

Antonin Scalia Law School
George Mason University

Law & Regulation of Financial Institutions

3-credit course

Law 240

Spring 2024

Wednesday from 7:45pm to 10:40pm

Instructor

Jason A. Derr

jderr@gmu.edu

Course Overview

Welcome to what has been described as the most bizarre, tangled financial regulatory system in the world! This course covers the law and regulation of financial institutions, with an emphasis on U.S. banking law and introductory-level material on securities and insurance law. Studying this material will provide students with an understanding of the various, and often complex, structures of U.S. financial institutions, as well as the substantive rules that apply to their activities.

The material covered in this course will require students to face questions and shape arguments relating to the past, present, and future of financial regulatory law and policy. Why do we have such an unusual financial regulatory framework? What activities are banks authorized to conduct? How do financial institutions make their money and what are the attendant risks? Are there externalities associated with such activities? And, if so, how should the government respond? Is the application of new technologies to the provision of financial services changing everything that came before, or is it simply more of the same?

Additionally, this course will include a variety of practical elements, such as understanding the multiple sources of banking, securities, and insurance law and reviewing specific actions taken by regulators. Throughout, the course will challenge students to consider how they would advise their client or what recommendation they would make to a senior financial regulatory counsel. Students will be expected to evaluate both sides of each issue and to persuasively articulate their position in class.

Perhaps most importantly, the class will strive to bring excitement and energy to the study of U.S. financial services law.

This course, including all assigned material and classroom discussion, does not represent the views of the Board of Governors of the Federal Reserve System or the U.S. government. All course materials and discussions represent the instructor's own viewpoint and should not in any way be construed as a statement or opinion on behalf of either the Board of Governors of the Federal Reserve System or the U.S. government.

Student Learning Objectives

Students will be able to demonstrate knowledge of the historical development of U.S. financial services law and how this history still shapes a wide range of current laws, regulations, and policies.

Students will be able to define the major legal forms companies use to engage in banking and other forms of financial services, the key legal powers that come with each form (especially with respect to securities and insurance activities), and the associated federal and state regulators that have jurisdiction over each legal entity and activity.

Students will be able to analyze fact patterns that place federal and state financial services laws into conflict and to describe how the law handles such circumstances, particularly in the context of national bank powers and state usury law, as well as the regulation of insurance companies.

Students will be able to demonstrate knowledge of the most important federal consumer financial laws and the powers and responsibilities of the newest federal regulatory agency in this area, the Consumer Financial Protection Bureau.

Students will be able to understand a basic bank balance sheet and to analyze its components under the critically important rules governing bank capital and liquidity.

Students will be able to analyze fact patterns to determine whether banks are in compliance with laws governing loans to one borrower, loans to bank insiders, transactions between banks and their affiliates, and prohibitions on bank tying.

Students will be able to describe the examination and enforcement approaches and authorities used by the various federal regulatory agencies.

Students will be able to demonstrate knowledge of why banks and other financial institutions fail and the federal and state government's powers and responsibilities in resolving these failures.

Casebook

Carnell, Macey, Miller & Conti-Brown, *The Law of Financial Institutions* (7th ed. 2021) [“CMMC”].

Final Exam, Class Participation, and Student News Discussion

This course will be graded on the basis of students’ performance on a final exam, with an additional class participation component (as described below).

The final exam will be limited open book, which means that you may use your casebook; any notes or outlines that you have personally prepared; and printed copies of any statutory, regulatory, or other materials that are discussed in the casebook or in class.

Class participation will be a very important part of this course. Students will be required to participate frequently and substantively during each class meeting. Consistently insightful class participation may result in a discretionary one-third grade increase (e.g., B to B+) while a consistent lack of preparation may result in a discretionary one-third letter grade decrease (e.g., B to B-).

As part of the class participation requirement, beginning at week 2 of the course, at least one student per class will be required to present a financial services news topic to the class. Students may select their presentation date in advance, but involuntary assignments will be made for any classes that lack volunteers. Depending on the class size, students may be required to present on more than one occasion. Articles for presentation must be sent to jderr@gmu.edu 24 hours in advance of class.

Instructor Availability

As a part-time adjunct, I do not have an office at the law school. I will, however, make every effort to be available to students outside of class. You can always reach me by email, which is provided at the top of the syllabus. If you would like to communicate by phone, it is preferred that we schedule the date and time in advance. I will also be available before and after class.

Reading Assignments

The reading assignments primarily comprise the CMMC casebook and all statutory and regulatory provisions discussed within. This course will spend a significant amount of time focusing on the text of the relevant statutes and regulations, so it is extremely important that students pull all statutory and

regulatory citations mentioned in the casebook and review them in detail along with the casebook material.

All the material contained in the following reading assignments (including the direct text of the statutory and regulatory provisions discussed within) *and* any additional material discussed in class may be tested on the final exam.

Other required reading assignments may be added to the material below during the semester. If any changes are made to the assigned material, I will be sure to provide sufficient advance notice either in class or by email.

Week 1—Introduction and History of Financial Regulation

Required Reading

- CMMC: 1-5; 63-73; 14-51; 744-48 (*Dimension Financial Corporation*)

Overview

- Introduction and Review of Syllabus
- What is a Bank?
- History of U.S. Financial Regulation from the Founding to the “Years of Stress”

Week 2—History of Financial Regulation (Continued), Banking Basics, and Who Regulates Whom?

Required Reading

- CMMC: 51-58; 5-10; 73-110

Overview

- [Student News Discussion]
- Financial Crisis of 2008 and Beyond
- Banking Business Basics and Balance Sheets
- The Federal Reserve and the Money Supply
- Banking Industry Structure
- Regulatory Structure: Who Regulates Whom/Pros and Cons
- Why Regulate Banks?
- Entry into Banking
- Judicial Review of Chartering Decisions

Week 3—Preemption, National Bank Powers, and Fintech

Required Reading

- CMMC: 58-60
- *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25 (1996) [read only preemption portion of opinion, pages 27-37]
- 12 U.S.C. § 25b
- *Lusnak v. Bank of America*, 883 F.3d 1185 (9th Cir. 2018)
- *Cantero v. Bank of America*, 49 F.4th 121 (2d Cir. 2022) [skip concurring opinion]
- CMMC: 451-64 (usury); 750-54 (fintech partnerships and *Madden* case); 112-34 (bank powers)

Overview

- Preemption: Interactions Between Federal and State Law
- Usury and Most Favored Lender
- Fintech Partnerships
- National Bank Powers

Week 4—Securities Law and National Banks' Securities Activities

Required Reading

- CMMC: 609-21 (securities regulation and registration); 626-28 (underwriting); 134-48 (national banks' securities powers)

Overview

- [Student News Discussion]
- Securities Regulation Overview
- Securities Registration
- Underwriting
- Broker-Dealer Regulation (Margin Rules)
- National Banks' Securities Powers

Week 5—Insurance Law and National Banks' Insurance Activities

Required Reading

- CMMC: 567-77; 581-93
- CMMC: 148-60; 160-61 (“authorized products” material only)
- *Insurance Agents of America v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993) [must pull case from your preferred legal research database]

Overview

- [Student News Discussion]

- Insurance Regulation Overview
- Economic Principles Underlying Insurance
- McCarran-Ferguson Act
- Insurance Company Solvency Regulation
- National Banks' Insurance Powers

Week 6—Bank Holding Companies, Financial Holding Companies, Affiliate Transactions, and Mergers & Acquisitions

Required Reading

- CMMC: 266-84; 257-66 (affiliate transactions); 416-35 (mergers and acquisitions)
- Bank Merger Guidelines:
<https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf>

Overview

- [Student News Discussion]
- Bank Holding Company Basics
- Financial Holding Companies
- Volcker Rule
- Thrift Holding Companies
- Subsidiaries of Banks
- Affiliate Transactions
- M&A and Antitrust Constraints

Week 7—Safety and Soundness: Capital Regulation

Required Reading

- CMM: 203-225; 231-42

Overview

- [Student News Discussion]
- Capital Regulation
- Prompt Corrective Action
- Stress Tests

Week 8—Safety and Soundness: Liquidity and Deposit Insurance

Required Reading

- CMMC: 177-203

Overview

- [Student News Discussion]

- Bank Runs and Panics
- Liquidity Risk Management
- Deposit Insurance

Week 9—Prudential Rules; Consumer Financial Protection Bureau and Select Federal Consumer Protection Laws

Required Reading

- CMMC: 244-47; 248-49 (*Problems* 1(a), 1(b)(1), 1(b)(2), 1(b)(5), 1(b)(6), and Problem 2); 250-55; 255 (*Problems* 1(a) through (c) only); 464-85
- Title X of the Dodd-Frank Act (Sections 1001-1002; 1011-1017; 1021-1026): <https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>
- *Community Financial Services Association of America, Limited v. Consumer Financial Protection Bureau*, No. 21-50826 (5th Cir. Oct. 19, 2022), <https://www.ca5.uscourts.gov/opinions/pub/21/21-50826-CV0.pdf> [Read only section I (pages 1-7) and section II(D) to the end (pages 23-39); skim the rest]

Overview

- [Student News Discussion]
- Prudential Rules: Loans to One Borrower, Interbank Liabilities, Insider Lending, and Other Insider Transactions
- Consumer Financial Protection Bureau Overview: Governance, Jurisdiction, and Authority
- Equal Credit Opportunity
- Truth in Lending
- Credit Reporting

Week 10—Federal Consumer Protection Law (Continued)

Required Reading

- CMMC: 485-500; 503-07; 435-42; 442 (*Problems* 1 through 4); 447-51; 518-27

Overview

- [Student News Discussion]
- Real Estate Transactions
- Predatory Lending
- Debt Collection
- Tying
- Privacy

- Community Reinvestment

Week 11—Examination and Enforcement

Required Reading

- CMMC: 313-14; 317-53; 363-66
- Federal Reserve Board Final Rule, “Large Financial Institution Rating System” (Nov. 2018) (*read* summary on page 58724 and appendix A, 58734-35, and *skim* from “LFI Rating Components” detail at 58735 to the end at 58739):
<https://www.govinfo.gov/content/pkg/FR-2018-11-21/pdf/2018-25350.pdf>

Overview

- [Student News Discussion]
- Monitoring: Background and the Supervisory System
- Enforcement: Written Agreements; Cease-and-Desist Orders; Suspension, Removal, and Prohibition; Civil Money Penalties; and Criminal Penalties

Week 12—Bank Failure

Required Reading

- CMMC: 367-97; 405-08

Overview

- [Student News Discussion]
- Logic of Receivership
- Appointing a Receiver
- Structuring Resolution
- Marshaling Assets
- Paying Valid Claims in Order of Priority
- DFA Title II Orderly Liquidation Authority and FDIC “Single Point of Entry” Proposal
- Resolution Planning (“Living Wills”)

Week 13—*Financial Regulation Jamboree*: Systemic Risk, Foreign Banking Supervision, Current Litigation, and REVIEW SESSION for FINAL EXAM

Required Reading

- CMMC: 286-87; 397-405 (SIFIs, Systemic Risk, and *MetLife, Inc. v. Financial Stability Oversight Council* (D.D.C. 2016))

- Title I of the Dodd-Frank Act (Sections 111-21):
<https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>
- CMMC: 289-97 (Foreign Banking Supervision)

Overview

- [Student News Discussion]
- Systemically Important Financial Institutions
- Foreign Banking Supervision
- Highlights of Current Financial Services Litigation
- REVIEW SESSION for FINAL EXAM