

Morgan Lewis

# insight

## Financial Services Insight

A perceptions study by Morgan Lewis in association with mergermarket



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Knowledge

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Morgan Lewis is pleased to present this study on the trends of strategic restructuring in the financial services industry.

**The financial markets in the United States and abroad are going through the largest structural changes they have experienced in decades.**

The markets themselves have become for-profit entities—in Europe, the operator of an exchange is a for-profit entity, while in the United States, the exchanges themselves have become public companies. Also, we see bulge-bracket securities firms buying strategic stakes in hedge fund managers. We don't expect this to continue at the same pace due to the subprime-related credit event, but we do expect there to continue to be transactions in the pure equity manager arena, especially for event-driven managers. Finally, the online business has remained active, with those firms buying companies possessing superior front-end technology for very active traders.

We now see ever-increasing consolidation in the market as the exchange companies, which are really specialized technology and communications platforms that facilitate trading, merge at an ever-faster pace. Previously, we had seen acquisitions within the U.S. (e.g., NYSE's acquisition of ARCA, and the combination of CME and CBOT), and strategic alliances in the international setting (e.g., CBOT's initiative with the Singapore Exchange to create JADE, the Joint Asian Derivatives Exchange). In 2007, we saw the first cross-border transactions involving U.S. exchanges, with NYSE and Euronext coming under common ownership in April 2007, the announcement of the first non-U.S. acquisition of a U.S. exchange with Deutsche Bourse, and the International Securities Exchange agreeing to merge.

We anticipate that the next step will be true mergers between derivatives exchanges across borders. It is a natural step from strategic joint ventures to common ownership. The cost savings of combined technology efforts would appear to make such combinations eminently practical. In furtherance of this, since exchanges profit from charging a transaction fee for each trade, having screens that cover all of the affiliated exchanges must be a long-term goal.

In the last year, both Morgan Stanley and Lehman have acquired significant minority stakes in hedge fund managers, or in some instances have made outright acquisitions. Their purpose is to provide a full suite of investment options to major institutional investors, and by doing so to capture in-house the manager's carried interest, rather than only receiving a selling fee. Morgan Stanley purchased outright or acquired interests in Frontpoint Partners, Avenue Capital, Lansdowne Partners and Brookville Capital. Lehman invested in Ospraie Management and D.E. Shaw. We expect to see continuing interest in such transactions.

On the brokerage front, we anticipate that large brokerage firms will continue to acquire broker-dealers that provide specialized front-end services to customers. Such acquisitions are highly desirable because of the trading volumes they provide, as well as the margin balances they carry. In recent months, we have been witness to Schwab's acquisition of the 401 Companies and Global Real Analytics, LLC, and NFS's acquisition of NWD Investment Management. Again, this emphasizes that the business is really driven by providing superior technology to customers, whether your product be investment planning or trading facilitation.

- **Robert C. Mendelson**  
Partner, Morgan, Lewis & Bockius LLP

# Plan for the Regulators

**Over the past decade, the securities industry has undergone significant consolidation. Broker-dealers, investment advisers, registered and unregistered investment funds, and securities and derivatives exchanges have sought opportunities to find synergies, create economies of scale, and eliminate redundancies.**

As with most business transactions, closing speed is a primary goal for the deal makers. The sooner the transaction closes, the earlier the firms can realize the benefits of the transaction and minimize customer and employee attrition. Because of the highly regulated nature of the securities industry, however, achieving this important goal requires thinking through from the outset the regulatory issues that may arise in the transaction.

A number of milestones along the path to closing exist where firms should take the opportunity to consider key regulatory issues beyond performing due diligence and negotiating the transaction agreement. Analyzing key regulatory issues early will make the transaction more

efficient. The following discussion identifies several of these milestones.

## Regulatory Approvals

Although any deal has pressing corporate, tax, employment, and antitrust issues related to the structuring of the combination, the regulatory timetable, in both the near and the long term, is critical to determining the appropriate structure for the combination, especially in the securities industry.

Conventional wisdom suggests that buyers typically prefer to structure combinations as asset-purchase transactions, and sellers favor stock deals, for a variety of sound reasons.

In particular, buyers prefer asset purchases because they allow the buyer to acquire specific assets and business lines of the seller selectively, avoid assuming the seller's liabilities, receive a "stepped-up" tax basis on the assets acquired, obtain the option—but not the obligation—to hire the seller's employees, and choose which of the seller's client and service-provider agreements to maintain.

Conversely, sellers generally favor stock purchases because the buyer typically takes not only the assets, but all of the related liabilities.

But when it comes to transactions involving participants in the securities industry, regulatory issues often drive the decision to select one structure over another.

For example, the buyer of a broker-dealer may prefer structuring the acquisition as a stock transaction to streamline the near-term review-and-consent process for the broker-dealer's primary regulator (such as the Financial Industry Regulatory Authority (FINRA)) as well as for the broker-dealer's customers.

The member regulation functions of the NASD and NYSE have been

consolidated into a single SRO, FINRA. The rule book of FINRA consists of both NASD's rules, plus NYSE's rules governing member regulation, which apply to FINRA members that also are NYSE members.

In stock deals, few changes (other than potential changes in certain key officers and directors) that would require significant regulatory scrutiny typically occur on the closing date. As such, FINRA, in Membership and Registration Rule 1017, allows a member firm to close a stock transaction upon 30 days' written notice—even if FINRA has not yet formally approved the change of equity ownership. Asset deals not involving two NYSE member firms are subject to the FINRA's formal approval process before the transaction can close.

NYSE only members, although not subject to a formal application review and approval process similar to NASD Rule 1017, are subject to various approvals of new trading-license holders, directors, and principal executive officers; member-firm name changes; changes of clearing platforms and corporate reorganizations involving the member firm. These requirements currently also apply to FINRA/ NYSE members. The NYSE recently eliminated the requirement that these changes be "posted" in the NYSE Weekly Bulletin in advance of the consummation of such changes.

Although many of these changes ultimately will occur and require regulatory approvals, companies should remember that the fewer changes to the continuing operations and structure of the broker-dealer at the outset, the faster the broker-dealer's primary regulator should be able to approve the initial transaction.

Investment advisers, however, need not wait for approval of a business combination from the Securities and Exchange Commission. Typically, the buyer can rely on the registration of the acquired adviser, so long as that adviser is no longer conducting business.

# Plan for the Regulators

Registered-fund mergers, on the other hand, require the filing of the SEC's Form N-14 or a proxy statement, which can take weeks or months to clear the SEC's review process. Fund directors also must approve the merger. Early planning is thus critical.

Customer-notification and disclosure requirements for securities-industry combinations in today's market are rarely so straightforward, however. Acquisitions of broker-dealers often involve mixed financial products as well as complex interdependencies upon affiliated or unaffiliated advisers and funds. Although these disclosure issues typically arise when integrating the firms' products and services after the deal closes, it is never too soon to review notices and consents for compliance with the current regulatory guidance. In particular, the following areas warrant evaluation:

## **Brokerage customer agreements**

It is important to review the seller's form of brokerage customer agreements to determine whether an assignment of the agreement is permissible. For a stock deal, this will not be an immediate issue because the deal will not trigger an assignment of the underlying customer agreement. For an asset deal, the assignment of customer agreements will require advance written customer notice. For most asset deals, FINRA will closely scrutinize these customer notices and related disclosures in the approval process.

## **Investment-advisory contracts**

For a transaction involving advisory agreements, the acquisition of an adviser or its agreements generally triggers an "assignment" under the Investment Advisers Act of 1940 (known as the Advisers Act) and the Investment Company Act of 1940 (known as the 1940 Act).

The Advisers Act requires nonregistered-fund advisory contracts to require client consent to an assignment, and the 1940 Act provides that the contracts of the fund's adviser and principal underwriter

automatically terminate upon their assignment. The Advisers Act and the 1940 Act broadly define an "assignment" to include a transfer of a controlling block (that is, 25 percent or more) of the assignor's outstanding voting securities, and "control" as the power to exercise a controlling influence over the management or policies of a company. As a result, a purchase of an investment adviser or a financial-services company that owns or controls any investment adviser, or the purchase of the principal underwriter to a registered fund, usually results in an assignment of the contract.

The buyer of a nonregistered-fund adviser should check client contracts to determine if the contract can be assigned through a negative-consent process. Even if using negative consents, buyers should anticipate that the consent process will typically involve a 45-day period that, if possible, should be completed before closing.

If the consent process straddles the closing date, the purchase agreement should contemplate that some advisory agreements may not transfer, resulting in an accompanying reduction in the assets that will be ultimately transferred. The buyer of a registered-fund adviser should ensure that it has obtained fund board and shareholder approval before the closing—or risk having no advisory or underwriting contracts in place upon closing.

## **Broker-dealer/investment-adviser interrelationships**

Combinations involving broker-dealers often reveal interrelationships between broker-dealers and affiliated or unaffiliated investment advisers. For example, a buyer may want to develop or expand its mutual-fund or variable annuities business and thus wish to acquire not only the broker-dealer acting as the product's underwriter and distributor, but also the adviser to the funds and the fund or contract assets themselves. Each of these acquisitions will trigger additional regulatory notification requirements and issues in valuing the deal, not to mention further

review by the primary regulator of the broker-dealer.

## Cash sweeps

One of the most common regulatory issues for combinations involving a broker-dealer involves the changes to cash-“sweep” products for brokerage customers. Such sweep products automatically invest idle cash balances in customers’ brokerage accounts into money-market mutual funds or bank accounts. These cash-sweep products, and the movement of assets between them, have attracted a tremendous amount of regulatory scrutiny during the past few years, and future regulatory guidance regarding bank-sweep products is expected.

In connection with these transactions, broker-dealers typically consider bulk transfers from one money-market mutual fund to another, or a so-called drain-and-fill from a money-market mutual-fund-sweep product to an FDIC-insured bank-sweep account. The regulatory scrutiny and consent process will depend largely on the selected approach, the limitations in the seller’s form of customer agreements, and the use of appropriate disclosures. Again, to the extent that the buyer learns of this issue at an early stage, the post-closing integration plan can be tailored accordingly.

## Regulatory Due Diligence

Securities-industry combinations present complex due-diligence issues that are often overlooked until far too near to closing. Typically, this occurs because the buyer and seller devote their time to the business logistics of the deal rather than the deal’s legal issues. At the end of the process, counsel may discover a lurking issue while reviewing the proposed opinions and their underlying representations.

For example, in a transaction where the buyer intends to acquire both private funds organized as a master-feeder complex (in which feeder funds invest all their assets in a master fund) and the funds’ private-placement agent and investment adviser, the seller’s counsel will need

to opine on whether the funds have a good exemption or exception from registration.

But counsel to the buyer and seller may differ on their interpretation of the law. For example, buyer’s counsel may require an opinion on the use of a Section 3(c)(1) feeder fund where the master fund relies on Section 3(c)(7) of the 1940 Act. If seller’s counsel for the deal did not organize the funds, neither seller’s counsel nor its officers and directors may be comfortable with providing factual representations, much less a legal opinion, on that issue without a backup opinion from the law firm that formed the funds. The sooner these regulatory issues are flagged, the earlier in the process they can be resolved.

Given regulators’ heightened scrutiny of the securities industry during recent years, both buyers and sellers should carefully consider the regulatory aspects of proposed deals from day one. Deciding early about the structure of the deal, the disclosures to customers, the consents from clients, the scope of related legal opinions, and the post-closing integration issues are all critical to avoiding regulatory pitfalls along the path to closing.

- **John V. Ayanian**

Partner, Morgan, Lewis & Bockius LLP

- **Monica L. Perry**

Of Counsel, Morgan, Lewis & Bockius LLP

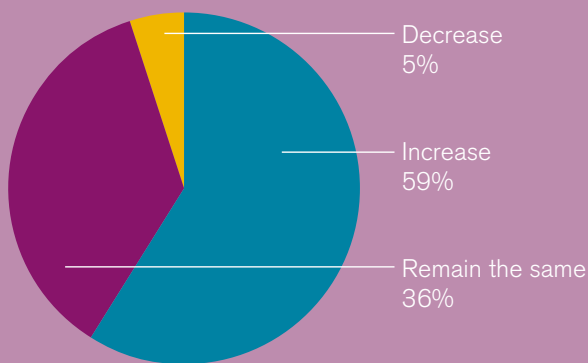
# Research Methodology

**Remark, mergermarket's publishing and market research division, surveyed 102 senior level corporate executives within the North American financial services sector. The interviews were conducted by telephone and the findings delivered to Morgan Lewis in aggregate and anonymously.**

The purpose of this survey was to gain insight into key trends and issues in the financial services sector and to determine how they are affecting the M&A strategies of senior level corporate executives in North America. This report looks specifically at current trends, growth across various sub-sectors, outsourcing, international consolidation and global expansion opportunities.

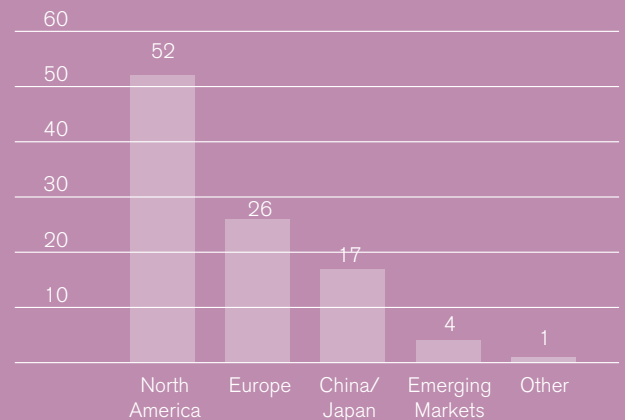
# Survey Findings

## What do you expect the overall pace of consolidation/strategic activity in the financial services industry to be over the next two years?



A majority of respondents (59%) expect the pace of consolidation/strategic activity in the financial services industry to increase over the next two years, while 36% of respondents expect consolidation to remain at current levels. General sentiment among corporate executives towards M&A in the financial services sector is bullish; one executive replied, "There are several trends of separate distribution in asset management and an increase in cross-border transactions."

## In which geographic regions do you expect to see the most financial services deal activity taking place in the next two years?

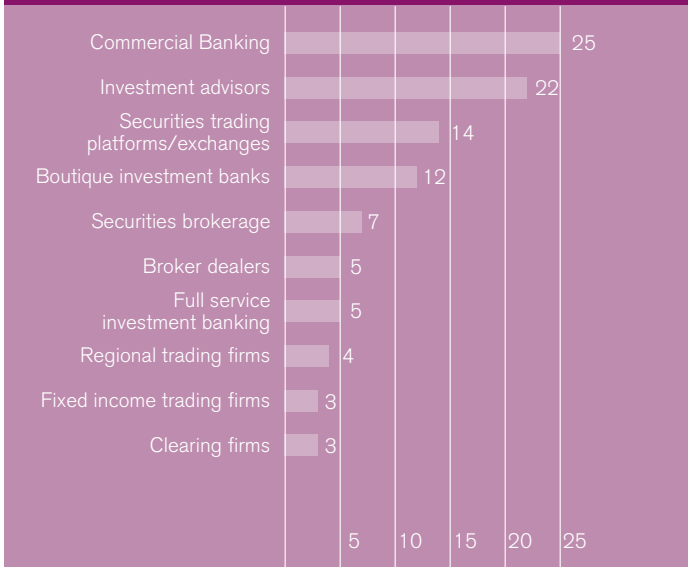


According to 52% of respondents, North America will continue to experience the most financial services deal activity, while 26% identify Europe as the next most likely region to experience significant M&A. "There will be a continued roll up of small players and the Italian market is really moving fast, while Northern Europe will be slower and Asian markets will see continued consolidation," said one respondent.

Asian markets such as China and Japan are favored to experience deal activity according to 17% of respondents. One executive acknowledged the region's challenges, however, noting that "regulatory issues are a big problem."

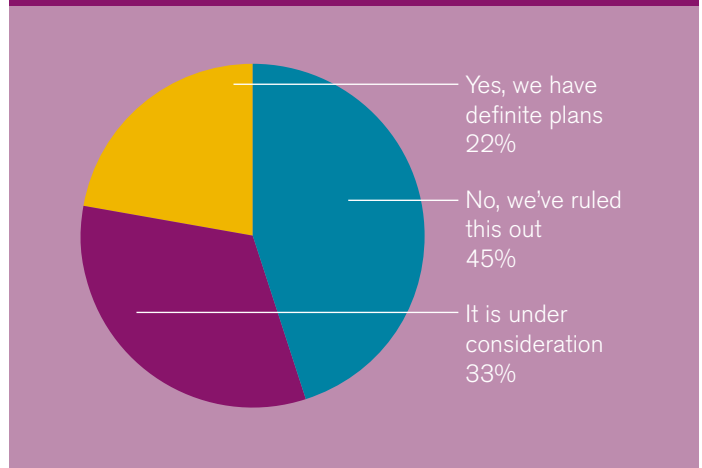
# Survey Findings

## In which sectors do you expect to see the most M&A activity in the next two years?



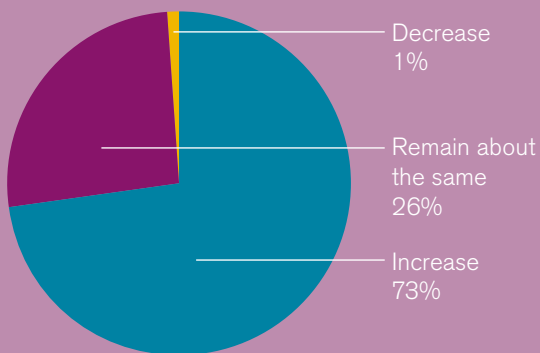
Commercial banking and Investment advisors are cited by 25% and 22% of respondents respectively, as the sectors most likely to undergo consolidation in the next two years. Respondents list “insurance and small banks,” as well as “mortgage and regional banks” as industry sub-sectors that will likely see significant consolidation.

## Will your firm/company be outsourcing significant business processes/activities in the next two years?



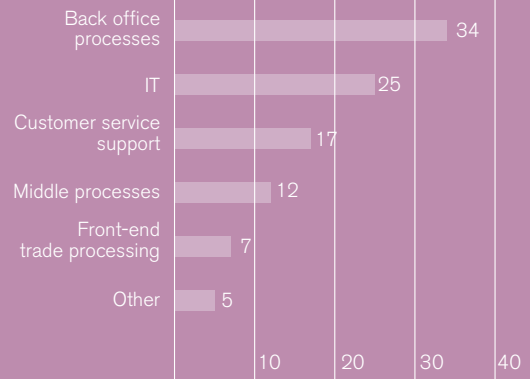
A majority of respondents, at 55%, have either finalized plans or are considering outsourcing significant business processes and/or activities at their respective firms in the next two years. Contrastingly, 45% of respondents have ruled out outsourcing in the next two years.

## Despite legal or regulatory concerns (e.g., accessibility for U.S. regulators), do you expect outsourcing in the financial services industry during the next two years to...?



A large majority of respondents, at 73%, expect outsourcing in the financial services industry to increase, and 26% expect the current level of outsourcing to remain the same. While regulatory concerns remain, the trend towards outsourcing is set to increase significantly in the next two years.

## In which of the following types of activities do you anticipate outsourcing in the next year?

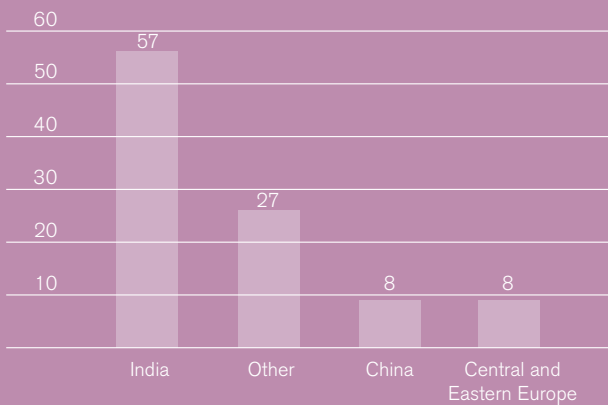


Thirty-four percent of respondents expect back office processes to comprise the majority of outsourcing requirements, while IT is expected to comprise the outsourcing needs for 25% of respondents.

Many firms outsource specialized business operations such as “security and compliance monitoring” or “PR and branding collateral” according to respondents. Others have already outsourced various functions entirely. “We anticipate outsourcing none; we’ve already outsourced finance, tax, admin and IT,” replied one executive.

# Survey Findings

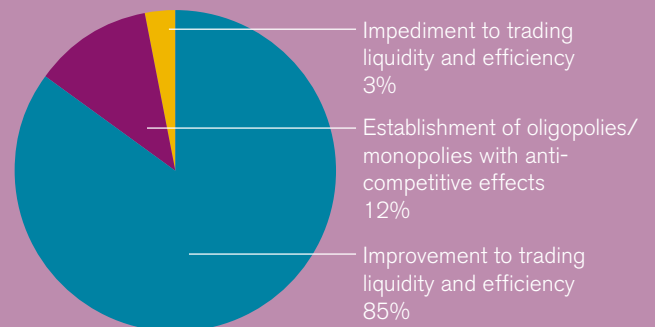
## Which geographic region do you expect to utilize for your outsourcing needs?



Not surprisingly, India was selected by 57% of respondents as the geographic region to be utilized for outsourcing needs. India, which offers a readily available talent pool of young, highly educated and English-speaking employees stands as the outsourcing destination of choice for many companies, particularly for information technology needs.

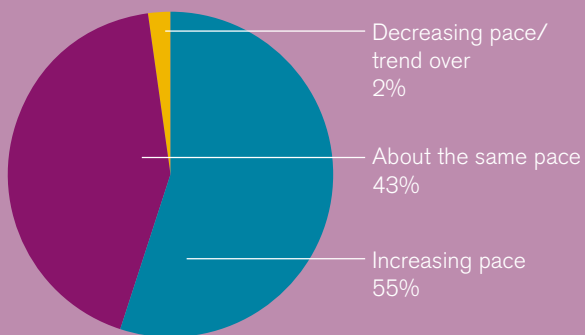
Twenty-seven percent of respondents cited Central America, Mexico, Cayman Islands, Singapore and the Philippines as attractive outsourcing locations.

## How do you view the NYSE and NASDAQ's acquisition of additional platforms and exchanges domestically and abroad?



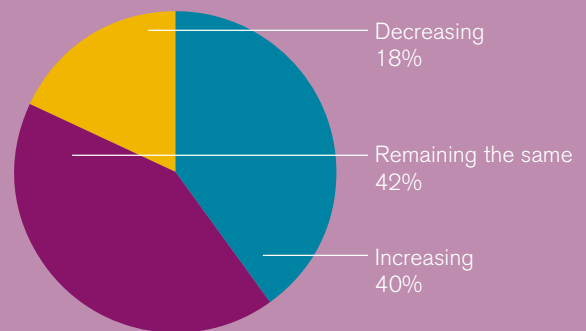
Eighty-five percent of those surveyed hold favorable views of the NYSE and NASDAQ's acquisitive posture towards other exchanges and trading platforms. "Markets are becoming global and having honest transparent real-time in a global marketplace is a desirable outcome," said one respondent. Another took note of existing challenges to exchange consolidation and said, "The impediment lies in old fashioned nationalistic concerns."

**Recently, we have seen transactions effected to focus companies on their core specialities within the industry. How do you expect to see this trend continuing in the next year?**



Ninety-eight percent of respondents expect a continued or increasing rate of deal activity between financial services firms seeking to bolster their core specialties.

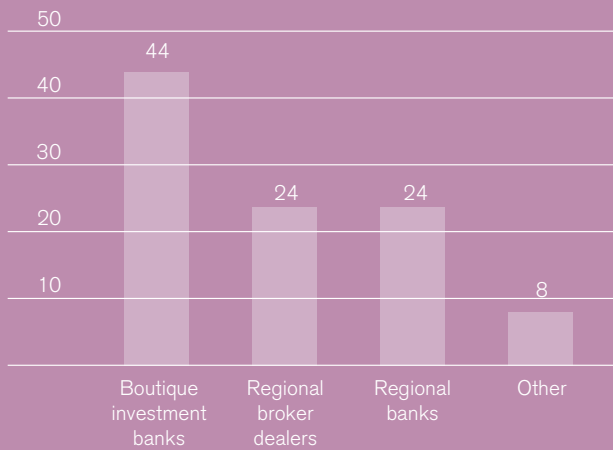
**In the last year, a number of financial services firms, have consummated IPOs to achieve liquidity or raise capital. Do you see this trend...?**



In a mixed response, 42% of respondents expect the number of financial services firms conducting IPO's to remain the same while 40% of respondents expect an increase. Currently, regulatory burdens associated with Sarbanes-Oxley as well as volatile capital markets could lead certain firms to opt out of a public listing.

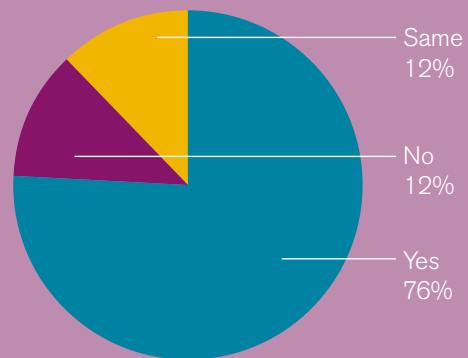
# Survey Findings

## Where do you mainly expect to see this activity from?



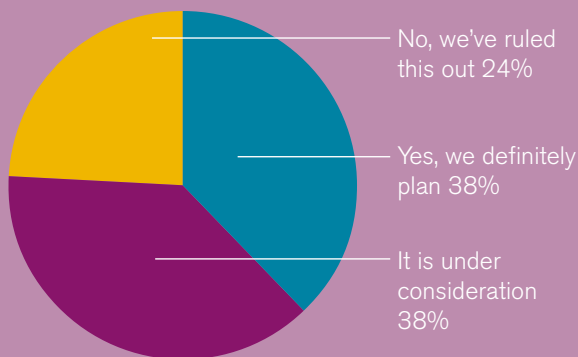
When asked where upcoming financial services IPOs will originate, 44% of respondents cite boutique investment banks as the most likely source, while regional broker dealers and regional banks are each cited by 24% of respondents, respectively.

## Do you foresee continued global expansion as necessary for financial businesses to maintain their competitive positions?



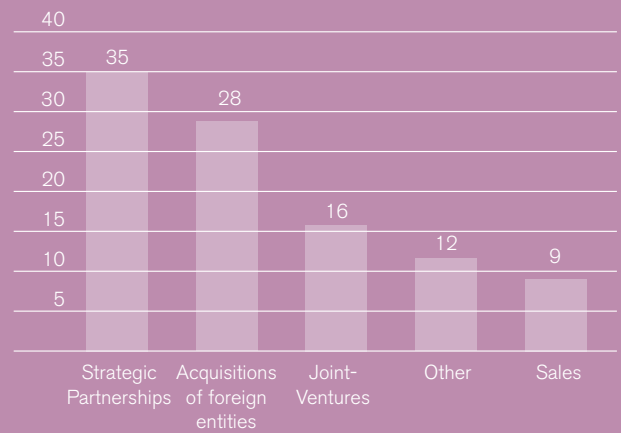
Seventy-six percent see global expansion as a necessary requirement for financial businesses to maintain competitiveness. The increasing pace of globalization and robust growth in emerging economies presents financial services firms with renewed expansion opportunities abroad.

## Do you think your firm/company will engage in consolidation/expansion related activities in the next two years?



Thirty-eight percent of respondents indicate that their firms have definitive plans for consolidation/ expansion related activities while an additional 38% have plans under consideration. While a number of respondents do not anticipate consolidation or expansion, increased M&A activity among financial services firms will likely be evident as growth strategies are pursued over the next two years.

## If so, what form do you think it will take?

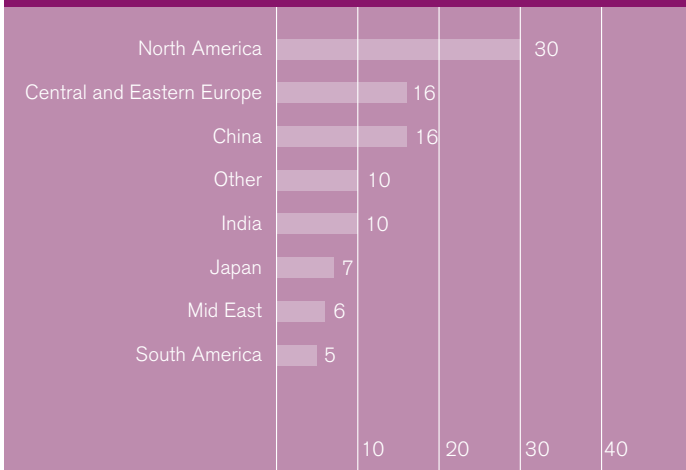


Thirty-five percent of respondents cite strategic partnerships as the most desirable form of expansion and consolidation, while 28% of respondents favor the acquisition of foreign entities.

Respondents also noted "new products," and the "acquisition of domestic entities," as viable strategies to achieve consolidation/ expansion needs.

# Survey Findings

## Which of the following geographic regions do you expect to turn to for expansion/consolidation activities?



Respondents identify a global range of expansion opportunities. Thirty percent of respondents expect further expansion in North America, likely due to the size and continued strength of the US economy. Expansion within Europe is also cited as a high priority. "All of Europe," is attractive, said one respondent.

Increasing demand for financial services in emerging markets, particularly the so-called BRIC countries of Brazil, Russia, India and China present long-term opportunities for financial services firms. One respondent replied that "We are looking at all English-speaking or English-oriented countries."

## Historical Analysis

## Top 45 Announced Deals for Year End June 30, 2007

	Status	Target Company	Bidder Company	Deal Value USD (m)
Nov-20-06	C	Equity Office Properties Trust	Blackstone Real Estate Partners	37,837
Apr-16-07	P	SLM Corporation	SLM Acquisition Corp	24,662
Apr-23-07	C	LaSalle Bank Corporation	Bank of America Corporation	21,000
May-29-07	C	Archstone-Smith Trust	Archstone-Smith Acquisition Co	19,820
Dec-04-06	C	Mellon Financial Corporation	The Bank of New York Mellon Corporation (Formerly The Bank of New York Company Inc)	16,495
Jun-01-07	C	Discover Financial Services, Inc.	Morgan Stanley (Shareholders)	13,145
Oct-17-06	C	Chicago Board of Trade Holdings	Chicago Mercantile Exchange Inc	10,965
Feb-16-07	C	Compass Bancshares Inc	Banco Bilbao Vizcaya Argentaria SA (BBVA)	9,732
Dec-17-06	C	Realty Corporation	Domus Acquisition Corporation	7,739
Nov-20-06	C	TD Banknorth Inc	TD Bank Financial Group	7,382
Jan-19-07	C	CNL Hotels & Resorts Inc	Morgan Stanley Real Estate Funds (MSREF)	6,600
May-31-07	C	AG Edwards Inc.	Wachovia Corporation	6,502
Feb-27-07	C	New Plan Excel Realty Trust Inc	Centro Properties Group	6,200
Oct-23-06	C	Inland Retail Real Estate Trust Inc	Developers Diversified Realty Corporation (DDR)	6,200
Nov-15-06	L	Reckson Associates Realty Corp.	Rome Acquisition Limited Partnership	6,033
Oct-09-06	C	Mercantile Bankshares Corporation	PNC Financial Services Group Inc	5,922
May-22-07	C	Crescent Real Estate Equities Company	Morgan Stanley Real Estate	5,884
Feb-16-07	C	The Mills Corporation	SPG Properties Inc( formerly Simon Property Group Inc)	5,723
Jun-20-07	P	Nuveen Investments Inc	Nuveen Consortium	5,652
Feb-06-07	L	Radian Group Inc	MGIC Investment Corp.	5,522
Jan-17-07	L	The Mills Corporation	Brookfield Asset Management Inc (formerly Brascan Corporation)	5,481

# Historical Analysis

	Status	Target Company	Bidder Company	Deal Value USD (m)
Aug-03-06	C	Reckson Associates Realty Corp.	SL Green Realty Corp	5,475
Feb-05-07	C	Investors Financial Services Corp	State Street Corporation	4,290
Jul-10-06	C	Pan Pacific Retail Properties Inc	Kimco Realty Corporation	3,934
Feb-01-07	C	Putnam, LLC	Great-West Lifeco Inc	3,900
Oct-06-06	C	RSC Equipment Rental	Oak Hill Capital Partners LP; Ripplewood Holdings LLC	3,800
Mar-13-07	C	Spirit Finance Corporation	Redford Merger Co.	3,472
May-11-07	C	Pegasus Aviation, Inc	AWAS	3,400
Nov-20-06	C	U.S. Trust Corporation	Bank of America Corporation	3,300
Dec-20-06	C	Sky Financial Group Inc	Huntington Bancshares Inc.	3,294
Jul-09-06	C	Heritage Property Investment Trust, Inc.	Centro Watt America REIT	3,200
Aug-30-06	C	Summit Real Estate Investment Trust	ING Real Estate Canada Trust	3,020
May-20-07	P	Blackstone Group Holdings LLC	Government of China (State Investment Company)	3,000
Oct-30-06	C	Trustreet Properties Inc	#GE Capital Solutions, Franchise Finance	3,000
Jun-04-07	P	Slough Estates USA Inc	Health Care Property Investors, Inc.	2,900
Aug-02-06	C	Broadridge Financial Solutions Inc	Automatic Data Processing (Shareholders)	2,784
Jul-13-06	C	AmerUS Group Co	Aviva plc (formerly CGNU plc)	2,678
Aug-21-06	P	Glenborough Realty Trust Inc	Morgan Stanley Real Estate Funds (MSREF)	2,646
May-07-07	C	Ohio Casualty Corporation	Liberty Mutual Group Inc	2,639
Nov-01-06	C	AmSouth Bank	RBC Centura Banks, Inc (formerly Centura Banks, Inc.)	2,500
Oct-05-06	C	Retirement Residences Real Estate Investment Trust	Public Sector Pension Investment Board (PSP Investments)	2,452
Apr-30-07	C	International Securities Exchange	Deutsche Boerse AG	2,430
Oct-31-06	C	Trammell Crow Company	CB Richard Ellis Group Inc	2,159
Jun-21-07	P	Equity Inns Inc	Whitehall Street Global Real Estate Limited Partnership 2007	1,933
May-22-07	P	Fremont General	iStar Financial, Inc.	1,900

# Morgan Lewis

## the right M&A team, start to finish

Successful M&A transactions in the financial services sector require business-minded legal talent. You need a team with deep industry knowledge and deal-making skills. We provide the right combination.

Our partners manage and coordinate our team to provide you with a dedicated single point of contact.

We're in this together. Your team and ours.



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