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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Reg Rollbacks Seen As Bit Player In $28B BB&T-SunTrust Deal

By **Jon Hill**

Law360 (February 11, 2019, 10:38 PM EST) -- Democratic lawmakers are pushing back on the $28 billion merger between BB&T and SunTrust as a potentially dangerous byproduct of recent efforts to loosen post-crisis regulations on big banks, but financial services attorneys told Law360 that this deregulation is only a minor player in this latest episode of banking industry consolidation.

Announced on Thursday, the megadeal would see North Carolina-based BB&T Corp. acquire Georgia-based SunTrust Banks Inc. for about $28 billion in stock, and marks the biggest bank tie-up since the financial crisis, creating the sixth-largest U.S.-based retail bank with roughly $442 billion in total assets.

Executives at the two regional banks have framed their so-called merger of equals as a strategic move aimed at enhancing their ability to deliver value to customers and take on the biggest of the big banks. BB&T CEO Kelly King, for example, has called the deal "an extraordinarily attractive financial proposition that provides the scale needed to compete and win in the rapidly evolving world of financial services," while SunTrust's CEO William H. Rogers Jr. has predicted that the combination will "accelerate our capacity to invest in transformational technologies for our clients."

But the transaction has run into criticism from Democrats on Capitol Hill like California Rep. Maxine Waters, chair of the powerful House Financial Services Committee, who issued a statement last week tracing the deal's roots to last year's Dodd-Frank Act rollback bill — known officially as the Economic Growth, Regulatory Relief and Consumer Protection Act — and related regulatory reform efforts supported by Trump-appointed banking agency heads.

"This proposed merger between SunTrust and BB&T is a direct consequence of the deregulatory agenda that Trump and Congressional Republicans have advanced," Waters said Thursday. "The proposed merger raises many questions and deserves serious scrutiny from banking regulators, Congress and the public to determine its impact and whether it would create a public benefit for consumers."

Democratic presidential candidate and staunch Wall Street critic Sen. Elizabeth Warren of Massachusetts has also joined the fray, casting the merger as part of a broader tide of post-EGRRCPA industry consolidation that threatens competition and consumer choice and questioning whether the Federal Reserve Board has the fortitude to stem it.

“The Board’s record of summarily approving mergers raises doubts about whether it will serve as a meaningful check on this consolidation that creates a new too big to fail bank and has the potential to hurt consumers,” Warren said in a letter to Fed Chairman Jerome Powell on Thursday.

But financial services attorneys who spoke to Law360 on Monday were skeptical that Washington’s recent moves to pare back post-crisis financial regulations deserved much credit for the BB&T-SunTrust merger.

“It is a more favorable regulatory environment in which two institutions of that size could obtain regulatory approval to merge, but it’s the underlying business reasons for doing the transaction that I’m certain drove the CEOs to get together and the boards to approve the deal,” said Rusty Conner, a Covington & Burling LLP partner who’s worked in banking M&A for more than three decades.

“You don’t do deals for regulatory reasons, you do them for underlying business purposes,” Conner said.

Gregory Lyons, a Debevoise & Plimpton LLP corporate partner and co-chair of the firm’s financial institutions group, agreed.

“I think the statute and the tailoring regulations probably had fairly little to do with this deal,” Lyons said.

Enacted last spring, the Economic Growth, Regulatory Relief and Consumer Protection Act — better known as S. 2155 or the Crapo bill, for its architect, Idaho Republican and Senate Banking Committee Chairman Sen. Mike Crapo — lifted the asset size threshold at which banks are automatically considered systemically important enough for tougher supervisory standards to apply.

By boosting that threshold from $50 billion to $250 billion, the bill was widely expected to fuel M&A activity among regional banks that might have previously been discouraged from crossing that $50 billion line and subjecting themselves to expensive additional compliance burdens.

But the as-yet-unnamed combination of BB&T and SunTrust would fall on the wrong side of that threshold. Individually, they’re each just shy of the line, with $225.7 billion and $216 billion in assets, respectively; together, they move well into systemically important territory with $442 billion in assets, meaning they would miss out on the bulk of the bill’s deregulatory benefits.

Of course, the Fed has called for relaxing certain capital requirements and other prudential standards for banks with between $250 billion and $700 billion in assets as part of its package of “tailoring” proposals unveiled last fall, but there, too, the biggest regulatory rollbacks are aimed at banks a step smaller than the proposed BB&T-SunTrust combination.

That’s why Day Pitney LLP partner Michael T. Rave, who’s advised on a number of bank M&A deals, said he’s not sold on the idea that this particular merger is the result of these deregulatory efforts. To the extent rule rollbacks do spur transactions, it’s going to be on the smaller end of the regional bank spectrum, where tie-ups can be expected to land below the new systemically important threshold, according to Rave.

"You're going to see a lot more deals not necessarily above the $250 billion level, but between the $50 billion and $250 billion levels," Rave said.

But even if EGRRCPA and the tailoring proposal weren't directly driving the BB&T-SunTrust deal, Rave and other financial services attorneys acknowledged that the current banking regulatory landscape under the Trump administration looks more favorable for industry consolidation than it has in a number of years.

"You could make a narrative that … this administration being more favorable to the financial services industry than the prior administration's perceived views led to the rebound in bank stock prices, which helps this merger come out," Douglas Landy, a Milbank Tweed Hadley & McCloy LLP partner and member of the firm's leveraged finance group, told Law360.

"I think that's probably a more direct scenario, and strategically there are all kinds of reasons for these two banks to merge," Landy said.

Conner likewise emphasized the tie-up's business rationale, agreeing that it "makes an awful lot of sense" from a strategic perspective.

"All institutions are seeking scale for efficiency," Conner said. "[BB&T and SunTrust] are going to extract a big amount of cost savings, which is important, and they're going to redeploy some of that into upgrading their technology platforms because the business model for financial institutions has changed so much."

And when examined against the backdrop of the banking industry's longer-term trend toward consolidation — there are roughly two-thirds fewer commercial banks in the U.S. today than there were 30 years ago, according to Federal Financial Institutions Examination Council data — the BB&T-SunTrust merger looks more like a continuation of a pattern, rather than a deviation from it.

"The number of banks in the United States has been shrinking as banks have merged," Landy said. "There was a long pause following the financial crisis, but it's a perfectly natural thing to have happen. We still have far more banks per capita than do European or Asian countries with similar economies."

BB&T and SunTrust have said that they expect their transaction to close in the last quarter of 2019, assuming they receive the requisite approvals from shareholders and federal regulators.

"We're confident the BB&T/SunTrust combination will be positive for consumers and communities, creating more value for all of our stakeholders," the two banks said in a joint statement to Law360. "The added scale of the combined companies will accelerate investment in transformative technology to create a more distinctive client experience, and the financial strength of the new institution will provide even more capacity to give back to the communities we serve."

And while some Democrats in Congress might disagree about the deal's merits, Lyons and other attorneys said lawmakers don't have a role in the approval process beyond making their views known to the regulators tasked with signing off on mergers and potentially mobilizing the public through hearings.

"There is no congressional review of the activity — it's a regulatory review of potential mergers," Lyons said. "Obviously the regulators will listen to their views, but at the end of the day, the regulators are going to apply the law and their interpretations of the law."

As part of the review process, the Fed must consider how a proposed merger could affect competition in the merging banks' relevant markets as well as the potential impact on financial stability. The Fed also examines how the banks have conducted themselves in their communities, including their Community Reinvestment Act performance and track records of compliance with consumer protection laws, among other considerations.

These factors are prescribed by law and meant to capture some of the same areas of concern that Democratic lawmakers have voiced about the downsides of consolidation, but Warren's letter last week pointed to the Fed's high rate of merger approval — nearly 87 percent of applications between 2006 and 2017, according to Fed data cited by the senator — as showing that the agency's scrutiny of these deals has been "anemic" in practice.

Landy said that Congress could revise and tighten these standards for merger approval going forward if it so desired, though it's unclear whether such a proposal could garner enough support from moderate Democrats, let alone Republicans, to be viable.

More broadly, just because regulators approve a merger doesn't mean they're not doing their jobs, according to Lyons. By allowing regional banks to consolidate, for example, regulators facilitate the creation of institutions that are better positioned to challenge the dominance of the biggest banks, which have continued to grow since the financial crisis, Lyons said.

"I have no doubt that the regulators will be looking very closely at this transaction, given that it's the largest one in quite a number of years," Lyons said. "If all the factors line up, I think there's a very good argument to be made that they're very much doing their job in a larger sense, because they are promoting the kind of competition that everyone seems to want to foster."

--Additional reporting by Chelsea Naso. Editing by Emily Kokoll and Alanna Weissman.