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THE LONG VIEW

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Paul Dudek

BANKING & FINANCE

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MOVING FORWARD AND LOOKING BACK

PAUL DUDEK

An SEC vet reviews a quarter-century of change in international corporate finance.

BY SUE REISINGER

AFTER A QUARTER-CENTURY IN PUBLIC SERVICE, one of the things that Paul Dudek is looking forward to in private practice—besides the money, of course—is international travel. Dudek, who left the U.S. Securities and Exchange Commission in July to join Latham & Watkins, served the past 23 years as head of the SEC's Office of International Corporate Finance. Occasionally he was invited, on someone else's dime, to help put on educational programs in other countries. "But mostly at the SEC we stayed at home, and people came to us," he says.

But he remembers one trip fondly. It was in 1996 in Moscow, as part of an educational program sponsored by the New York Stock Exchange. "It was the heyday of foreign listings," he recalls, "and many Russian companies wanted to do IPOs [initial public offerings] in the U.S."

After the course work, participants enjoyed a social hour. And the Russians, as they are wont to do, made rounds of toasts to everyone. Eventually, in searching for something else to drink to, Dudek says, "they toasted to the SEC, and then to the U.S. generally accepted accounting principles. I'm not sure there's ever been a vodka toast to U.S. generally accepted accounting principles before," he says, laughing.

Now he has a chance for more foreign toasts. Latham has set up a national office to serve both lawyers and clients seeking the latest information on SEC developments and capital markets around the world. Dudek is already planning a traveling program to talk about regulatory issues and to meet with foreign companies interested in IPOs and entering the U.S. market. "There will be more travel, and I'm looking forward to that very much," he says.

At the SEC, Dudek supervised some 500 employees. He came to the agency 26 years ago after working on capital market transactions in the New York office of Cleary Gottlieb Steen & Hamilton. Through the years he shared his knowledge as an adjunct professor at Georgetown University School of Law and at the Osgoode Hall Law School of York University in Toronto, and he taught classes at Duke University Law School and the Center for Transnational Legal Studies in London.

Dudek also shares his experience by speaking at capital market conferences. Recent ones included programs on the Asia-Pacific, Turkey, the Caribbean and Latin America. He serves as a U.S. representative to the Corporate Governance Committee of the international Organisation for Economic Co-operation and Development, and as co-moderator of the Practising Law Institute's (PLI) global capital markets program, held annually.

His knowledge and experience in capital markets is probably unparalleled. David Lynn, a partner at Morrison & Foerster, has known Dudek for years and co-moderated the most recent PLI seminar with him in April. "He really believed with a passion in his mission [at the SEC] to facilitate foreign companies coming to the U.S., while preserving investor protection," Lynn says. "He lived and breathed that on a level that probably no one else had before him, or ever will after him."

Because of his wealth of knowledge and rare vantage point, Corporate Counsel asked Dudek to discuss significant changes that occurred in the global marketplace during his watch. He brought up five. We then asked other experts, who don't necessarily know him, to comment on some of the choices. While most lawyers would cite a specific case, or a certain new law, Dudek sees a bigger picture. Here are the types of insights he brings to Latham.

1. TRANSPARENCY

While more a trend than a sudden change, Dudek says the increased recognition of the importance of disclosure has truly transformed global financial reporting. Where once there was an accepted concept of hidden reserves in accounting principles offering a way to "smooth out" earnings, "no one argues that things should be hidden anymore," he says. "To have a globally accepted set of reporting standards that have swept the world, along with GAAP [generally accepted accounting principles], is a tremendous development."

For lawyers dealing with the SEC, Dudek says: "It's not just the legal argument anymore; they need to make the economic argument."

Dudek credits the Sarbanes-Oxley Act of 2002 with enhancing the trend. He notes that key parts of the law relating to disclosure and internal control reports have been adopted around the world. "Was it a sea change?" he asks. "I don't know, but it certainly improved and continued the [transparency] trend."

Other experts agree on the importance of transparency. In a recent article on hypertransparency in business, authors Alison Taylor and James Cohen wrote about the social, economic and environmental change that accompanies disclosure. "Companies in the future will behave as if everything they say and do may become public," the article said. Taylor is the director of energy and extractives in the New York office for the nonprofit Business for Social Responsibility; Cohen is an expert on anti-corruption, international development and security sector reform based in Washington, D.C.

Their article said that more governments are seeking increased transparency—and a greater role in regulating—corporate supply chains. As examples, they cited the California Transparency in Supply Chains Act and the United Kingdom's Modern Slavery Act. And in June the SEC adopted rules to require resource extraction issuers—such as the oil, natural gas and mineral industries—to publicly disclose information regarding payments to the U.S. or any foreign government. "The vast expansion of interconnectedness will transform how companies manage and engage with their external and internal stakeholders," the articles stated.

2. RELIANCE ON CAPITAL MARKETS

During his career, Dudek says, he saw a growing realization that companies need to rely on capital markets for economic growth, not just in the U.S. but also throughout the world. "The trend certainly developed over time," he says, "with the increased role of privatization and of the capital markets. Now investors are even coming into smaller companies."

And the greater the role of the capital marketplace, the greater the need for transparency. Parts of Dudek's five points weave in and out of each other, and so it is with the increased importance of capital markets and transparency. "It dovetails with good financial reporting," Dudek says. "If you are going to have a global capital market, you need disclosure and transparency."

Another expert, Stephen Gillespie, a partner in the London office of Gibson, Dunn & Crutcher, recalls that the globalization of capital coincided with the deregulation of financial markets in the 1980s. Gillespie co-chairs his law firm's global finance group and says, "talking from the point of view of someone sitting in London doing European financing," the era ushered in the biggest changes he has seen.

Deregulation in the U.K. and Europe followed the U.S. efforts. And that, Gillespie says, led to the dominance of the U.S. investment banks in the market. He adds, "With the deregulation of the financial services markets, there was an inflow of huge amounts of U.S. capital into Europe. It effectively opened up the U.S. capital market to foreign borrowers."

3. TECHNOLOGY

Back in the day, as Dudek tells it, investors relied on newspapers and company press releases for their market information. Today there are internet news sites, company websites, Twitter, Facebook, email, texting and an array of instant information. "The marketing of securities may have changed," he says, "but the goal hasn't. Investors still need to look at companies on an individual basis. What they go through in terms of understanding an investment is the same as it's ever been."

Technology is transforming other aspects of business as well. In a speech earlier this year, Robert Kaplan, the president of the Federal Reserve Bank of Dallas, said that technology "disruptions" are changing the way companies think about capital and other spending. Increasingly, emerging business models are disrupting older models "in ways that would not have been imagined only a few years ago," he said. "Think Uber versus a taxi or car service, Airbnb versus a hotel room, Amazon versus a retail store."

Such changes raise policy issues, too. From using technology in lowering costs to using it in replacing workers, companies and their general counsel need to explore the consequences. "It is difficult to determine the ultimate impacts," Kaplan said. "However, these are key issues that policymakers will need to better understand."

And technology weaves into transparency as well. The Taylor-Cohen article noted that by 2020 there will be 80 billion devices connected to the internet. The result is that companies have to accept that their ability to control reputation has been greatly reduced. "This new environment raises complex and morally fraught questions around privacy, surveillance, transparency and freedom of expression," the article said. "This will require rethinking approaches to reputation, stakeholder engagement and values."

4. ECONOMIC ANALYSIS

Dudek sees another trend in how sophisticated economic analysis has come to affect the development of new rules at the SEC. In the past, he says, economic analysis was not robust. Someone would come up with an estimated number and look to the economists to justify it. But technology, among other things, has made the process faster, easier and more accurate.

"What you see now is a full-blown economic analysis of what this means for rule writing," Dudek says. "And for how in-house lawyers and outside counsel need to interact with the agency with much more in-depth knowledge on the economic impact of a particular rule. It's not just making a legal argument anymore; they need to make the economic argument."

5. SMALLER COMPANIES/EMERGING MARKETS

In the 1990s, Dudek says, megacompanies in Europe were at the forefront of entering the U.S. capital market. He recalls the first large European company to list in the U.S. was German automaker Daimler-Benz (simply Daimler today) in 1992. After that, he oversaw about 2,000 foreign companies going public by seeking IPOs in the U.S., with an increasing number of them of mid-to-small size, and an increasing number based outside Europe.

Daniel Spiegel, senior of counsel and a member of the public policy and government affairs practice at Covington & Burling in Washington, D.C., says that the growth of emerging markets entering the global economic and trading system has been a major economic change. Among other things, Spiegel was the U.S. ambassador to the European Office of the United Nations in Geneva from 1993 to 1996 and worked as a special assistant to then-Secretary of State Cyrus Vance.

Corporate lawyers must be very adept when entering these markets, Spiegel says. "They are entering systems without a strong rule of law and with weak regulatory systems," he explains. Pointing to the traditional skills of a corporate lawyer advising a company making an investment in Europe, Spiegel notes, "Those skills may not be sufficient in the emerging market context."

Beyond corruption and compliance issues, he says, there are a wide range of political and legal issues to consider. He recalls, for example, working with a vaccine company that wanted to establish a factory in a foreign country with an emerging market. But they realized "that its intellectual property could be in danger and unprotected in that market."

WHAT ABOUT BREXIT?

Yet one more major change looms in the global marketplace. Dudek didn't list it because he says it's too early to gauge its impact or to know if it belongs in the top five. But Covington's Spiegel and Gillespie, the Brit, have no doubt that the U.K. leaving the European Union (EU) and its single market will have a massive impact. Spiegel says that "it is the most important development affecting American companies invested in Europe since the formation of the EU" in 1993.

Everyone is waiting for the British and the European Union to begin negotiations over their new economic relationship. The U.K. has two years to arrange its withdrawal and negotiate a new pact.

How difficult will the negotiations be? Really tough, Spiegel and Gillespie agree. But Spiegel points out that each has political and economic needs that it wants the other to meet. "The British still want as much access as possible to the European market," Spiegel says. And the EU still wants access to the British market, because—as a July newsletter by the Dallas Fed discusses—nearly all the populations of Europe are declining except the U.K., which is expected to grow through the end of the 21st century. At the current rate, the U.K. will overtake Germany as Europe's most populous nation by about 2050.

But the EU must be cautious. Spiegel explains that if it gives the U.K. too sweet a deal, other nations might want to depart the EU and seek similar agreements. On the other hand, they say, the EU needs British help with its financial issues and with the headache of massive immigration into Europe.

As for Dudek, perhaps he's saving his own analysis for paying Latham clients. Maybe that's how you transition from SEC vet to rainmaker. ■