Practice Spotlight: Jeffrey Rubin

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A securities practice with cross-border media deals as its cornerstone has put Hogan Lovells' Jeffrey Rubin in the midst of an increasingly sophisticated and rapidly evolving international regulatory regime. As the Dodd-Frank Act nears zero hour, Rubin offers both plaudits and concerns for a securities reform movement so sweeping in its scope that its unintended consequences may not yet be fully appreciated.

Business Law Currents: How did you decide to go into securities law?

***JR**: I had an interesting and peripatetic journey. As a first year law student in upstate New York, I took a contracts course taught by William Hicks. He was an extraordinarily good teacher, and I'd determined to take as many classes as possible from great teachers. In subsequent years I also took the course he taught on corporations and then on securities. During summers, I worked for a local legal services organization, focusing on consumer protection and truth-in-lending. One of the attorneys I worked with suggested that the best way to develop excellent legal skills would be to work after graduation for a New York law firm providing quality training. I was fortunate to receive such an offer. Although I wanted to be a litigator, the managing partner noticed that I had taken a securities law course, and assigned me to the corporate and securities department. Although he invited me to let him know if I was dissatisfied, I never looked back.*

Although I had had no experience practicing securities law, I immediately took a liking to it. I enjoyed the intellectual rigor, as well as the dynamism of doing deals. Also, I considered it a very ethical practice, because securities law is essentially a form of consumer protection.

Business Law Currents: You have a strong background in representing media companies. How did that come about? Are there particular issues in securities offerings for media companies?

***JR**: Although I've worked in areas other than media, I've been actively involved in media since about 1984. The firm for which I worked represented Rupert Murdoch's News Corporation. Initially, were involved in transactions involving print media. For example, we assisted News Corp. in its acquisition of the Chicago Sun-Times and the Boston Herald and a series of magazines from Ziff-Davis and McGraw Hill. News Corp. then expanded to movies and electronic media. In the mid-80s, we assisted with the acquisition of 20th Century Fox and in 1986 we acquired a television station group from Metromedia that became the core of the Fox television network. This last transaction involved both M&A work and securities work, in connection with financing the $2 billion purchase price.*

I've enjoyed working on securities transactions for international media companies. In addition to News Corp., I've worked with British Sky Broadcasting as well as other issuers. The business is interesting, and involves understanding, and disclosing clearly to investors, a variety of commercial, regulatory and technology aspects of the issuer's business that are unique to media companies. Fortunately these days, through the SEC's EDGAR system, there are significant opportunities to readily research disclosure precedents. When I started out, locating precedents was not as easy, especially precedents relating to foreign issuers who were still filing with the SEC on paper. I recall an offering I worked on some years ago involving a company engaged in an emerging technology, where I couldn't locate any precedents describing the industry and its risks, so we had to create those descriptions. I was very flattered a few months later to see someone else's registration statement using much of my language to describe that industry.

Business Law Currents: And it was your representation of the Murdoch companies that originally got you started doing international securities work?

***JR**: Yes, at the time we began to represent it, News Corp. was based in Australia, and many aspects of international securities practice were not as developed as they are today. The staff of the SEC was extraordinarily helpful in working to resolve questions raised by foreign issuers, and was sensitive to the conflicts that existed between procedures for US offerings and procedures involving offerings outside the U.S. As a result of this experience, I developed a broad appreciation for the complexities associated with representing foreign issuers in the US. At the time we first started representing News Corp., they did not have any significant US securities presence. That changed with the securities offering associated with the Metromedia transaction in 1986, and with many subsequent debt and equity transactions. In 1994, I spent a significant amount of time in Britain working on the IPO of British Sky Broadcasting, in which News Corp. had a large interest.*

I felt extremely fortunate to work on these international deals. If you consider domestic transactions to be monochromatic, then many registered international offerings are in Technicolor — you deal not only with domestic disclosure issues and offering rules, but the disclosure requirements and procedures of the foreign jurisdictions where the securities are offered. I've generally found this additional complexity to be intellectually satisfying.

Business Law Currents: What are the key complications that you faced in international offerings and how has it changed over the years? Has there been convergence?

***JR**: The international securities bar has become much more sophisticated, and many of the issues that confronted us a decade ago no longer pose such challenges. Coordination of the timing of offerings used to be a larger problem than it is now. Filing an initial registration statement in the US could, for example, create gun-jumping or other issues abroad, and the changes made to the registration statements pursuant to SEC comments created disclosure issues elsewhere. . For this reason, the SEC has provided a number of accommodations to foreign issuers, such as permitting foreign issuers to submit their initial registration statements to the SEC on a confidential basis rather than publicly. Although not all such differences have been eliminated, there has been a significant evolution in international practice. More lawyers understand the critical paths necessary to preparing and closing deals, so transactions generally proceed in a more coordinated manner.*

Also, it has become easier for foreign issuers to become listed or do registered offerings in the US, because the SEC is now accepting IFRS financials without requiring issuers to reconcile their financials to U.S. GAAP. In this process, the SEC has developed a sophisticated understanding regarding IFRS financials. Another significant development streamlining offerings by foreign issuers in the US has been public offering reform, which modernized many of the rules relating to public offerings, and which made offerings by WKSIs, or well-known seasoned issuers, much more efficient. Many large reporting foreign companies qualify as WKSIs. On the private side, foreign issuers are often surprised at how quickly transactions can be structured and effected in the US under SEC Rule 144A, pursuant to which offerings are sold to large institutions that meet the SEC's definition of "qualified institutional buyer."

Business Law Currents: You've been a leader in the ABA for some time.

***JR**: Yes. As I'd mentioned, when I started working on international securities transactions, we were confronted with a lot of questions that did not have readily available answers. I got involved in the ABA to meet with other practitioners who were dealing with some of the same issues. I found the work of the International Securities Matters Subcommittee, which was part of the ABA's Federal Regulation of Securities Committee, to be extraordinarily helpful.*

I never thought my ABA activity would lead me to become chair of the Federal Regulation of Securities Committee. At the time I became involved, Alan Beller and Steve Cooper were co-chairs of the International Securities Matters Subcommittee. When Alan left to become Director of the SEC's Division of Corporation Finance, I was asked to be a vice-chair of the Subcommittee, and then later became its chair. I'd worked on a number of the comment letters the FedRegs Committee submitted to the SEC, and when I termed out on the International Subcommittee, Keith Higgins, the chair of FedRegs, invited me to become a vice chair of FedRegs in charge of comment letters. When Keith's term expired, he asked if I would become the chair of FedRegs.

My service as chair of FedRegs has been exhilarating — because of the extraordinary quality of the people I've met and worked with, the variety of the Committee's activities and the importance of the issues that we've been grappling with, especially in the wake of Dodd-Frank. The members of the FedRegs Committee, and the entire ABA Business Law Section, are a remarkable group of people. I've been very fortunate to have developed many friendships and professional relationships from my bar activities.

Business Law Currents: So, both in your practice and at the ABA, no doubt your practice has been consumed by Dodd-Frank for the past year and is likely to be for years to come. What are some things you think the law got right?

***JR**: I think Dodd-Frank was right in focusing on systemic risk. It also correctly recognized that the financial crisis resulted from weaknesses in a number of systems, rather than a failure of any single system. In addition, Dodd-Frank provided relief to smaller reporting companies from the need to obtain auditor attestations to their annual internal control reports.*

Business Law Currents: And a couple of things in Dodd-Frank you think need revisiting?

***JR**: In many respects, I question whether the legislative response, which in many ways was very prescriptive, was appropriate. I have a huge respect for the need to maintain the integrity of our financial markets, as well as need to promote efficient capital formation and the ability of companies to operate in the best interests of their shareholders. Because most of our livelihoods are related to the capital markets, including investments for college tuition for our children, as well as for retirement, I am very sensitive to the implications of tampering with the financial markets without knowing exactly what the full consequences of the changes will be. If we are addressing a particular problem, we should ask whether we are satisfied that the solution is the most efficient and effective.*

We need to also ask about the risk that the solution will fail to meet its objectives or have unintended consequences. We live in an increasingly globalized economy, and the effect of over-regulation, or regulation that is not properly targeted, can place unreasonable burdens on companies, and can lead some market participants to move their businesses offshore.

That said, while a number of items in Dodd-Frank seem reasonable, I'm concerned that a number of its provisions, emanating from the need to act decisively in the wake of the financial crisis, may not be appropriately balanced. For example, they may impose costs burdens on companies, and on capital formation which are out of proportion to the benefits they will achieve. In many areas, I believe the legislation is too broad. For example, our asset-backed securities markets have provided us with tremendous liquidity, and although some people have identified abuses in the markets for residential mortgage-backed securities as a cause of the financial crisis, many segments of the asset-backed market had no relationship to the causes of the financial crisis.

I'm concerned that Dodd-Frank may have painted with too broad a brush in trying to remedy problems with only one segment of this market with responses that affect a far broader market. And many of the sections of Dodd-Frank have nothing to do with the weaknesses that led to the financial crisis, but appear to have been included to achieve other purposes. These provisions would have been better left for consideration in a less charged environment. One of my principal concerns with Dodd-Frank was that its specificity in some cases left little room for the SEC or other government agencies to tailor their rulemaking to respond to a wide range of legitimate concerns.

One aspect of Dodd-Frank I have concerns about is the conflict minerals provision. There can be no doubt that the civil war in the eastern Congo, in which an estimated 5.4 million people have lost their lives, represents a humanitarian crisis that demands our attention. But I question the wisdom of the provision Congress included in the Dodd-Frank Act, which will require thousands of public companies that use the so-called conflict minerals, which are tin, tantalum, tungsten and gold, to disclose annually in their SEC filings information about the use of conflict minerals in the products they manufacture.

As a result, companies will need to know not only the origin of any conflict materials they use, but also the origin of any conflict minerals in any components their suppliers provide to them and information further back along the supply chain, to their suppliers' suppliers and so on. This may represent a considerable burden, and that the statute does not include any de minimis exception – a company whose products use any conflict minerals at all, even $100 a year, is obligated to determine the origin of these minerals, and

then to provide additional information and audits if any of the minerals comes from the Democratic Republic of the Congo [DRC] or any adjoining country.

Although the idea is to put pressure on companies at the top of the supply chain that will filter down throughout the supply chain to cut off demand for conflict minerals from the DRC, I don't think this is the best way to respond to the DRC crisis. There are no doubt more direct means to cut off support for the armed groups in the DRC, and the cost and burdens imposed on companies subject to the Dodd-Frank provision will be considerable, even if the companies, at the end of the inquiry, conclude that they do not use any conflict minerals from the DRC. And, as one person has noted, even after this process is implemented, do we really believe that an ounce of gold mined in the DRC will have no buyer on the world market? Also, some industries, such as the electronics industry, have moved ahead with their own programs focused on the conflict minerals supply chain. I'd prefer to see how those programs operate before adopting a "one size fits all" approach imposed through legislation.

Business Law Currents: And the conflict minerals rule does not even have anything to do with the financial crisis.

***JR**: That's right. It also has nothing to do with the historic mission of the SEC, which is to protect investors, maintain fair and orderly markets and to promote capital formation. The statute does not even mention these goals. Considering the burdens this legislation will impose on public companies, it's possible that the provision will work to the detriment of many investors. And certainly, the conflict minerals issues had nothing to do with the financial crisis. As I've said, I believe the situation in the DRC requires a response, I just think the response by Congress is not the right solution.*

Business Law Currents: Dodd-Frank is not the first financial legislation has been rushed out without considering all the consequences.

***JR**: Sarbanes-Oxley is one example. Section 404 mandated that companies adopt internal control standards. Unfortunately, in the rush to meet the statutory requirements, the PCAOB adopted auditing standards that were overly broad, and companies had no guidance from the SEC. It wasn't until the PCAOB revised its auditing standards to implement a more risk-based review, and the SEC adopted management guidance, that this imbalance was rectified. And, as I mentioned earlier, now Congress has acted, in Dodd-Frank, to remove some of the burden the internal control provisions imposed on smaller reporting companies. My point is that had the legislation permitted the SEC and the PCAOB enough time to develop appropriate management guidance and auditing standards, and provided the SEC sufficient exemptive authority, it could have eliminated much of the excess burden. Another example is that, because of the rush to enact SOX, we have two provisions requiring companies to provide somewhat similar quarterly certifications by their principal executive and principal financial officers. Absent the rush to adopt, this duplication could have been avoided.*

I see similar aspects in Dodd-Frank. Because of the legislation's prescriptive timetables for regulation and implementation, the agencies charged with rulemaking and implementation may not be able to devote the time to the serious and comprehensive consideration that these provisions require. An agency's proposed rulemaking process, the public comment process, and the agency's deliberations regarding final rules are all very important, and when the timetables prescribed by the legislation are too compressed, the results of the process suffer.

Business Law Currents: With all the regulatory change right now, what are the challenges you face in your practice keeping everyone up to speed?

***JR**: When the pace of change is rapid, all those affected by the change experience significant anxiety. Companies need to understand the changes, prepare for the changes, and implement and analyze the changes. Because clients turn to their securities lawyers to communicate, and in many cases translate, these changes to them, it puts considerable burdens on securities lawyers to keep up to speed on these regulatory developments, and to be proactive in advising clients.*

You are effectively performing a vetting function, triaging what client's need to know immediately versus things that do not require immediate attention. And in this process making sure your information is current and informed. Among other things, that means that securities lawyers need have access to up-to-date high quality information. That's why the work of groups such as the ABA Business Law Section are so important, as well as information services like Thomson Reuters.

Hogan Lovells Partner **Jeffrey W. Rubin** focuses his practice on domestic and international securities transactions, corporate finance transactions, and mergers and acquisitions. In the securities area, Mr. Rubin has represented issuers and underwriters in public offerings and private placement transactions, with an emphasis on international transactions. He has also represented private equity funds in connection with technology and other portfolio investments. Mr. Rubin is the Chair of the Federal Regulation of Securities Committee of the American Bar Association's Business Law Section. He may be reached at jeffrey.rubin@hoganlovells.com.