

Broker/Dealer Regulation ©
Fall 2017
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SYLLABUS

Reminder: this is a paper class, not a final examination class.

- Grading shall be based upon the following:
- Final Paper---45 %
 - Two (2) Short Intermediate Written Homeworks---25 % each (total 50%)
 - “Intangibles,” i.e., class participation-----5 %

Grading will conform to Law School policy for electives and a class enrollment of this size.

Classes:

Each numeral below indicates a class session, commencing with the inaugural class on Monday, 21 August 2017, et seq.

The brevity of certain reading assignments is not a mistake. The readings are very targeted in order to complement the lectures in an elective class. Moreover, not reading a one or two page assignment is inexcusable.

Any case cited below is required reading. Look it up electronically and/or in hard copy. For the Supreme Court cases, focus on the case syllabus; thereafter briefly review the majority opinion only (unless otherwise directed).

1. Introduction; A brief walk through history; the Great Depression and the calls for reform; the need for broker/dealer regulation in modern America; the role of broker/dealer regulation in a free economy; the need for balance and the need to face new challenges; a few words about administrative law and administrative agencies.

We will re-examine Twentieth Century America, the Great Depression, and the birth of modern broker/dealer regulation. We will discuss how a free and robust economy is protected by the appropriate degree of regulation. This will bring us to the present day, and the current role of broker/dealer regulation and its readiness for the constant challenges of the cheaters and scamsters of recent vintage (Madoff, Rajaratman, et al.)

Materials and Page Assignments:

Textbook at p. 2-16; Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

A general awareness of American and global history from that era is also quite helpful. Consult any number of books, biographies, and television documentaries that inform you of those times.

2. Securities Law Background, Part I; The 1933 Securities Act; SEC Rules and Regulations thereunder.

Broker/dealer regulation rests upon the solid foundation of federal securities laws. We will first examine the 1933 Securities Act, which regulates the bringing of securities to the market for the first time. Topics will include registration, the main players in that process, exceptions to regulation such as the “Rule of Fives,” with significant attention to the liability provisions of the ’33 Act, such as Sections 11 and 12.

Materials and Page Assignments:

Textbook at p. 20-25, 31-35, and 50-59.

1933 Securities Act (Title 15, U.S.C.); S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946); Herman v. MacLean & Huddleston, 459 U.S. 375 (1983); Pinter v. Dahl, 486 U.S. 622 (1988); Omnicare, Inc. v. Laborers District Council, 575 U.S. ____ (March 24, 2015); contemporary readings on the Facebook IPO and similar.

3. Securities Law Background, Part II; The 1934 Securities Exchange Act; creation of the Commission; SEC Rules and Regulations thereunder.

A discussion of the Securities and Exchange Commission, its early history, its first Chairman, and its current makeup; an examination of the principal anti-fraud provisions of the ’34 Act, principally Section 10 and Rule 10b-5 promulgated thereunder, including modern interpretations.

Materials and Page Assignments:

Textbook at p. 72-86.

1934 Securities Exchange Act (Title 15, U.S.C.), Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. ____ (2011); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. ____ (2014), and related Supreme Court cases; Sabino & Sabino, “From *Chiarella* to *Cuban*: The Continuing Evolution of The Law of Insider Trading,” 16 Fordham Journal of Corporate & Financial Law 673 (2011); U.S. v. Parigian 824 F.3d 5 (1st Cir. 2016);

Colombo, “Tipping the Scales Against Insider Trading: Adopting a Presumption of Personal Benefit to Clarify *Dirks*,” 45 Hofstra Law Review 117 (2016).

4. Securities Law Background, Part III; The 1934 Securities Exchange Act Continued (see above); State “Blue Sky Laws, New York’s Martin Act, the role of state regulators and prosecutors.

Materials and Page Assignments:

Sabino, “The New Uniform Statute of Limitations for Federal Securities Fraud Actions: Its Evolution, Its Impact, And A Call for Reform,” 19 Pepperdine Law Review 485 (1992); California Public Employees’ Retirement System v. ANZ Securities, Inc., 582 U.S. ____ (June 26, 2017); People v. Greenberg, ____ N.Y. 3d ____ (June 2, 2016).

5. Broker/Dealer Regulation as Self-Regulation; the Maloney Act; the creation of the Self Regulatory Organization (“SRO”).

We will examine the delegation of the regulation of Wall Street to...well, Wall Street. We will witness the birth of the SRO, and its evolution from the NASD to the modern FINRA; the promulgation of FINRA Rules; SEC oversight. And a few words about the MSRB, the Municipal Securities Rulemaking Board.

Materials and Page Assignments:

Textbook at p. 114-130, 138-44; the Maloney Act of 1938; NASD and FINRA materials; FINRA mission (from the FINRA website).

6. Dealers and Market Makers; who are those people on the stock exchange floor? dealers, market makers, and “specialists,” and the demise of most of them; putting customers first, obtaining the best price, and violations such as “interpositioning.”

Materials and Page Assignments:

Textbook at p. 158-61, 173-80, 188-192, 196-97, 208-17, 222-25, 226-29, 242-44. United States v. Finnerty, 533 F.3d 143 (2d Cir. 2008).

7. Obligations of Brokers and Dealers; Applicable Rules of “Know the Security,” “Know the Customer,” “Suitability,” and similar; The “Boiler Room,” prohibitions on trading in “penny stocks,” “Churning,” “Front Running,” and other improprieties :

Materials and Page Assignments:

Textbook at p.261-62, 269-70, 305-07, 309-15, 325-327, 331-33, 353, 359, 373-378, 380, and 397; FINRA Rules 2009, 2010, 2110, 2114, S.E.C. v. Wellshire Securities, Inc., 737 F.Supp. 251 (S.D.N.Y. 1990); see also S.E.C. Litigation Release No. 18072/April 4, 2003 (subsequent action).

8. Control Person Liability, Section 20 of the '34 Act; the Duty to Supervise; the Role and Significance of the Compliance Department, the Compliance Officer, and related personnel; Separation of Market Research from Retail Brokerage; the "Chinese Wall" and breaching same.

Materials and Page Assignments:

Textbook at 399-400, 406; SIPC v. BLMIS, 511 B.R. 375 (Bankr. S.D.N.Y. 2014), the Henry Blodget case, i.e., separating market research from investment banking and retail sales.

9. Regulation of the Markets Themselves; the traditional Floor Exchanges; the modern Electronic Exchanges; The 1987 Crash, "Flash Crashes," and other market calamities of the modern age; distinguishing the Great Recession and its root causes, the the Great Recession's aftermath of regulation.

Materials and Page Assignments:

Textbook at 458-59, 475-83, and 514-15; Starr, Inc. v. U.S., ____ F.Supp.3d ____ (June 16, 2015) (Wheeler, J.) (Court of Federal Claims).

10. Obligations to Maintain Net Capital, Prohibitions on "Parking" to evade Net Cap requirements; "Parking" in another form as a violation; Segregating and Safeguarding Customer Property; Margin Accounts; Regulation "T;" Short Sales.

Materials and Page Assignments:

Textbook at 521-22, 526-33, 533-38; 554-55; 559-61; 562; 572-73; Merrill Lynch v. Manning, 578 U.S. ____ (May 16, 2016); the Jeffries & Co. "parking" scandal.

11. The Securities Investor Protection Act ("SIPA"); the Securities Investor Protection Corporation ("SIPC"); the Bernard Madoff cases; SIPA liquidations.

Materials and Page Assignments:

Textbook at 552-53; Sabino, “The Role Of Bankruptcy Courts In Stockbrokerage Liquidations,” 16 *Securities Regulation Law Journal* 227 (1988); SIPC v. BLMIS, 496 B.R. 744 (Bankr. S.D.N.Y. 2013); CarVal UK Ltd. v. Giddens (In re Lehman Brothers, Inc.), 791 F.3d 277 (2d Cir. 2015) (definition of SIPA “customer” does not include repos).

12. SIPA Continued (see above).

13. Investment Advisers; the Investment Advisers Act of 1940; Fiduciary Duty for Investment Advisers Distinguished, and its future; Financial Publications and Freedom of the Press.

Materials and Page Assignments:

Textbook at 584-91, 592-93, 601-03; S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963); Gabelli v. S.E.C., 568 U.S. 442 (2013); United States v. Tagliaferri, ___ F.3d ___ (No. 15-536) (2d Cir. May 4, 2016); Department of Labor regulations promulgated in mid-2016 imposing fiduciary standard upon brokers in handling retirement and IRA accounts.

14. An Overview of FINRA Arbitration; its beginnings; mandatory arbitration; claimant v. the broker/dealer; conduct of the arbitration; similarities and dissimilarities to litigation; the finality of the arbitrator’s decision.

Materials and Page Assignments:

Federal Arbitration Act, 9 U.S.C. § 1, 2, and 9; FINRA website, tab on “Arbitration,” “Mediation,” and related topics.

Attendance & Lateness:

You are expected to arrive on time and prepared for each class.

Moreover, the rules of the New York State Court of Appeals and the American Bar Association require law students to be in good and regular attendance in the courses for which they are registered. To comply with these rules, you must attend at least 85% of the regularly-scheduled classes for this course.

There shall be a sign-in sheet for each regularly-scheduled class. **Your signature (or lack thereof) on these sheets shall presumptively determine your attendance at (or absence from) any given class.** Each student is individually responsible for signing the

attendance sheet in. Falsification of sign-in sheets (by, for example, signing another student's name) is a violation of the Code of Academic Conduct.

If you exceed the permitted absences by not attending class, or by failing to sign in, you will be administratively withdrawn from the course. Any such withdrawal may have serious ramifications for your financial aid, academic standing, and date of graduation. If you are excessively absent from several classes, you may face additional sanctions, including but not limited to denial of certification of good and regular attendance to the New York State Board of Law Examiners, or other state bar examiners.

The Office of Student Affairs has authority to excuse class absences for religious reasons and in cases of truly compelling hardship. If you wish to claim a particular absence as excused, and thus not counted against your maximum number of allowable absences, you must take that issue up with the Office of Student Affairs. I shall mark an absence as excused if and only if I receive a note or email from the Office of Student Affairs to that effect.

Lastly, late arrivals are disruptive to the class. For this and other reasons, please make every effort to arrive on time to class.

Does Not Fulfill a Writing Requirement; However...

It is true that you will be undertaking a modest amount of writing in this class.

Regrettably, due to the strict parameters imposed upon classes for meeting the Writing Requirements, this specific class will not satisfy those prerequisites.

Nevertheless, excellence in your writing assignments in this class will provide writing samples for potential employers, expand and improve your writing skills, and no doubt make you an overall better writer. Indeed, the last is a specific intent of these assignments.

Laptop Computers

You may bring and use laptops in this class.

However, "mute" them (or type quietly, whatever) so as not to disturb your classmates.

Utilize them to take notes and/or refer to class-related information.

And just so we are clear, checking your Facebook page, ESPN, and the like are impermissible uses of your laptop. Refer to the "Intangibles" portion of your grade.

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