General Information:

Course objectives and expectations: This course is designed to provide students with an understanding of the practice issues faced in a complex securities investigation. Recent SEC regulatory trends and policy initiatives will be examined as applied to Division of Enforcement investigations and their impact on charging and settlement decisions. Students will understand the inter-relatedness of the attorney-client privilege, corporate privileges, the work product doctrine, and professional responsibility under the Sarbanes-Oxley Act in the representation of entities and individuals in an SEC fraud investigation. We will consider also common practice issues including managing concurrent SEC and Department of Justice (DOJ) investigations. Students will gain practical knowledge of the issues arising through interaction and negotiation with the SEC and DOJ during the investigative process, and strategic decisions in order to achieve the optimal result for the client.

Grading and Final Exam:

Your grade for the course will be based on attendance, class participation and a final exam. The final exam will be a take-home, open-book exam to be taken during the exam period which runs from December 8-19, 2015.

Readings: Assigned and optional readings will be available on the CANVAS site for this course. “Optional Readings” are intended to enhance the student’s understanding of the issues. We will from time-to-time make additional brief materials available on CANVAS drawn from current developments in our area of study. Please check CANVAS regularly for additional and/or updated materials.

Class Participation: The classroom setting for this course will be interactive. Participants are encouraged to raise issues and questions on topic during class sessions relate to the course concepts.

Contact information: We will be available after class for meetings and before class on request. For administrative issues related to the course, you may contact
teaching assistant Please post questions or comments on CANVAS.
Class 1: The Basics

September 3, 2015

The Basics (The first class is a survey intended to familiarize students with the focus, concepts, statutes and practice issues that will be covered in the course.)

- Common examples of securities fraud
- What makes a securities fraud investigation complex?
- Informal investigation (MUI) - the call from staff and request for documents
- Formal order of investigation - subpoena power – documents and testimony
- Importance of effective interaction with the regulators – timing and purpose
- The timeline of a complex securities fraud investigation

SEC Enforcement

- SEC authority to investigate fraud; civil action and penalties
- ENF’s specialization units
- SEC’s role and mission in concurrent proceedings
- Overview of staff investigation
  - Informal/formal
  - Document request/subpoena
  - Taking testimony/proffers
  - Staff’s view of conflicts

From investigation to Wells: understanding and managing the stages of investigation

- Decisions made at the beginning of an investigation determine its outcome
- The principal junctures of an investigation and decision tree
- The end game

DOJ: Criminal Investigations of Securities Fraud

- Referrals from the Staff to DOJ
- Main Justice versus USAO
- Investigative Agencies

Assigned Reading:

(1) Rule 10b-5, Exchange Act of 1934
(2) Section 21(a)-(d), Securities Exchange Act of 1934

SEC Enforcement Manual (2015)- http://www.sec.gov/divisions/enforce/enforcementmanual.pdf; Sections 2.1 (Matters under investigation); 2.3.2 (Opening an Investigation); 2.3.3-.4 (Formal Orders); 2.4 (The Wells Process); 3.2.3- (Voluntary Document requests); 3.2.3.1 (Forms 1661 and 1662); 3.2.6 (Subpoenas for documents); 3.3.2 (No Targets of Investigation); 3.3.5 (Testimony under subpoena); 4.1.3 (The Fifth Amendment Privilege against Self Incrimination)

Class 2: Managing Concurrent Investigations
September 10, 2015

DOJ

- Electronic surveillance (18 U.S.C. §§ 2510, et seq.)
- Grand Jury (Fed. R. Crim. P. 6)
- Immunity (18 U.S.C. § 6001 et seq.)
- Obstruction of Justice (18 U.S.C. §§1512, 1519, 1520)
- Perjury and subordination (18 U.S.C. §§ 1621-22)
- State actor doctrine

Assigned Reading:

(1) United States v. Stringer, 535 F.3d 929 (9th Cir. 2008)
(2) United States v. Gupta, 848 F. Supp. 2d 491 (S.D.N.Y. 2012)
(5) SEC Enforcement Manual (2015)- Section 3.1.4 (Parallel investigations and the state actor doctrine)

Class 3: The Corporation
September 17, 2015

Understanding the business of the corporation, its organization, financial reporting practices and historical share price fluctuations

- General Documents of Interest
  - Board Packages
  - Board Minutes
  - Board Committee Minutes
  - Compliance Program
  - Document Retention Policy
Cast of Characters: The Company

- The Board
- Inside/outside directors
- Audit Committee
- Compensation Committee
- Finance Committee
- Executive Management
- CEO
- COO
- CFO
- General Counsel
- Chief of Accounting
- Chief Compliance Officer
- Middle managers and other employees

Outside Counsel: Outside Counsel’s Most Important Question: Who is the client?

- Transactional/SEC Disclosure
- Special litigation counsel

Independent Auditor

The Three Independent Branches of Corporate Financial Governance

- The Audit Committee
- The CFO
- The Outside (Independent) Auditor

The Corporate Decision Makers

- The Board of Directors
- The Audit Committee
- Special Committee

Assigned Reading:
Class 4: Recent DOJ and SEC Programmatic Initiatives  September 24, 2015

SEC

- Broken Windows

- Financial Reporting Fraud: The Financial Reporting and Accounting Fraud Task Force (“Fraud Task Force”)

- Compliance Program Initiative: A joint effort between the Division of Enforcement and OCIE

- Admissions: “egregious cases”
  
  o DOJ has always required admissions from individual and corporate defendants.
  
  o SEC only recently started requiring admissions of liability as opposed to settling with “no admit or deny” settlements.

- Use of Administrative Proceedings

DOJ

- Cooperation
- Compliance
- Individuals
- International coordination and prosecutions

Assigned Reading:

(1) Section 8A of the Securities Act, 15 U.S.C. § 77h-1;
(3) A. Lieberman, Fast Track Justice: Is the SEC’s Resort to Administrative Proceedings in Complex Enforcement Actions the Exercise of “Unchecked and Unbalanced Power”? 
In the Matter of GTrade Services LLC et al., AP File No. 3-15654 (Dec. 18 2013);
In the Matter of Scottrade, Inc., AP File No. 3-15702 (Jan. 29, 2014)
Hill v. SEC, 2015 US Dist. Lexis 74822 (June 8, 2015, N.D.Ga.)

Class 5: Privileges October 1, 2015

Privileges I

• Attorney-Client Privilege
• Advice of Counsel Defense
• The Corporate Privilege: from “control group” to “subject matter”
• Work Product Protection
• 5A Right against Self Incrimination

Privileges II

• Preserving the Privilege
• Who may waive the privileges?
• Communications with third parties?
• Forensic Accountants and Auditors
• Government: Report of Internal Investigation
• Selective waiver
• Common Interest and Joint Defense Agreements

Assigned Reading:

(1) Upjohn Co. v. United States, 449 U.S. 383 (1981);
(2) In re Kellogg, Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014)
F. R. Civ. P. 26 (b)(3);
(3) In re Initial Public Offering Sec. Litig., 249 F.R.D. 457 (S.D.N.Y. 2008);
(4) United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009)
Class 6: Representing a Public Company, Sarbanes-Oxley and Model Rules

October 8, 2015

Sarbanes-Oxley and the Model Rules of Professional Conduct

- Reporting up/out
- Conflict of interest and multiple representation
- Confidentiality and Privilege
- SEC Rule of Practice 102 (e)

Representing a Public Company in SEC Formal Investigation: Selected Issues

- Representing multiple subjects of an investigation
- Conflicts and professional responsibility
- Joint representation agreements
- Representing Witnesses Testifying in the Formal Investigation
  - Rules of the Road
  - 5th Amendment
- Preservation of the corporate privilege

Representing a Public Company with DOJ

Assigned Reading:

1. Part 205 Sarbanes-Oxley Act of 2002 (SOX),
2. ABA Model Rules of Professional Conduct 1.13, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.16;
3. Rule of Practice 102 (e)
4. In re Grand Jury Subpoena, 415 F. 3d 333 (4th Cir. 2005);
5. United States v. Nicholas and Ruehle, 606 F.Supp.2d 1109 (C.D.Cal. 2009);
6. United States v. Schwimmer, 892 F. 2d 237 (2d Cir. 1989);
(8) *Legal and Ethical Issues Affecting the Conduct of an Internal Investigation by Audit Committees and Independent Counsel*, D. Brodsky, K. Sivashanker, B. Morris (Latham & Watkins LLP 2011)


Class 7: Dodd-Frank

October 15, 2015

Dodd-Frank Whistleblower Provisions and Corporate Compliance

- Dodd-Frank whistleblower provisions
- The Corporate Compliance program
- Compliance Officers as “Gatekeepers.”
- When SEC will file actions against compliance officers

Assigned Reading:

(1) Dodd-Frank Wall Street Reform and Consumer Protection Act §922; Rule 21F of the Securities Exchange Act of 1934 (May 25, 2011);

Class 8: Financial Reporting and Accounting Fraud

October 22, 2015

Financial Reporting and Accounting Fraud: Selected Issues

- Badges of Fraud
- Sources: Compliance Program; whistleblower; disgruntled employee; outside transactional counsel
- Reporting chain within Company under SOX
- Powers of SLC/Audit Committee/QLCC
- Decision to retain independent outside counsel to conduct the investigation
- Auditor Independence and Reporting Requirements: §10A and Rule 10A-1

Assigned Reading:

(1) Kmart Anonymous Letter;
(2) Sample FinFraud document subpoena;
(3) Section 10A and Rule 10A-1 of the Exchange Act
(4) Arthrocare trial brief
Classes 9: The Internal Investigation October 29, 2015

Conducting the internal investigation: Independence, Authority, Scope

- Advising and managing the client: risk/benefit analysis
- Documents: preservation (freeze); retrieval; control; privilege log (F. R. Civ. P. 26 (b)(5)(A))
- Interviewing Corporate Employees (Upjohn and Model Rule 4.3)
- Memoranda and notes (work product doctrine; fact or opinion?)
- Internal Investigation Report: to whom and how conveyed
- Self-reporting and voluntary disclosure
- Interim remedial action

Assigned Reading:

1. *Conducting the Internal Investigation: Documents and Interviews*, G. Stein (Schulte Roth & Zabel LLP 2011);
2. *Concluding the Internal Investigation*, S. Malina (Greenberg Traurig LLP 2011);
3. *Public Disclosure of the Results of Internal Investigations*, M. L. Kwan-Gett and R. van der Meuten (Wilkie Farr & Gallagher LLP 2011);


Insider Trading

- Insider trading cases after *Newman*

Sentencing Issues in Securities Fraud cases

- Recent changes in USSG
- Proving Loss

Class 11: Broker-Dealer Fraud November 12, 2015

Broker-Dealer Fraud: Recent Enforcement Trends and Developments in Today’s Nanosecond Financial Markets
• Dark pools/ATS
• Broker conflicts: Order flow/ Best execution/ Make-take fees
• Market access violations (Rule 15c3-5)
• Layering/Spoofing (red flag: high number of canceled orders))
• ENF/OCIE Task Force
• Managing the OCIE Audit

Assigned Reading:

(1)  *In the Matter of Liquidnet, Inc.*, AP File No. 3-15912 (June 6, 2014).
(2)  *In the Matter of Pipeline Trading Systems LLC* AP File No. 3-14600 (Oct. 24, 2011)
(3)  *In the Matter of Wedbush Securities Inc.et al.*, AP File No. 3-15913 (June 6, 2014)
(4)  *In the Matter of Knight Capital LLC*, AP File No. 3-15570 (Oct. 16, 2013)

**Class 12: SEC and DOJ Cooperation Initiatives, FCPA**

**SEC Cooperation Initiative**

- Cooperation with SEC: The Process/Rewards and Risks
- The Seaboard Factors: Fair or coercive?
- Cooperation with DOJ: a complicating factor

**DOJ Cooperation [Metrics]**

**FCPA**

**Assigned Reading:**

(1)  SEC Enforcement Manual, Section 6 (Fostering Cooperation)
(3) SEC Section 21(a) Report and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions;

(4) Report of Investigation Pursuant to Section 21(a) of the Exchange Act (W. R. Grace & Co);

No Class: Thanksgiving Break

November 26, 2015

Class 13: Charging Decisions, etc. and Class Review

December 3, 2015

Charging Decisions, Forum Selection, and Negotiating with the SEC: Should your client settle or contest?

- The Wells process: Reverse proffers, admissions, “binary” negotiation/decision tree, collapsed timeframe
- Federal court or AP: What factors determine the forum and what are the relative advantages of each?
- Potential remedies

Negotiating with DOJ

Class Review

- General review of substance covered in class
- Discussion of Final Exam

Assigned Reading:

(1) Compare In the Matter of Athena Capital Research, A.P. No. 316199, with In the Matter of Latour Trading LLC, A.P. No. 3-16128;
(2) Sections 21(d), 21B and 21C Exchange Act; Rule 102(e);
(3) SEC Enforcement Manual, Section 2.4 (The Wells Process)