

NBA 563 & LAW 649

THE IPO AND M&A PROCESSES

FALL 2007

SYLLABUS

This course provides an in-depth look at initial public offerings and mergers and acquisitions from a practitioner's point of view. With respect to initial public offerings, the course covers: the applicable statutory framework, pre-offering corporate preparations (such as the implementation of poison pills), the due diligence process, the implementation of corporate governance policies appropriate for a public company, the offering registration process, liability under federal securities laws, the Securities and Exchange Commission review process, underwriting arrangements, selection of a trading forum, and the role of securities analysts. Regarding merges and acquisitions, the course explores: choosing an appropriate transaction structure (i.e., stock sale versus asset sale, merger, etc.), deal financing alternatives, due diligence, public company transaction issues (i.e., anti-takeover matters and directors' fiduciary duty concerns), and crucial legal and business aspects of the acquisition, such as caps/collars, letters of intent, successor liability, continuity of employees, noncompetition agreements, and reacting to hostile bids.

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COURSE WEBSITE

The website for the course is on Blackboard under NBA 563. The address for Blackboard is <http://www.blackboard.cornell.edu>. All course materials, including this syllabus and the lecture notes, will be posted on the course website. In addition, we will post announcements on the course website from time to time, so please check the website routinely. Also, please be sure to enroll in the course website so that you will receive any course email distributions.

Note: There may be a site on Blackboard under LAW 649. We will NOT use this site as the course website. ALL students should enroll in and use the NBA 563 site.

PROFESSOR EMAILS, OFFICE LOCATIONS, AND OFFICE HOURS

Professor Nozell: jdn23@cornell.edu, 322 Sage Hall.

Professor Teitelbaum: jct35@cornell.edu.

Professor Teitelbaum's office location will be posted on the course website.

Office hours for Professors Nozell and Teitelbaum will be posted on the course website.

TEACHING APPROACH

The teaching focus in the class is on practice. Our goal is to impart knowledge that you can use in practice, particularly as an investment banker, CFO or corporate lawyer. Therefore, you should not be surprised if the amount of theoretical discussion is minimal.

We will endeavor to make the class as interactive as possible. Additionally, we expect to have a few guest speakers. To facilitate class discussion, it is important that you complete the required reading assignments in advance of class. In addition, it is important to display your NAME CARDS during class at all times.

GRADING POLICY

Letter or S/U grade option for MBA and JD students. H/S/U for LLM students.

There will be a midterm exam covering IPOs and a final exam covering M&A -- each exam is worth 50% of your final grade. In addition, we will assign at least two problem sets. Good work on problem sets and class participation can help a grade. Poor work on problem sets, lack of class attendance, or being unprepared for class can hurt a grade.

Note to JD students: We will adhere to the law school's mean grade cap for JD students. Accordingly, JD student transcripts will not carry an asterisk next to their grade for this class.

LAPTOP POLICY

Laptop computers are **not** allowed in class.

COURSE MATERIALS AND WEEKLY READING ASSIGNMENTS

The course materials are comprised of:

1. A **course packet**, which contains selected readings. The course packet is available for purchase in the Johnson School Store.
2. Patrick J. Schultheis, Christian E. Montegut, Robert G. O'Connor, Shawn J. Lindquist, and J. Randall Lewis, *The Initial Public Offering: A Guidebook for Executives and Boards of Directors (Second Edition)*, Bowne & Co. Inc., 2004. Complimentary copies of this text have been provided by Bowne and will be distributed during the first class meeting.
3. David Harding and Sam Rovit, *Mastering The Merger: Four Critical Decisions That Make Or Break the Deal*, Harvard Business School Press, 2004. This book is available for purchase in the Johnson School Store. We will read approximately half of this book during the M&A part of the course. The second half of the book, dealing with post-merger integration issues, will likely prove useful for you as well.

In addition:

4. We will distribute during the first class meeting an example IPO prospectus that we will read and discuss throughout the semester.
5. We will ask you to read a few statutes, forms, and other materials which are available online at websites designated in this syllabus. Moreover, we may provide additional handouts or post additional readings on the course website from time to time. We will announce any additional readings in class and by posting an announcement on the course website.

Beginning on the next page you will find reading lists for each week of the course. Numbered references are to the materials contained in the texts or the course packet. Unnumbered references are to materials which are available online at designated websites. **The weekly reading assignments are integral to the course. Please read all the required materials.**

**WEEK 1 (8/27 and 8/29) Introduction; What is an IPO; The Parties;
Corporate Governance**

1. The Initial Public Offering Process, Practising Law Institute -- How to Prepare an Initial Public Offering (1994).
2. Deciding to Go Public, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 1.
3. Evidence on What CFOs Think About the IPO Process: Practice, Theory, and Managerial Implications, Journal of Applied Corporate Finance (Summer 2006).
4. Assembling Your IPO Team, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 2.
5. Gearing Up, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 3.
6. Hosting the Organizational Meeting and Management Presentations, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 6.

Note: A good IPO glossary is available online at <http://www.ipohome.com/newcomer/glossary.asp>.

WEEK 2 (9/3 and 9/5)

Section 5; The Registration Statement; MD&A

1. Regulatory Framework of Securities Act Registration, Soderquist on the Securities Laws (5th ed. 2006), Chapter 3.
2. A Breath of Fresh Air: The SEC Adopts Securities Offering Reform Amendments, Covington & Burling Securities Client Advisory (July 26, 2005).

Note: This item summarizes SEC Release No. 33-8591: Securities Offering Reform (July 19, 2005), which is available at <http://www.sec.gov/rules/final/33-8591.pdf>. Technical amendments to the release are available at <http://www.sec.gov/rules/final/33-8591a.pdf>. Reading the release is **optional**.

3. Commission Overhauls Executive Compensation Disclosure Rules, Shearman & Sterling LLP Client Publication (August 2006).

Note: This item summarizes SEC Release No. 33-8732A: Executive Compensation and Related Party Disclosure (August 29, 2006), which is available at <http://www.sec.gov/rules/final/2006/33-8732a.pdf>. Subsequent amendments are available at <http://www.sec.gov/rules/final/2006/33-8765.pdf>. Reading the release is **optional**.

4. The following readings on Sarbanes-Oxley:
 - a. Summary of Sarbanes-Oxley Act of 2002, Nixon Peabody LLP (August 2, 2002).
 - b. The Sarbanes-Oxley Act and IPO Filers, Insights, Volume 17, Number 10 (October 2003).
 - c. IPOs and SOX: Global Environment–Global Opportunities, Strategic Finance (January 2007).
 - d. The Case for Clarity, CFO (September 2006).
5. Pages 133-147 of Preparing the Registration Statement and Going Effective, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 8.
6. Preparing The New MD&A, ALI-ABA Business Law Course Materials Journal, Volume 30, Number 1 (February 2006).
7. Preparing MD&A: A Practitioner’s Checklist, Insights, Volume 8, Number 5 (May 2004).

SEC Release No. 33-8350: Commissions Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations (December 19, 2003), available at <http://www.sec.gov/rules/interp/33-8350.htm>. Reading the release is **optional**.

Securities Act of 1933 – Section 2(a)(10), Section 5, and Rules 134, 135, 153, 163A, 164, 169 (available at <http://www.law.uc.edu/CCL/index.html>)

Form S-1 Registration Statement
(available at <http://www.sec.gov/about/forms/forms-1.pdf>)

Regulation S-K – **Skim** sections referenced in Form S-1
(available at <http://www.law.uc.edu/CCL/index.html>)

WEEK 3 (9/10 and 9/12)

Due Diligence; Liability

1. Potential Liability and the Role of Due Diligence, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 7.
2. Due Diligence and Securities Act Liability, Understanding the Securities Law (3d ed. 2001), Chapter 6.
3. Sections 8.3.3, 8.3.4 and 8.5 of Liability for Securities Act Violations, Soderquist on the Securities Laws (5th ed. 2006), Chapter 8.
4. Claims Under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, Robins, Kaplan, Miller & Ciresi L.L.P. (March 9, 2005).
5. In re WorldCom, Inc. Securities Litigation: Due Diligence for Underwriters and Directors, Covington & Burling -- Securities Client Advisory (March 7, 2005).
6. The Due Diligence Defense Under Section 11 of the Securities Act of 1933, Brandeis Law Journal (2006). Reading this item is **optional**, but recommended.

Securities Act of 1933 – Sections 11, 12, 15, and 17
(available at <http://www.law.uc.edu/CCL/index.html>)

Securities Act of 1934 – Section 10(b) and Rule 10b-5
(available at <http://www.law.uc.edu/CCL/index.html>)

WEEK 4 (9/17 and 9/19) SEC Review; Pricing; Comfort Letters; Road Show

1. Pgs. 147-158 of Preparing the Registration Statement and Going Effective, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 8.
2. Pgs. 144-154 of Corporate Finance and the Securities Laws, Aspen Law & Business (2d ed. 1997).
3. Pgs. 168-171 of Underwriting Arrangements and Marketing, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 9.
4. Understanding Comfort Letters for Underwriters, The Business Lawyer (Volume 34, July 1979).
5. Pgs. 183-188 of Underwriting Arrangements and Marketing, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 9.
6. Why IPOs Still Use the Old Way, WSJ (July 6, 2005).
7. Finance Chiefs May Be Aware of Low IPO Pricing, WSJ (February 16, 2006).
8. IPO Roadshows Gain Some Glitter, WSJ (June 19, 2006).

Securities Act of 1933 – Rules 424(b), 430A, and 462
(available at <http://www.law.uc.edu/CCL/index.html>)

SAS 72: Letters for Underwriters and Certain Other Requesting Parties
(available on the course website under “Course Documents”). Reading SAS 72 is **optional**.

www.RetailRoadshow.com – Students should visit this website, which provides electronic roadshows for individual investors seeking information about public offerings. The electronic roadshow features a presentation by the executives of the issuing company. We will view this website and discuss it in class, so please take a look.

WEEK 5 (9/24 and 9/26) Underwriting; Forum Selection

1. Pgs. 159-168 and 172-176 of Underwriting Arrangements and Marketing, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 9.
2. Offering Economics, Explanation and Analysis, Lazard Client Manual.
3. Underwriting Agreements, Practising Law Institute -- How to Prepare an Initial Public Offering (2002). You may **skim** Annex A of this item.
4. Impact of Securities Offering Reform on Underwriting Arrangements, Insights, Volume 19, Number 10 (October 2005).
5. SEC Issues Guidance on Regulation M and IPO Allocations, Shearman & Sterling LLP (April 14, 2005).

Note: This item summarizes SEC Release No. 33-8565: Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations (April 7, 2005), which is available at <http://www.sec.gov/rules/interp/33-8565.pdf>. Reading the release is **optional**.

6. SEC, NYSE, and NASD Propose Rules for Allocation and Distribution of Offering Shares, Aspen Publishers, Inc. (February 2005).

Note: This item summarizes the following documents:

- a. SEC Release No. 33-8511: Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings (December 9, 2004), available at <http://www.sec.gov/rules/proposed/33-8511.htm>.
- b. SEC Release No. 34-50896: Self-Regulatory Organizations; Notice of Filing of Proposed Rule Changes by the New York Stock Exchange, Inc. and the National Association of Securities Dealers, Inc. Relating to the Prohibition of Certain Abuses in the Allocation and Distribution of Shares in Initial Public Offerings (December 20, 2004), at <http://www.sec.gov/rules/sro/nyse/34-50896.pdf>.
- c. NYSE/NASD IPO Advisory Committee Report (May 2003), which is available on the course website under "Course Documents".

Reading these documents is **optional**, but we recommend you read the NYSE/NASD IPO Advisory Committee Report.

7. New NYSE and NASDAQ Corporate Governance Listing Standards, Covington & Burling (February 12, 2004). You may **skim** this item.

Note: Item 10 summarizes Section 303A of the NYSE Listed Company Manual, which is available at <http://www.nyse.com/audience/listedcompanies.html>, and NASD Rules 4200 and 4350, which are available at <http://nasd.complinet.com/nasd/display/index.html>. Reading these rules is **optional**.

8. Firms Close In on Settlement of IPO Inquiry, WSJ (June 22, 2004).

NYSE Listed Company Manual – Section 902

(available at <http://www.nyse.com/regulation/listed/1182508124422.html>)

NASDAQ Listing Standard and Fees

(available at http://www.nasdaq.com/about/nasdaq_listing_req_fees.pdf)

NASDAQ Market Cost Comparison – Students should check out this fee calculator provided by NASDAQ, which you can use to compare annual listing fees on NASDAQ and the NYSE.

(available at http://www.nasdaq.com/reference/market_costing.stm)

Securities Exchange Act of 1934 – Regulation M.

(available at <http://www.law.uc.edu/CCL/index.html>). You may **skim** Regulation M.

WEEK 6 (10/1 and 10/3) More on Underwriting; Analysts

1. Pgs. 176-183 of Underwriting Arrangements and Marketing, Bowne -- The Initial Public Offering (2d ed. 2004), Chapter 9.
2. Global Analyst Research Settlement Joint Press Release (April 28, 2003).
3. NYSE Rule 472 (Communication with the Public) and NASD Rule 2711 (Research Analysts and Research Reports).
4. SEC Regulation FD: New Rules for Communicating With Analysts and Investors, Cooley Godward LLP -- Cooley Alerts (October 1, 2000).
5. Analysts Independence, Insights, Volume 17, Number 11 (November 2003).
6. SEC Adopts Final Rule Relating to Analyst Certification, Nixon Peabody LLP (undated).
7. Has Wall Street Changed Its Tune?, NY Times (June 19, 2005).

Securities Exchange Act of 1934 – Regulation FD
(available at <http://www.law.uc.edu/CCL/index.html>). You may **skim** this item.

Securities Exchange Act of 1934 – Regulation AC
(available at <http://www.law.uc.edu/CCL/index.html>). You may **skim** this item.

WEEK 7 (10/8 and 10/10)

Fall Break; No Class

Law school students are on break this entire week, and Johnson school students are on break Monday and Tuesday. Thus, THERE WILL BE NO CLASS THE ENTIRE WEEK.

WEEK 8 (10/15 and 10/17) Insider Trading

1. **Review Week 3, Item 4: Claims Under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5**, Robins, Kaplan, Miller & Ciresi L.L.P. (March 9, 2005).
2. Primer on Trading on the Basis of Material, Non-Public Information, J. Marston (2004).
3. Insider Trading -- A U.S. Perspective, SEC (September 19, 1998). Reading this item is **optional**.

Securities Act of 1934 - Section 10(b) and Rule 10b-5
(available at <http://www.law.uc.edu/CCL/index.html>)

Securities Act of 1934 - Section 16(b) and Rules 16b-3, 16b-6, 16b-7
(available at <http://www.law.uc.edu/CCL/index.html>)

WEEK 9 (10/22 and 10/24)

**Deal Structure Alternatives: Introduction;
“Paying” for the Deal**

1. Articles on Current M&A Environment:
 - a. A Merger? Did Anyone Tell The Board?, NY Times (June 26, 2005).
 - b. Reverse Mergers Move Into Fashion, WSJ (June 29, 2005).
 - c. Try Before You Buy, CFO.com (May 8, 2006).
 - d. Phelps Dodge Agrees to Buy 2 Canadian Rivals, WSJ (June 26, 2006).
 - e. A Board That Knows Two Words: No Sale, NY Times (July 8, 2007).
2. Resales of Stock Acquired in Merger Transactions, Insights, Volume 17, Number 2 (February 2003).
3. D. Harding and S. Rovit, *Mastering The Merger: Four Critical Decisions That Make or Break the Deal*, Harvard Business School Press (2004). **Read Chapters 1 and 2.**

Deal Structure Charts – **Students should read these charts carefully.** We will reference them often in class, so please take a look. (available on the course website under “Course Documents”)

**WEEK 10 (10/29 and 10/31) **Due Diligence; Confidentiality Agreements;
Asset vs. Stock Deals – Pros and Cons****

1. Structuring a Taxable Conveyance of a Corporate Business, Texas Bar Journal (June 1989).
2. Confidentiality Agreements for the Sale of a Business, The Practical Lawyer (December 2002).
3. Market Dictates Boardroom Deals, The HCI Group Ltd (undated).
4. Beware the NDA, The VC Buzz, Joseph Bartlett (May 21, 2002).
5. Due Diligence, Quick and Clean, CFO.com (April 27, 2006).
6. Split-offs Get a Bright-line Test, CFO.com (June 30, 2006).
7. Secrets of the M&A Masters, CFO (September 2005).
8. *Mastering the Merger. **Read Chapter 3.***

1. Another Look at Allocating Market Risk in Stock Acquisitions, Insights, Volume 17, Number 8 (August 2003).
2. Model Letter of Intent (2 models). These items are for your **reference**.
3. Caution: Earnout Ahead, CFO (June 2002).
4. The Art of Earnouts, Strategic Finance (June 1, 2003).
5. Deal Breakers, Buyers Are Giving Themselves More Outs By Expanding Material Adverse Change Clauses, CFO.com (October 20, 2003).
6. The State of the Art in No Shops, Fiduciary Outs and Termination Rights, Stephen Glover (undated). Reading this **optional**, but it does provide additional analysis that the law students in particular may find useful in practice).

WEEK 12 (11/12 and 11/14) Key Aspects of M&A Deal (Continued)

1. Pricing Formulations in Stock-for-Stock Mergers, Richard E. Climan (1998).
2. Purchase Price Adjustments, Earnouts, And Other Purchase Price Provisions, ALI-ABA Business Law Course Materials Journal, Volume 30, Number 3 (June 2006).
3. Delaware: New Rules for Special Committees and Fairness Opinions?, Wachtell, Lipton, Rosen & Katz (December 30, 2005).
4. What's Fair is Fair, Wachtell, Lipton, Rosen & Katz (May 31, 2005).
5. You Can Call It a Fairness Opinion But That Wouldn't Be Fair, NY Times (July 10, 2005).
6. Amendments to the Best Price Tender Offer Rules, Insights, Volume 20, Number 12 (December 2006).
7. The M&A Blind Spot, WSJ (June 16, 2007).
8. The Buyout Binge, CFO (April 1, 2007).

WEEK 13 (11/19 and 11/21) Takeover/Anti-takeover Arena

1. Advising the Board of Directors in Acquiring a Business, Insights, Volume 19, Number 13 (March 2005).
2. Advising the Board of Directors in Mergers and Acquisitions, Securities and Commodities Regulation, Volume 31, Number 7 (April 1, 1998).
3. Delaware Chancery Court Clarifies When a Board of Directors Must Conduct an Auction, Insights, Volume 14, Number 4 (April 2000).
4. Responding to Hostile Takeovers, ALI-ABA Business Law Course Materials Journal, Volume 30, Number 1 (February 2006).
5. ISS Study Finds Companies with Stronger Takeover Defenses Outperform Other Companies, Wachtell Lipton Rosen & Katz (February 24, 2004).
6. The Embattled Poison Pill, Insights, Volume 19, Number 4 (April 2005).
7. **Review Week 9, Item 1a:** A Merger? Did Anyone Tell The Board?, NY Times (June 26, 2005).
8. Company Proposals to Declassify Boards of Directors, Insights, Volume 19, Number 9 (September 2005).

WEEK 14 (11/26 and 11/28) Case Study: Acquisition of NCS Healthcare, Inc.

1. Acquisition of NCS Healthcare, Inc.

Note: This is a case study that we will discuss in class.

2. Delaware Supreme Court Issues Written Opinion Regarding Its Controversial Lock-Ups Ruling, Faegre & Benson (2003).
3. Delaware Supreme Court on Fiduciary Outs in Merger Agreements, Wachtell, Lipton, Rosen & Katz (2003).
4. Will Your Defensive Line Be Too Strong? Designing M&A Defensive Strategies?, Insights, Volume 19, Number 12 (December 2005).
5. Toys “R” Us: An About Face from the Deal Protection Jurisprudence That Led to Omnicare, Insights, Volume 19, Number 12 (December 2005).