DALLAS BAR ASSOCIATION · SECURITIES SECTION

Enforcement Lessons for Transactional Lawyers

How Routine Transactions Become Regulatory Investigations

Jason T. Barnes

Shareholder, Corporate Finance & Securities
Munsch Hardt Kopf & Harr, P.C.

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PROGRAM OVERVIEW

Program Roadmap

01 **Framing: The Transactional Lawyer's Blind Spot**
Why deal counsel underestimate regulatory exposure in routine transactions

02 **How It Starts: Triggers That Turn Routine Into Regulatory**
Examination types, transactional red flags, and deal structure exposure

03 **The Escalation Path: Examination → Investigation → Enforcement**
Document requests, deficiency letters, referrals, and the cooperation framework

04 **Where Transactional Counsel Get Pulled In**
Exposure beyond the registered intermediary, and legacy vs. structural risk

05 **Building in Protection: Practical Steps for Deal Counsel**
Due diligence, documentation, structuring, and post-closing compliance

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SECTION I

Framing: The Transactional Lawyer's Blind Spot

Patent and latent risk, and why the investigation rarely starts where you'd expect

I

The Transactional Lawyer's Blind Spot

1 Patent vs. Latent Risk

Securities issues in a transaction carry both risks visible at closing and risks that surface only after closing, once regulators, investors, or counterparties look back at how the deal was built.

2 A Separate Track

Securities compliance exposure runs independently of the corporate law and governance issues that dominate deal negotiation. It is easy to clear a deal on the corporate checklist while leaving a securities problem untouched.

3 Legacy Risk Transfers

In many transactions, the buyer inherits the target's past securities compliance history along with its business. What looked like a routine acquisition can carry someone else's unresolved regulatory exposure.

PRACTICE POINT

The corporate governance checklist and the securities compliance checklist are not the same list. Clearing due diligence on one says nothing about exposure under the other - which is exactly why the gap goes unnoticed until a regulator asks.

Where Securities Law Overlaps Transactional Work

TRANSACTION / INSTRUMENT	WHERE THE SECURITIES OVERLAP HIDES
M&A Stock Purchase or Merger	Buyer generally assumes the target's securities law history, including unresolved prior offerings and undocumented intermediary compensation.
M&A Asset Purchase	Exposure can sometimes be limited, but successor liability still turns on a facts-and-circumstances analysis, not a guarantee.
Rollover Equity & Seller Notes	Routinely mischaracterized as non-securities; the Howey and Reves tests apply regardless of the label the parties chose.
Earnouts & Deferred Consideration	Can themselves be securities, carrying their own valuation-gap and tax characterization traps.
Intermediary & Finder Compensation	Transaction-based fees trigger a broker-dealer registration analysis; the 2023 M&A broker exemption is narrow and fact-specific.
Private Placements, Funds & EB-5 Raises	Accredited investor verification and general solicitation limits apply regardless of deal sophistication.

SECTION II

How It Starts

The triggers that turn a routine transaction into a regulatory matter

II

Three Ways an Inquiry Begins

ROUTINE

Cycle Examinations

Scheduled, periodic reviews of a broker-dealer or adviser as part of the ordinary regulatory calendar - not triggered by any specific concern.

CAUSE-BASED

Complaint or Referral

Triggered by an investor complaint, a red flag in a filing, or a referral from another regulator. Private placement activity is a frequent entry point.

SWEEP-BASED

Industry-Wide Inquiry

A focused, sector-wide review of a specific compliance issue across many firms at once, often following an enforcement trend or emerging risk area.

PRACTICE POINT

Private placement activity is often examined as part of a broader broker-dealer cycle exam. Findings there can cause the review to expand rapidly into a focused, cause-based inquiry - the category a matter starts in is not the category it ends in.

Common Transactional Triggers

1 Form D and Offering Document Irregularities

Inconsistent or incomplete Form D filings, or offering documents that don't match how the deal was actually marketed and sold.

2 Mischaracterized Compensation

Intermediary fees computed as a percentage of proceeds or paid at closing are treated as transaction-based compensation regardless of how the engagement letter labels them - a frequent unregistered broker-dealer trigger.

3 Deal Structure Itself

Stock deals and mergers typically carry forward the target's securities law history; asset deals can limit exposure, but successor liability can still attach depending on the facts.

4 Investor Complaints

A single dissatisfied investor, often unrelated to the current transaction, can be the entry point that puts a prior offering under a regulator's microscope.

PRACTICE POINT

Examiners focus heavily on compensation agreements and wire transfer records, tracing past the contract label to the economic reality of what was actually paid and when.

SECTION III

The Escalation Path

From document request to deficiency letter to formal investigation - and the off-ramps along the way

III

The Opening Move: Document Requests

What Gets Requested

Form D filings and related offering documents, subscription agreements, investor suitability records, intermediary compensation agreements, and due diligence files.

The Response Itself Is Evidence

The completeness and organization of a document response signals the quality of the firm's compliance function to examiners. Incomplete or disorganized responses accelerate scrutiny.

Absence Is a Finding

What a firm cannot produce is informative on its own. Missing suitability records, absent due diligence files, and undocumented compensation arrangements are findings before any substantive analysis even begins.

PRACTICE POINT

Investor complaints, flagged Form D filings, and state regulator referrals are the most common triggers behind a document request.

From Deficiency Letter to Investigation

1

Deficiency Letter

Most examination findings result in a written description of findings and required corrective action.

2

The Response Matters

How a firm responds to the deficiency letter substantially affects whether the matter stays at the examination level or escalates further.

3

Escalation Triggers

Formal investigation typically follows willfulness, significant investor harm, or a pattern suggesting the deficiency is not isolated - and an inadequate response to the deficiency letter is itself an escalation trigger.

4

SEC Referral

Enforcement referrals to the SEC are more common where conduct involves fraud, significant sums, or unregistered activity by non-FINRA members, where FINRA's own jurisdictional reach is limited.

PRACTICE POINT

Current enforcement priorities feeding this pipeline: continued scrutiny of Reg D exemptions in private offerings, SEC-DOJ coordination on insider trading tied to merger leaks and material nonpublic information, and expanding cross-border regulatory coordination.

Cooperation as an Off-Ramp

The SEC has repeatedly signaled that it will reward firms that self-report, cooperate, and remediate - sometimes reducing penalties substantially, and in some cases foregoing them.

Self-Policing

Appropriate safeguards and technologically current compliance policies

Self-Reporting

Reporting without delay, including before an internal investigation is complete

Proactive Remediation

Timely correction of the underlying issue, not just the paperwork

Above-and-Beyond Cooperation

Going beyond the legal minimum in assisting the inquiry

Early, Often, Substantive Engagement

Sustained, meaningful collaboration with the regulator throughout

PRACTICE POINT

Concrete steps regulators have credited: self-reporting before an internal investigation is even complete, using forensic accountants to explain complex data, and proactively identifying witnesses and facilitating interviews.

SECTION IV

Where Transactional Counsel Get Pulled In

Exposure is rarely limited to the registered intermediary

IV

Exposure Beyond the Registered Intermediary

1 Issuers and Issuer Counsel

When a registered intermediary participates in a placement, the exposure does not stay solely with that intermediary. Issuers, issuer counsel, and other parties with knowledge of a compliance failure can be drawn into the proceeding.

2 A Widening Circle

A single inquiry involving one intermediary can expand into a broader investigation of a network of related parties involved in placing the same offering.

3 Cross-Border Compounding

For cross-border transactions, it is no longer just the SEC acting alone. Foreign regulators increasingly coordinate enforcement as global information-sharing agreements expand.

PRACTICE POINT

Cooperation among all related parties matters. Inconsistent accounts across related entities are themselves treated as an independent escalation trigger, separate from the underlying conduct.

Legacy Risk vs. Structural Risk

Legacy Risk

Risk associated with the company being acquired - the target's past offerings, past intermediary arrangements, and past disclosure practices, inherited by the buyer at closing.

Structural Risk

Risk created by the deal itself - how rollover equity, seller debt, earnouts, and post-closing arrangements are characterized and documented, and whether they rely on a valid exemption.

PRACTICE POINT

Rollover and earnout structures carry their own disclosure obligations - pre-emptive rights, tag-along and drag-along rights, and appraisal rights all raise issues independent of the exemption analysis.

SECTION V

Building in Protection

Practical steps for deal counsel, before and after closing

V

A Practical Checklist for Deal Counsel

1 Due Diligence

Calibrate diligence requests to regulatory risk specifically - prior offerings, intermediary compensation arrangements, and suitability documentation - not only business and corporate governance risk.

2 Documentation

Build a paper trail during the deal that would hold up under a document request, not just a closing binder that satisfies the corporate checklist.

3 Structuring & Disclosure

Choose deal structure and disclosure language deliberately to manage successor liability and post-closing tail risk, particularly for rollover equity and earnouts.

4 Post-Closing Handoff

Build a compliance handoff to the client's ongoing team so that structural protections put in place at closing are actually maintained afterward.

PRACTICE POINT

Post-closing integration should specifically revisit insurance coverage gaps and earnout structures, since seller wealth exposure and personal liability tail risk often surface only after closing.

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Three Things to Take Away

1 The escalation path has off-ramps.

A deficiency letter is not a verdict. How a firm and its counsel respond - completeness, cooperation, remediation - substantially affects whether a matter stays contained or escalates to formal investigation.

2 Exposure is not limited to the intermediary.

Issuers, issuer counsel, and other parties with knowledge of a compliance failure can be drawn into a proceeding. Staying on a deal after spotting a problem is itself a risk decision.

3 Deal structure is a securities decision, not just a corporate one.

Whether risk transfers, limits, or is newly created depends on choices transactional counsel make directly - stock versus asset structure, exemption reliance for rollover equity, and disclosure drafting.

Questions & Discussion

Jason T. Barnes · jtbarnes@munsch.com · 214.880.1024