an accretive synergy approach, Turk said.

Meanwhile, there are a multitude of reasons to get out of the title business.
“Running a title business is actually quite problematic,” Turk said. “There are hurdles and pitfalls every step of the game. When I say you’re only as good as your last deal, what I mean is, Realtors tend to judge you only on the strength of your very last transaction. You could have 10 years of good work and one bad deal and then they go. So, it’s a business that’s fraught with risk.

“Every transaction can sink you,” he added. “Anyone that’s been involved with a wire fraud can tell you that. There’s volatility in interest rates, refi volumes and of course the broader economy. Right now, everyone is riding high on the low-interest rate environment. That could change in a moment.

“Volumes are cyclical. Costs of course are rising, and things are changing. The fintechs and others want to eat the lunch of the independents. They’re looking for better, faster, cheaper, easier ways and methodologies to enhance the consumer experience.”

Riley addressed the importance of doing your compliance due diligence before binding yourself to the acquisition.

“First and foremost, a buyer and seller need to understand what ALTA’s best practices are and make sure the business is operating in compliance with those best practices,” he said. “Make sure the business is running smoothly, the underwriters are happy, and there aren’t issues with respect to your escrow - going back three to five years.”

Riley suggested sellers obtain two or three years of underwriter field audits from the underwriter, plus two or three years of claims history, and making sure any issues have had satisfactory resolutions.

He added it’s also necessary to be conscious of different states’ cybersecurity and data protection regulatory requirements – especially in New York and California. In addition, buyers need to consider two or three years of the businesses customer’s complaint history.

“Expectant sellers should spend some time looking at your Yelp reviews or other online reviews,” Riley said. “Because that’s the first thing your buyer is going to do. They’re going to look at what customers are saying. If there are issues, be prepared to tell your prospective buyer what steps you took to resolve those complaints and what you have done to make sure the issue did not occur again.”

He also advised sellers to pay close attention to their vendor relationships and agreements. “Make sure those relationships are strong and vibrant,” Riley said. “Have those agreements ready to pull out and show your buyer. Without these vendors, these title agencies don’t run.”
A buyer’s due diligence should also include requiring proof of the legitimacy of marketing arrangements such as MSAs, as well as office/conference room rentals, administrative services agreements, affiliated business arrangements (including licensure and HUD’s 10-point test), co-marketing or sponsorship agreements, and lead generation agreements.

“For affiliated business arrangements, if you’re ready to sell, you need to pull those agreements out and make sure they’re up to date and compliant with RESPA Section 8(c)(4) and be able to illustrate how they help your bottom line,” Riley said. “For co-marketing agreements, you need to understand where the business is coming from.”

Riley also suggested cleaning up social media activities (such as deleting political posts) and being willing to explain any pending or resolved state and/or federal administrative actions over the last five years before selling.