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Banking Group Of The Year: Davis Polk

By **Jon Hill**

Law360 (January 21, 2022, 3:40 PM EST) -- Davis Polk & Wardwell LLP represented Morgan Stanley in its $13 billion acquisition of E-Trade, which was the biggest purchase by a Wall Street bank in more than a decade, and helped a major Indian bank successfully sew up a U.S. regulatory investigation, just two of the accomplishments that earned the team a spot among Law360's 2021 Banking Groups of the Year.

With a roster of clients that includes global financial services powerhouses and up-and-coming fintech platforms, Davis Polk boasts a reputation as a top financial institution law firm that dates back to the late 1800s, when financier J.P. Morgan began a relationship with the firm that has continued on to the present day through his corporate namesakes, JPMorgan Chase & Co. and Morgan Stanley.

But Davis Polk hasn't rested on its laurels. Over the last year, a string of achievements has distinguished the firm's multidisciplinary practice in banking, which caters to an evolving mix of regulatory, transactional and litigation needs for clients by drawing on the expertise of dozens of attorneys stationed across the firm's U.S., European and Asian offices.

"We're not siloed," said Margaret E. Tahyar, co-head of Davis Polk's financial institutions group. "We're a partnership. We work together, and we're all about responding to client demand. I see that demand going up as financial regulation keeps getting more complex, so I expect us to keep growing."

This collaborative approach was on display as Davis Polk advised Morgan Stanley on the investment bank's back-to-back acquisitions of online brokerage E-Trade Financial Corp., which closed in October 2020, and asset manager Eaton Vance Corp., which closed in March 2021.

Valued at $13 billion, the E-Trade deal made particularly big waves because it marked the first major acquisition by a systemically important bank since the 2008 financial crisis and was viewed as a test of where the boundaries of acceptability now stood with regulators once wary of increasing bank size.

The deal also carried significance as a major step forward in Morgan Stanley's yearslong effort to reduce its reliance on its higher-risk investment banking business lines for income, a strategic shift that was again at play in the bank's subsequent decision to buy Eaton Vance for $7 billion.

"Davis Polk has been involved with Morgan Stanley on this strategic transformation really every step of the way," said Marc Williams, one of the firm's lead partners on the deals. "It's been a constant part of the conversation because it's really critical for us to know what the client is looking to accomplish with a transaction in order for us to provide the best possible advice and service we can."

The familiarity that builds up over time in a relationship can make those conversations easier and more efficient with a longtime client like Morgan Stanley, whose original "articles of partnership were actually signed in Davis Polk's offices," Williams said.

However, he explained, it's more than familiarity that keeps the relationship going.

"When you look at deals like these, one of the reasons why Morgan Stanley comes to us is it can draw on disciplines across the firm's practice, so it's not just [mergers and acquisitions]. It's tax, it's capital markets, it's executive compensation — it's a large team that participates in the deal," Williams said.

"This broad and deep relationship between Morgan Stanley and Davis Polk, and the level of trust that exists there, really facilitated getting two large, complicated deals done in quick succession," he added.

Davis Polk is currently deploying its transactional capabilities in service of another systemically important bank, State Street Corp., which the firm is advising on a $3.5 billion acquisition of Brown Brothers Harriman's investor services business.

Announced in September, the deal involves a complex carveout maneuver that Davis Polk helped negotiate in a lightning-fast two months and is shepherding now through the regulatory approval process. Pending completion, the transaction is poised to make State Street the largest custody bank in the world.

Davis Polk also expanded its presence as a deal adviser to regional and community banks on transactions including First Interstate Bank's $2 billion all-stock purchase of Great Western Bank, announced in September, and Regions Bank's purchase of Sabal Capital Partners, completed in December for an undisclosed amount.

But it's not just bank M&A work that has set Davis Polk apart. The boom in special-purpose acquisition companies, or SPACs, in recent years has also highlighted the firm's skills as an adviser to banks that provide financing for these deals.

That was the case in early 2021, when Davis Polk was representing the arranging banks involved with a planned SPAC transaction to merge and take public three of investment firm Vista Equity Partners' automotive-related software portfolio companies. But the deal fell apart in March, forcing Vista and the banks to figure out a plan B that Davis Polk was instrumental in helping to hammer out on the fly.

"The banks had to pivot rather quickly," said Jason Kyrwood, co-head of Davis Polk's finance practice and one of the lead partners advising the banks. "[Vista] still successfully combined all the businesses, the structure and credit profile was quite different, and the financing had to be tailored accordingly to meet bank underwriting standards while meeting the company's financing needs."

"It was a good example of the breadth of the lawyers in the group — that they can adapt and adjust when the [deal] structure does," added James Florack, co-head of Davis Polk's finance practice and another one of the lead partners for the banks in what was ultimately an $8.26 billion multicurrency financing.

Davis Polk's banking attorneys also showed strength in the courtroom with a precedent-setting New York Court of Appeals victory that the firm scored for Morgan Stanley in a so-called putback litigation brought over a residential mortgage-backed securities trust created by the bank before the 2008 financial crisis.

In a December 2020 decision, the Court of Appeals upheld a "sole remedy" provision in the trust's governing agreements that the bank sought to invoke against claims for breach of contract asserted by the RMBS trustee behind the litigation.

The trustee argued Morgan Stanley had been grossly negligent with the RMBS trust and therefore couldn't enforce the provision, citing the general public policy rule that parties can't contractually shield themselves from liability for their own gross negligence.

But the Court of Appeals agreed with the Davis Polk team, which was led by civil litigation partner Brian Weinstein, that this rule didn't apply to the sole remedy provision. The rule only applies to "exculpatory clauses or provisions that limit liability to a nominal sum," and the provision cited by Morgan Stanley was neither, the court said in its decision.

The outcome was a win not only for Davis Polk's client but also for the broader structured finance industry, where a number of investment banks are still battling crisis-era RMBS cases that could be undercut by the decision.

In the past year, Davis Polk has additionally demonstrated its prowess in navigating regulatory matters for financial institution clients like ICICI Bank Ltd., India's largest private sector bank.

Serving as lead counsel, Davis Polk steered ICICI through the rocky waters of a four-year-long U.S. Securities and Exchange Commission investigation into the bank's loan-loss allowance accounting practices.

The investigation, which was prompted by whistleblower allegations of wrongdoing, ultimately concluded with a declination in October 2020, when the agency informed the bank's Davis Polk attorneys that the matter was closed and no enforcement action would be pursued.

Tahyar, who was one of the firm's partners on the matter, described this result as one that ICICI sorely deserved.

"Sometimes you go in with a client and, you know, there's a smudge here and a smudge there. But we had done email reviews, there were witness interviews, there was all this other [evidence], and we felt this client was absolutely in the right," Tahyar said. "We felt vindicated."

--Editing by Daniel King.