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

Q&A With Hodgson Russ' John Zak

Law360, New York (March 27, 2013, 5:08 PM ET) -- John J. Zak is a partner in Hodgson Russ LLP's corporate and securities practice group in the firm's Buffalo, N.Y., office. He heads the firm's securities and capital markets practice.

Zak concentrates his practice in U.S. securities regulation and compliance, mergers and acquisitions, and corporate law and governance. He is active in the firm's U.S.-Canada practice group and regularly counsels Canadians on U.S. securities and corporate law matters. Zak has experience in public and private securities offerings, including venture capital and private equity transactions and executive compensation arrangements. He also counsels a variety of privately held companies. Zak is a member of the board of directors of Rex Energy Corporation (Nasdaq: REXX).

Q: What is the most challenging case you have worked on and what made it challenging?

A: My most challenging case was a matter for a public company client involving what are euphemistically known as “accounting irregularities.” It started with a midnight call from the distraught founder/CEO facing that his life’s work would go up in flames and got worse from there. We had it all — the U.S. Securities and Exchange Commission, FBI, Department of Justice, class actions, derivative actions, forensic auditors. Two officers of the company went to jail. The stock price never recovered, even after all the smoke cleared, and the company was eventually sold to a competitor.

Q: What aspects of your practice area are in need of reform and why?

A: I’d really like to see some movement toward comprehensive federal securities law reform. The public and private offering rules, even with some recent enhancements, remain challenging to navigate. The new crowdfunding rules proposed under the JOBS Act were a disappointment, and for what appears to be political reasons only, the SEC has not yet finalized the rule that would repeal the existing ban on general solicitation for offerings sold to accredited investors.

The reporting regime for public companies under the Securities Exchange Act could also use revamping. Form 10-Ks are now routinely 100 pages long and that’s for nonbank filers. For many banks, 100 pages just covers the financial statements. Form 10-Qs are also longer than ever, and don’t even get me started about proxy statements. I don’t know which investors the SEC thinks are reading these lengthy disclosure documents, but it certainly isn’t anyone who doesn’t have to do it for a living.

Q: What is an important issue or case relevant to your practice area and why?

A: I mentioned an important issue in my previous response. It would be very helpful if the SEC could find its way to adopting straightforward final rules repealing the ban on general

solicitation in private offerings sold to accredited investors. I cannot tell you how many times we have struggled to describe for clients seeking to raise capital the dos and don'ts of the private offering process.

As the rules now stand, you cannot have general solicitation of investors or you blow the exemption for your private offering. Much of the challenge relates to the meaning of "general solicitation" and, of course, the SEC has never drawn a particularly clear line as to is and is not general solicitation. A definition might help, but instead the SEC has given us a series of fact-based no-action letters to navigate. This gets back to my point about reform. The U.S. capital markets have successfully managed through these rules for many years; it has always seemed to me, however, that it was much harder than it needed to be.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Mark Gentile at Richards Layton in Wilmington, Del. He is a genuine expert in the area of M&A jurisprudence and Delaware corporate law generally. He's always pleasant and composed, even under pressure; he's prompt, courteous and an incredibly hard worker — and he's from Buffalo.

Q: What is a mistake you made early in your career and what did you learn from it?

A: As a relatively young associate a client asked me to fly across country with him to try to settle a dispute arising out of an acquisition agreement. Across the table were the sellers and their far more experienced lawyers. The meeting lasted less than an hour; no progress was made and my client was disappointed. I had said very little at the meeting and had deferred to my (older) client. On the long flight home it occurred to me that the reason I had been asked to attend was not to act as a potted plant. (Albeit at the time a potted plant with a billing rate of only $75/hr.). It was that my client had confidence in me and valued my participation. Instead, I had wasted my time and his money. I learned that clients are paying you to do more than sit at their side and say atta-boy. Even if that's what they appear to want, you need to find a way to add value, even in difficult circumstances.

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