Overview
This course will examine the laws and legal principles that govern the transnational regulation of corrupt practices and the legal, policy and practical issues that arise from current enforcement practices. The principal, though not exclusive, focus will be the U. S. Foreign Corrupt Practices Act and, to a lesser extent, counterparts including the 2010 U.K. Bribery Act. Topics will include the purpose and usefulness of cross-border and extraterritorial regulation of international business practices, the factors governing the exercise of prosecutorial discretion in the cross-border context, the issues surrounding self-disclosure of criminal conduct, the nature and role of anticorruption compliance programs, and alternatives to the current regime including civil liability for bribe payers and bribe seekers/takers.

Materials
The materials for this course include key legal instruments as well as various judicial decisions, litigation materials, media reports and scholarly commentary. All materials will be posted on NYU Classes.

Evaluation
Grades will be based primarily on scores on the final examination. Positive classroom participation will be taken into account when assigning final grades, as will unexcused failure to attend class or obvious failure to prepare. Students are expected to attend class and to arrive prepared to discuss the day’s assignment. There will be a three hour open book examination.

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SYLLABUS: REGULATION OF FOREIGN CORRUPT PRACTICES

1. Introduction: The Problem of Corruption and the Basics of the FCPA (August 31)

A. Subject

In this introductory class, we will cover three main topics:

1. The problem of corruption generally, and transnational bribery specifically, including debates over the nature/extent of the problem, its implications for economic development, government legitimacy and stability, foreign policy, and national security.

2. The history leading up to the enactment of the United States Foreign Corrupt Practices Act (“FCPA”) in 1977, including the disclosure program initiated by the U.S. Securities and Exchange Commission (“SEC”) in the 1970s for “sensitive payments,” the “honest and faithful services” theory of fraud articulated in the United Brands prosecution, and subsequent changes and developments, including the recent surge in FCPA enforcement as well as the availability of alternative statutes and theories.

3. An overview of the structure of the FCPA and its major features, and of the basic principles of jurisdiction under the FCPA and corporate liability under U.S. law generally.

B. Required Reading


2. **What Is Bribery? The Scope of the Prohibition (September 7)**

   **A. Subject**

   This class will focus on controversies surrounding the substantive (non-jurisdictional, non-intent) edges of the FCPA’s anti-bribery provision. Among other things, the class will cover the following legal questions and related debates:

   1. What is “anything of value”? Does it (or should it) include, e.g., indirect reputational benefits or charitable donations?

   2. Who counts (or should count) as a “foreign official” under the FCPA? To what extent should this category include employees of state-owned enterprises? Should the FCPA be amended (or interpreted by the courts) to provide a more precise definition of “foreign official”? Alternatively, should the FCPA be expanded to preclude bribes paid to private parties as well?

   3. What counts as a bribe that is paid to “to assist in obtaining or retaining business”? Does (or should) this category include bribes paid to reduce business costs (for example, by avoiding regulations or taxes)?

   **B. Required Reading**

   5. Restoring Balance, 24-27.

3. **What Is (Or Should Be) the Mens Rea Requirement for an Anti-Bribery Violation? Corrupt Intent (September 14)**

   **A. Subject**

   This class will consider various questions related to the mens rea requirements for liability under the FCPA’s anti-bribery provisions. The class will cover a range of related topics, including:

   1. An overview of the different mens rea standards for liability under different provisions of the FCPA, including civil and criminal liability for violation of the anti-bribery, books and records, and internal controls provisions.

   2. Whether a quid pro quo is required for a finding of “corrupt” intent.
3. Whether and in what circumstances transfers of value to secure “generalized goodwill” or build relationships count as bribery under the FCPA?

4. What it means to seek to act "for purposes of influencing any actor or decision of [a] foreign official in his official capacity" or "for purposes of" securing any improper advantage."

B. Reading


4. Knowledge Under the FCPA and the Problem of Third Parties (September 21)

A. Subject

This class will consider various questions related to the requirement of “knowledge” under the FCPA including, in particular, the issue of when a prospective defendant can be said to “know” that some or all of what is given to a third party (whether a consultant, distributor, co-owner, partner or other agent) will be given improperly to a foreign government official or other prohibited recipient. The class will cover issues such as:

1. What should count as “willful blindness” under the FCPA’s anti-bribery provisions, particularly in the context of dealing with third parties who interact with government on a firm’s behalf?
2. What is the relationship between knowledge and corrupt intent?
3. To what extent does reliance on counsel defeat “knowledge”? Does a defendant have the requisite knowledge if he or she actually believes a transaction is not improper?

B. Required Reading

2. Collection of selected case law quotations and citations entitled “Knowledge Under FCPA Requires Deliberate and ‘Conscious Purpose’ to Avoid Confirming the Suspected Truth and Is Negated by Good Faith Belief in Legality” (skim).


**A. Subject**

In this class we will review two distinct categories of issues: Exceptions and affirmative defenses to anti-bribery allegations and the issues of when, if at all, a parent corporation can be found civilly or criminally liable for an anti-bribery violation by its subsidiary. We will also briefly consider the issue of when an acquiring corporation is responsible for past or future violations by an acquired entity. In particular, this class will cover three exceptions/defenses to FCPA anti-bribery prosecutions, which appear in the statute itself. (Another prominent proposal in the literature, relating to a “compliance defense” to corporate liability, will be discussed in a subsequent class.) Further, it will consider the arguments for and against the SEC’s position that, for purposes of civil enforcement, a parent issuer is automatically liable for anti-bribery violations of its subsidiaries.

1. The FCPA contains an exemption for so-called “facilitation payments” (a.k.a “grease” payments). What is the scope of this exemption? Should it be clarified, expanded, eliminated, or retained as is?
2. The FCPA contains an affirmative defense for payments that are legal under the written laws of the host country. What is the scope of this exemption? Should it be expanded to include corruption that is *de facto* permitted even when it is not explicitly permitted by written laws?
3. The FCPA contains an affirmative defense for *bona fide* expenses for promotion, demonstration, and education about products, including reasonable travel and accommodation expenses. What is the scope of this exemption?
4. When, if at all, should a parent corporation be criminally or civilly liable for an anti-corruption violation by a subsidiary?
5. What are the duties and potential liabilities of an acquiring company for past or future violations by an acquired company?

**B. Required Reading**


6. The “Books and Records” and “Internal Accounting Controls” Provisions of the FCPA (October 5)

A. Subject

This class will consider the “books and records” and “internal accounting controls” provisions of the FCPA which apply to “issuers” of U.S. listed securities, the differing standards that apply in civil as opposed to criminal actions and the issue of parent liability for controls and books and records violations at the subsidiary level. The class will cover a range of topics including:

1. What, if any, are (or should be) the intent requirements for a civil (SEC) enforcement action?

2. What is a “book, record and account” and when do such “books, records and accounts” fail to, “in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer”?

3. What is an “issuer” for purposes of determining the civil liability of parent/issuer corporations for consolidated subsidiaries and how do the civil “books and records” and “internal accounting controls” provisions apply to subsidiaries of “issuer” parents? What principles govern (or should govern) their liability?

4. What is the nature of an “issuer’s” obligation to seek to impose books and records and accounting controls on ventures in which it owns “50% or less” of the voting stock?

5. When, if at all, is it appropriate to base a “books and records” or “internal accounting controls” charge on an alleged bribe that is not a violation of the FCPA because of a lack of jurisdiction or other reason?

6. What are (or should be) the intent requirements for a criminal (DOJ) prosecution and what issues arise in criminally enforcing a statute that prohibits “knowingly” failing to implement controls “sufficient to provide reasonable assurances” that specified objectives are achieved?

7. Who is a “person” who can be charged with “knowingly circumventing” or “knowingly failing to implement” an issuer’s internal accounting controls?

8. When, if at all, is it appropriate to charge a corporation with “circumventing” its own controls on the basis of the acts of employees acting contrary to those controls or to charge a subsidiary with circumventing the controls imposed by its issuer parent?
9. To what extent should senior corporate officers or parent corporations be civilly liable for violations of the “books and records” or “internal accounting controls” provisions on a “control person” theory of liability?

B. Required Reading

8. Letter brief (redacted) to DOJ on criminal accounting and books and records provisions (July 21, 2014).

7. The Limits of U.S. Jurisdiction (October 12)

A. Subject

This class will focus on the jurisdictional reach of the FCPA and related accessory liability statutes and on the statutory and constitutional limits on the exercise of jurisdiction.

1. What are the statutory requirements for FCPA anti-bribery jurisdiction over a person?
2. What are the statutory and constitutional limits on the extra-territorial reach of U.S. law, in general, and the FCPA in particular?
3. To what extent can jurisdiction over an anti-bribery violation be based on concepts of conspiracy or aiding and abetting?
4. When is a person an “agent” who can, as an “agent,” be liable for an FCPA violation?
5. To what extent is there (or should there be) jurisdiction over employees, agents, officers or directors of an “issuer” of U.S. Securities under the FCPA or any stockholder of any “issuer” acting on behalf of such “issuer”?

B. Required Reading

2. United States v. Kay, 513 F.3d 432, 452-54 (5th Cir. 2007)

8. Remedies, Sanctions, the Role of Prosecutorial Discretion and the “Voluntary Disclosure” Calculus (October 19)

A. Subject

This class will focus on the numerous considerations that drive prosecutorial decision making, as well as issues related to the penalties, sanctions, and other remedies that may be imposed for FCPA violations. This class will cover:

1. The considerations that inform the exercise of prosecutorial discretion
2. The basic penalty provisions of the FCPA, as well as provisions related to sanctions, including the Alternative Fines Act and the interplay of criminal and civil monetary sanctions of, and use of, disgorgement, restitution and monitorships.
3. The role of and difference between, declinations, non-prosecution agreements (“NPAs”), deferred prosecutions agreements (“DPAs”) and “decline and disgorge” agreements.
4. Issues presented by the existence of multiple (often uncoordinated) regulatory and enforcement regimes, including multi-jurisdictional enforcement and regimes calling for automatic and discretionary disbarment and exclusion from government contracting.
5. The considerations that govern the decision of whether or not to make a “voluntary” disclosure including when a disclosure is required, the costs and benefits of decisions to disclose (or not disclose) and the issue of how to mitigate risk going forward.
6. Discussion of the implications of corporate self-disclosure on FCPA liability and penalties, including a discussion of the U.S. Sentencing Guidelines and the DOJ and SEC’s current guidelines regarding self-disclosure and leniency, as well as various proposals in the literature for a more formalized leniency policy, possibly modeled on the DOJ’s antitrust leniency policy.
B. **Required Reading**

4. *April 5, 2016 Memorandum from Andrew Weissmann, Chief Fraud Section, Criminal Division*
5. PowerPoint Presentation titled “The Voluntary Disclosure Calculus in the Cross-Border Context”.

9. **Prosecutorial Discretion Continued, Review and Hypotheticals (October 26)**

A. **Subject**

In this class we will continue discussions of the issues addressed in Class 8 and discuss the basic elements of typical FCPA anti-corruption compliance programs. We will also review the materials from Classes 1-7. Hypotheticals will be distributed in advance of class as a means of review.

B. **Required Reading**

1. Review of slides from Classes 1-8.
3. "Attachment C" to standard DOJ Deferred Prosecution Agreement
5. *Busting Bribery*, 29-33
6. Hypotheticals (to be posted online).

10. **Local Law Enforcement and International Anti-Corruption Law (November 2)**

A. **Subject**

This class will focus on the U.K. Bribery Act of 2010 and then consider the existence and relevance of non-U.S. enforcement including local law enforcement and non-U.S. counterparts of the FCPA and the problems engendered by the issue of overlapping regimes. Topics will include:

3. Issues of double jeopardy, double disgorgement and comity.
4. Forms of international cooperation, including cooperation among law enforcement agencies.
5. The impact of U.S. enforcement on enforcement elsewhere including objections to exercising U.S. jurisdiction over transactions abroad and the question of whether the FCPA amounts to a form of “moral imperialism” and, rather than “leveling the playing field up,” merely opens the door to less scrupulous competitors from other countries.

B. Required Reading

5. Press Release regarding VimpelCom, United States Attorney’s Office, S.D.N.Y. (Feb. 18, 2016)

11. Alternative Theories of U.S. Criminal Liability For Official Corruption and For Illicit Payments to Private Actors (November 9)

A. Subject

This class will explore the applicability of U.S. criminal statutes other than the FCPA to overseas corruption (public and private), the distinction between private and public or “official” corruption and the issues of whether and when there should be extraterritorial application of national laws to corrupt activities not involving government officials.

B. Required Reading

1. Excerpts of Selected U.S. Statutes (other than the FCPA) of Possible Relevance to Foreign Corruption Matters (focus on §§ 1341, 1343, and 1346; §§ 1952, 1956(a)(1) and 1957)
2. RJR Nabisco v. European Community et al., ___ U.S. ____ (June 20, 2016) (excerpts) (Sections I-III)
5. U.S. v. Castle, 925 F.2d 831 (5th Cir. 1991)

12. Civil Liability for Bribe Payers: Theories of Liability and Limitations (November 16)

A. Subject

This class will focus on the various legal theories that have been used to attempt to impose civil liability on the payers of bribes (including, in particular, civil RICO) and on the broader question of what damages or other harm can flow from bribery, who has (or should have) standing to pursue legal claims based on that harm, the applicability of the doctrines of in pari delicto and respondeat superior in certain circumstances and whether and when the courts of a particular jurisdiction should adjudicate such claims.

B. Required Reading

2. Review Excerpts of Selected U.S. Statutes (other than the FCPA) of Possible Relevance to Foreign Corruption Matters (focus on § 1961 definitions, and §§ 1962(c) and 1964 (c)).
3. RJR Nabisco v. European Community et al., ___ U.S. ___ (June 20, 2016) (excerpts) (Section IV and Ginsberg Dissent)

13. Civil Liability of Foreign Officials and Other Bribe Takers: Theories of Liability and Limitations (November 30)

A. Subject

This class will focus on the potential civil liability of public and private bribe takers and will explore the legal tools available to deprive bribe takers of the fruits of their misconduct through, among other things, pursuit of money laundering and forfeiture theories as well as the limitations on the usefulness of those tools especially where government actors are involved.
B. **Required Reading**

1. Review Excerpts of Selected U.S. Statutes (other than the FCPA) of Possible Relevance to Foreign Corruption Matters (focus on § 981 – Civil Forfeiture Provision of the Title 18 of United States Code).


14. **Assessment of the Anti-Corruption Regime (December 7)**

A. **Subject**

This wrap-up session will be a general discussion of the state of anti-corruption law and enforcement and the impact that the FCPA and its enforcement have had on U.S. economic and political competition with other countries.

B. **Required Reading**


