SYLLABUS
GLOBAL COMPLIANCE IN THE DIGITAL AGE

Professor Eric Kriftcher
erickriftcher@optonline.net
646-855-0832 (office)
516-655-0154 (mobile)

Class Time: Thursday, 6:10 PM - 8:00 PM
Room: [ ]

COURSE DESCRIPTION

Welcome to Global Compliance in the Digital Age. This course explores and analyzes the statutory and regulatory compliance challenges for use and management of electronic information for e-commerce and litigation discovery across industries and the barriers of national cultures, histories and differing legal systems.

To reach an understanding of the compliance network for electronic information, we will analyze how differing notions of “personal information” in privacy and data protection laws and regulations impact the daily interfaces essential to e-commerce. If “big data” is the lifeblood of e-commerce, how do we balance commercial interests with individual protections? Is “opting-in” or “opting-out” adequate? We will examine practical frameworks for management of data in finance, healthcare, education and other regulated areas. U.S. federal and state information compliance schemes will be analyzed.

Beyond discussions of privacy and data protection, we also will look at other impacts from the explosion of technology and new uses of data. Within finance and banking, we will consider how the depth and velocity of trading activity creates opportunities for both appropriate and inappropriate behavior. Important and evolving anti-money laundering and “know your customer” requirements will be studied. In the health care area, we will explore existing statutory frameworks and consider practical impacts given the current COVID-19 crisis. What limits exist or should exist for governments and corporations when responding to a global pandemic? We also will analyze 4th Amendment and related criminal proceedings, and notions of “search and seizure” when dealing with electronic information. Cybersecurity requirements and controls will be reviewed. In each of these areas, we will consider new compliance tools that are needed for industries to ensure the existence of adequate safeguards and controls.

As one of our Learning Objectives, you will gain knowledge and understanding of both substantive and procedural laws impacting these sectors. Further, you will analyze the practical impacts of these laws and regulations on the daily activities of corporations, other businesses and individuals. You will learn how to apply the concepts we discuss in class, and which you read in the assigned
materials. For example, what are the public policy impacts of one form of privacy protection versus another? You also will prepare a practical presentation on relevant topics as if you were addressing a client or colleagues. We also will explore discovery and other litigation issues related to electronically stored information, including review of non-disclosure agreements, document retention policies, litigation hold memoranda, and information governance policies and procedures. Cross-border impacts of these issues also will be considered.

Please be advised that this course will challenge you to think differently as we analyze legal problems where there may be little case law, or where the case law is in conflict. This is an ever-evolving area of the law and we will pivot as needed to address current developments. You will be expected to keep the practical in mind as you read, discuss and analyze the issues presented. Through these exercises, we will meet other Learning Objectives, including exercising proper professional responsibilities and developing entry-level lawyering capabilities. Hopefully, you will leave the class with a unique understanding of one of the most fascinating, and fastest-growing areas of the law.

COURSE MATERIALS

References and/or links to readings will be distributed to students and case citations will be provided for selected assignments. Additional materials may be added from time to time. We will not have a formal textbook for the class. You may wish to search for news articles, law firm summaries, or other press reports discussing some of the newer statutes, key regulations and important cases. These materials may provide helpful background as we dive into source materials.

Please note that electronic information compliance is an area of law that is evolving. As a result, the topics for a particular class, and the assignments, may be revised during the semester. I will provide sufficient notice when this occurs.

COURSE REQUIREMENTS

This course uses a seminar format and there will be a great emphasis on informed and well-prepared student participation. Attendance is expected at least in accordance with Law School standards.

Twenty percent (20%) of the grade will be based on active and informed class participation. Fifteen percent (15%) will be based on an in-class presentation, likely with one other student, on a topical issue relevant to the course (e.g., the JP Morgan “spoofing” case; FTC findings against Facebook; etc.). While there will be one or two student presenters on a topic, all students remain responsible for the reading that is the subject of the presentation. An additional fifteen percent (15%) of the grade will be based on a mid-semester brief writing assignment. The final fifty percent (50%) will be based on an open-book, take home final exam that will have a series of topical fact patterns for you to analyze and discuss.
COMMUNICATIONS

If you have questions during the semester, including in connection with your presentation, please send me an email or text and we will set up a time to speak. I will not have formal office hours, but will make myself available. Rather than wasting your valuable time, if you have questions please ask. We can make sure to alert the entire class if the question impacts everyone.

CLASS 1 (January 21) – virtual class (N.B. topics and assignments may adjust depending on time needed to get through the materials)

Topics: Introduction and Course Overview - Global perspectives on data privacy and data protection (part 1)

- Data protection/security and privacy
- Is there a general right to privacy? Should there be?
- Common law privacy rights
- Section 230 of the Communications Decency Act of 1996
- Global privacy regulations overview – general rights v. sector based rights

Reading/Viewing Assignment:

- The Social Dilemma, Netflix Docudrama, analyzing social, political and cultural issues and challenges from technology and social media advances

- Google Privacy Policy, available at policies.google.com

- S. Warren and L. Brandeis, The Right to Privacy, 4 Harvard L. Rev. 193 (1890)


- Communications Decency Act of 1996, section 230, 47 USC 230 (“the twenty-six words that created the internet”)

CLASS 2 (January 28) – virtual class

Topic(s): Global perspectives on data privacy and data protection (Part 2)

- Global privacy regulations
  - EU Privacy Directive 95-46
  - General Data Protection Regulation (“GDPR”)
- Jurisdictional Scope
- Cross-Border Information sharing
- Brexit Impacts
Reading Assignment:

- EU’s Regulation (EU) 2016/679 (General Data Protection Regulation), available at https://gdpr-info.eu

*Presentation – 2 students - CNIL (French Regulator) decisions relating to Google and Amazon and use of cookies (December 2020); CNIL May 2018 Google and transparency*

- EU-U.S. Privacy Shield (2016), available at https://www.privacyshield.gov/servlet/servlet.FileDownload?file=015t00000004qAg

*Presentation – 2 students --Data Protection Commission v. Facebook Ireland (Schrems II); striking down Privacy Shield*


**CLASS 3 (February 11; currently no class February 4 for Public Interest Career Fair)**

**Topic(s): Global perspectives on data privacy and data protection (Part 3)**

- US Privacy regulations – national (FTC Act) and state (e.g., California, New York)
- Sector specific privacy regs (e.g., The Privacy Act of 1974, 5 USC 552a; Health Insurance Portability and Accountability Act, 1996 (HIPPA); Children’s Online Privacy Protection Act of 2000 (COPPA); Gramm-Leach Bliley Act (GLBA)
- CPRA (approved by California voters 2020, effective 2023)
- NY Privacy Act (failed to pass 2019; reintroduced 2020)
- Internet privacy – will there be federal regulation?

Reading Assignment:

- FTC Act Section 5, 15 USC 45

*Presentation – 2 students - FTC Imposes $5 billion penalty and sweeping new privacy restrictions on Facebook, FTC, see Complaint and Press Release, available at ftc.gov*

- California Consumer Privacy Act of 2018 (the “CCPA”), available at oag.ca.gov (see also Deloitte CCPA Reference Guide)

- NY SHIELD ACT, amended 2019 (”Stop Hacks and Improve Data Security Act”); see also NY Identity Theft Protection and Data Services Act (2019), 23 NYCRR Part 500 (see also Ropes and Gray NY Privacy Law Alert, August 26, 2019)
CLASS 4 (February 18 likely to be rescheduled)

Writing Assignment due February 25 - Should the US develop a national law addressing privacy akin to GDPR in the EU, particularly in the tech space, or continue to rely on sector by sector legislation to address the issue (e.g. Health Care, Education, etc.) at a national level along with individual state laws – 4-5 pages

CLASS 5 (February 25)

Discuss Writing Assignment

Topic(s): Financial Services and Banking (Part 1, Market Structure and Control Issues)

- Electronic Trading – algorithmic trading; programmatic trading; high frequency trading
- Automated Trading Systems and ECNs
- Use of data and privacy – contractual arrangements/trading practices disclosures
- Flash Crash of 2010 – Presentation 2 students (see below)
- Knight Securities 2012
- Regulatory Controls – Reg ATS, CATS, SEC Rule 15c3-5 (17 CFR 240.15c3-5), Limit Up-Limit Down (SEC Rel. 34-69077), Trade Reporting (2020 FINRA Treasury Reporting Proposal)

Reading Assignment:

- 2010 CFTC-SEC Advisory Committee Report on May 6, 2010 Flash Crash and 2011 Advisory Committee Recommendations
- Market Access Rule 15c3-5 and 17 CFR 240.15c3-5
- S. Lofchie, Lofchie’s Guide to Broker Dealer Regulation, pp. 119-123 and 141-144 (to be distributed)
- Flash Boys, by Michael Lewis (interesting, optional book)

CLASS 6 (March 4)

Topic(s): Financial Services and Banking (Part 2, Manipulation Issues)

- Manipulative Conduct
FX
LIBOR
Spoofing, JPM Pays $1 Billion – Presentation 2 students – see below
● Consent Orders, Undertakings, Surveillance Tools and Controls
● Electronic Communications – recordings, current work environment

Reading Assignment:

-In the Matter of Barclays PLC, CFTC Docket 12-25, June 27, 2012 (CFTC Action for LIBOR Manipulation)

= Deutsche Bank LIBOR Settlements with FCA, DOJ, CFTC and NYS

-FCA and CFTC Actions for FX Manipulation Against Citibank, HSBC, JP Morgan, RBS and UBS, November 12, 2014

-CFTC Spoofing Case Against JP Morgan, available at cftc.gov, September 29, 2020

-CFTC Electronic Trading Guidelines, December 2020

CLASS 7 (March 11)

Topics(s) – Financial Services and Banking (Part 3)

● Confidentiality Agreement Issues
● Data Protection and Security Issues – IP, name use and marketing, decoupling, security (also to be discussed in Cybersecurity class)

● Anti-Money Laundering Regulations and Controls
   Bank Secrecy Act and AML Regulations; Patriot Act of 2001
   Know Your Customer (KYC) and Customer Due Diligence Obligations (CDD)
   Placement, Layering and Integration
   Anti-Money Laundering Act of 2020
   Red Flags and Enforcement/Whistleblower Awards

Reading Assignment:

Lofchie’s Guide to Broker-Dealer Regulation, pp. 75-91 (to be distributed)


HSBC Money Laundering Case, July 17, 2020, available at justice.gov (DOJ investigation) and sec.gov (SEC investigation) – Presentation – 2 students
CLASS 8 (March 18)

Topic(s): Electronic “personal” data, privacy rights and the Fourth Amendment

- “…to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause…”
- Wyden-Daines Amendment

Reading Assignment:

- J. Harper, Administering the Fourth Amendment in the Digital Age, available at constitutioncenter.org
- Riley v. California, 573 U.S. 373 (2014)


CLASS 9 (March 25)

Topic(s): Cybersecurity in the digital age and certain state and certain federal laws affecting global corporations

- FTC Act, Section 5
- Cybersecurity Act of 2015
- SEC requirements
- Gramm–Leach–Bliley Act
- Contractual and other cybersecurity controls

Reading Assignment:


- *Presentation, 2 students, In re Equifax Settlement with FTC, CFPB and various States, July 22, 2019*

**CLASS 10 (April 1)**

Topics: U.S. health information compliance (Part 1)

- Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)
- HIPPA Security and Privacy Rules: analysis and practical compliance challenges
- State laws may be stricter than HIPAA (e.g., California, Massachusetts, New York, North Carolina and Texas)

Reading Assignment:

- HIPPA Privacy and Security Rules, 45 CFR Part 160 and 164


- California Confidentiality of Medical Information Act, CA Civil Codes Sections 56-56.16, available at https://irb.ucsd.edu/cmia.pdf
CLASS 11 (April 8)

Topic(s): U.S. health information compliance (Part 2)

- Dept. of Health and Human Services commentaries, Guidance, FAQ responses and decisions in HIPAA administrative proceedings
- HSA v. Anthem, Inc.
- HIPAA compliance and Covid-19- Privacy Waivers During a National Health Crisis

Reading Assignment:


-TBD - Writing Assignment/Presentation Due April 15: Your client, a California-based healthcare system, asks you to put together a short slide deck (up to five) for senior management training on health information protocols impacting the client.

CLASS 12 (April 15)

Topic(s): Litigation, Discovery and Electronically Stored Information (ESI) – part 1

-What is electronic data or electronically stored information (ESI)? Why is it important?
-When is information “stored” for production purposes?
-Data management for global companies

Reading Assignments:


CLASS 13 (April 22)

Topic(s): Litigation, Discovery and Electronically Stored Information (ESI) – part 2

- Privilege issues
- Litigation holds – notices and practical considerations

Reading Assignment:

- United States v. Finazzo, 2013 WL 619572 (E.D.N.Y. 2013)
- Scott v. Beth Israel Medical Center, 17 Misc.3d 934, 847 N.Y.S.2d 436 (S. Ct. N.Y. 2007)

CLASS 14 (April 29)

Topic(s): Litigation, Discovery and Electronically Stored Information (ESI) – part 3

- Cross-Border Issues – Who can access information and where is it held?
- Blocking statutes
- Aerospatiale v. District Court of Iowa five-factor balancing test for U.S. courts
- Evidentiary issues and hearsay for electronic information

Reading Assignment:

