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TRAVERSING THE MINEFIELD: JOINT VENTURES AND THE FOREIGN CORRUPT PRACTICES ACT

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High-risk business relationships and aggressive enforcement make the Foreign Corrupt Practices Act (“FCPA”) a minefield for transnational joint ventures. Spiraling FCPA risks emerge from a variety of scenarios, including vicarious liability for the acts of majority-owned or controlled joint ventures, joint-venture partners, and third-party agents. The involvement of state-owned enterprises further elevates the risk of a costly enforcement action, as even routine payments can become potential FCPA landmines. Expansive applications of the FCPA’s accounting provisions—which can ensnare corporate issuers regardless of whether a corrupt payment occurs—add additional danger to an already perilous environment.

While numerous strategies for mitigating FCPA exposure are available, even expansive due diligence, comprehensive compliance systems, and ironclad contractual remedies cannot protect against an uncertain enforcement landscape. The continuous evolution of FCPA enforcement raises the costs of compliance by adding additional uncertainty to joint-venture relationships. This may have an unintended consequence: deterring the investments that best promote the anti-corruption and pro-competition norms underlying the FCPA.

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INTRODUCTION

FEW laws pose greater risks to multinational businesses than the Foreign Corrupt Practices Act (“FCPA”), a 1977 statute that prohibits the bribery of foreign officials and establishes bookkeeping and internal accounting control requirements for corporate issuers.¹ The aggressive enforcement that has come to define the FCPA shows no sign of abating, with senior Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) officials promising “very significant” cases and penalties in the future.² While mitigating FCPA risks has become critical in a wide array of cross-border initiatives, transnational joint ventures have the potential to be particularly dangerous engagements.³

Transnational joint ventures can become high-risk undertakings because the factors that make them valuable gateways to new markets and opportunities frequently come with a myriad of anti-bribery compliance challenges. Joint ventures are, at base, collaborations among firms with

¹ 15 U.S.C. § 78dd-1 (2014). The FCPA’s books and records and internal control provisions apply only to “issuers.” *Id.* § 78m(a)–(b). An “issuer” is an entity with a class of securities registered under Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, or which is required to file periodic reports under Section 15(d) thereof. 15 U.S.C. § 78dd-2(h)(1).

² Brian Mahoney, *Expect More Big FCPA Cases in 2014: DOJ, SEC Officials*, LAW360, Nov. 19, 2013, <http://www.law360.com/articles/489940/expect-more-big-fcpa-cases-in-2014-doj-sec-officials> (quoting remarks by Charles A. Duross, Chief of the DOJ’s FCPA Unit and Kara A. Brockmeyer, Chief of the SEC’s FCPA Unit); *see also* Eli Richardson, *International Anti-Corruption Efforts Are Here to Stay*, LAW360, Nov. 21, 2013, http://www.law360.com/articles/490078/international-anti-corruption-efforts-are-here-to-stay?article_related_content=1 (DOJ and SEC officials have remarked that FCPA enforcement will remain “vigorous” in the future). Indeed, several large FCPA settlements occurred in 2014. *See* Press Release, Sec. & Exch. Comm’n, SEC Charges Alcoa with FCPA Violations (Jan. 9, 2014), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936> (discussing combined SEC and DOJ settlement figure of \$384 million); Press Release, U.S. Dep’t of Justice, Marubeni Corp. Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an \$88 Million Fine (Mar. 19, 2014), *available at* <http://www.justice.gov/opa/pr/2014/March/14-crm-290.html>; Press Release, Sec. & Exch. Comm’n, SEC Charges Hewlett-Packard with FCPA Violations: Co. to Pay \$108 Million to Settle Civil and Criminal Charges (April 9, 2014), *available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075>.

³ *See* Gibson, Dunn & Crutcher LLP, *Decoding FCPA Enforcement: The U.S. Government Issues Comprehensive Guidance on the Foreign Corrupt Practices Act* (Nov. 19, 2012) at 12, *available at* <http://www.gibsondunn.com/publications/pages/DecodingFCPAEnforcement-USGovernment-ComprehensiveGuidance.aspx> (discussing significant FCPA risks posed by joint ventures).

differing specializations that allow them to share costs and leverage each other's resources.⁴ Combined with functional and legal requirements to partner with local firms to access certain markets, these benefits have made joint ventures important vehicles of transnational business.⁵ Yet, realizing the advantages of joint ventures often comes with a costly side effect: heightened FCPA exposure based on the acts of majority-owned or controlled joint ventures, joint-venture partners, and third-party agents acting on behalf of joint ventures. The shadow of vicarious liability is ever-present.

The FCPA's perpetual evolution magnifies these risks. This is illustrated by the first FCPA enforcement action of 2014, in which the SEC brought anti-bribery claims against Alcoa Inc. ("Alcoa") based on its majority stake in a joint venture that allegedly bribed Bahraini officials.⁶ Rather than rely on traditional principles of vicarious liability based on a controlling entity's authorization, direction, or control of an improper transaction, the SEC advanced a controversial agency theory that greatly extended the reach of the FCPA's anti-bribery provisions.⁷ The impact was enormous—Alcoa and a subsidiary agreed to pay \$161 million to the SEC out of \$384 million in total disgorgement, forfeiture, and penalties, representing the fifth largest combined FCPA settlement in nearly forty years of enforcement.⁸

⁴ See discussion *infra* Part I.

⁵ See, e.g., ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS 107 (2010) (explaining that U.S. firms conducting business abroad "frequently enter into joint ventures . . . In many countries it is a legal requirement that foreign parties have a local partner to undertake certain projects. In other cases, it will be essential . . . to access labor, equipment, financing, and other resources"); see also Daniel Chow, *China Under the Foreign Corrupt Practices Act*, 2012 WIS. L. REV. 573, 584 (2012) ("Many [multinational corporations] partner with state-owned enterprises as joint-venture partners and in some cases, the use of a [state-owned enterprise] as a joint-venture partner is required by [People's Republic of China] authorities."); see also Lee Dunst, *Panel 3: The FCPA and the UK Bribery Act*, 8 N.Y.U. J.L. & BUS. 355, 361 (2011) (explaining, "in many countries, Latin America and Asia in particular, the way many U.S. companies are going into those regions is through joint ventures").

⁶ See Cease and Desist Order, *In re Alcoa Inc.*, Exch. Act Rel. No. 71261 (Jan. 9, 2014), available at <http://www.sec.gov/litigation/admin/2014/34-71261.pdf>. The DOJ criminally charged Alcoa World Alumina LLC, an Alcoa subsidiary, with a single count of violating the FCPA's anti-bribery provisions. Information, United States v. Alcoa World Alumina LLC, No. 14-cr-7 (W.D. Pa. filed Jan. 9, 2014). A guilty plea resulted. Plea Agreement, *Alcoa World Alumina*, No. 14-cr-7 (W.D. Pa. filed Jan. 9, 2014).

⁷ See discussion *infra* Part IV.B.1.b.

⁸ Press Release, Sec. & Exch. Comm'n, SEC Charges Alcoa with FCPA Violations, *supra* note 2.

An expanding agency doctrine is but one of many FCPA landmines threatening transnational joint ventures. Another appears when a joint venture includes a state-owned enterprise as a partner.⁹ The presence of state-owned enterprises severely complicates anti-corruption compliance by introducing “foreign officials” into the joint venture, elevating the risk that even “routine” compensation, dividend, and other payments may mask bribery.¹⁰ The situation becomes even more uncertain when a state-owned enterprise assumes majority ownership or control of a joint venture.¹¹

In addition to its anti-bribery prong, the FCPA’s expansive books and records and internal control provisions can ensnare a corporate issuer despite the absence of an improper payment or the involvement of a foreign official.¹² Issuers that own majority stakes in joint ventures face particularly acute risks under the FCPA’s accounting provisions, as controlled entities can expose their issuer owners to liability even where the issuer has no knowledge of a violation.¹³

While business entities are undoubtedly responsible for complying with their legal obligations, it must be recognized that even exceptional due diligence, comprehensive compliance systems, and ironclad contractual remedies cannot protect against an uncertain enforcement landscape.

⁹ See discussion *infra* Part IV.C.

¹⁰ See David W. Simon et al., *As Hospitals and Hospital Systems Expand Overseas, FCPA Risks Loom*, AHLA CONNECTIONS, Mar. 2013, at 23 (arguing that transnational “alliances or joint ventures present enormous risk, since most overseas partners are themselves government instrumentalities. Thus, all payments made, or benefits given to, employees or representatives of these entities implicate the FCPA.”).

¹¹ See discussion *infra* Part IV.C.3.

¹² See, e.g., Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. CRIM. & CRIMINOLOGY 465, 468 (2005) [hereinafter Deming, *Record-Keeping Provisions*] (explaining that the FCPA’s accounting provisions, “[u]nlike the anti-bribery provisions, . . . are not limited to the making of improper payments to foreign officials”); see also Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 NW. J. INT’L L. & BUS. 303, 312 (1998) (explaining that the FCPA’s accounting provisions “are much broader” than the anti-bribery provisions and “extend to all of a company’s business, domestic as well as foreign, legitimate as well as corrupt; they are not limited to accounting for corrupt foreign payments”).

¹³ See, e.g., Joel M. Cohen & Adam P. Wolf, *Private Equity Investment and the FCPA*, 44 REV. SEC. & COMMODITIES REG. 197, 199 (2011) (explaining that the SEC may bring a books and records or internal controls claim against an issuer relating to an improper payment by a controlled entity “even if the improper payment is made without any knowledge by the issuer, and the improper payment and any acts in furtherance of it took place entirely outside of the United States”).

Evolving interpretations and continuous extension of the FCPA and the resulting costs to businesses may inadvertently deter compliant firms from investing in markets reputed for corruption, or which require foreign investors to partner with state-owned enterprises.¹⁴ This unintended consequence risks excising a vital means of exporting the anti-corruption and pro-competition norms the FCPA was designed to promote.¹⁵ Joint ventures—which facilitate close collaboration between member firms and are increasingly subject to FCPA compliance systems—are especially promising vehicles for fulfilling this design.¹⁶

This Article is composed of six parts. Part I introduces the common structures and potential benefits of joint ventures. Part II introduces the FCPA and its enforcement. Part III analyzes two elements of the FCPA's anti-bribery provisions that create especially difficult compliance challenges for joint ventures: the knowledge standard, and the question of when an entity constitutes an “instrumentality” of foreign government, such that its employees are deemed “foreign officials” under the FCPA.

Part IV examines FCPA enforcement actions and guidance from the DOJ and the SEC to analyze four primary scenarios that create an FCPA minefield around transnational joint ventures. Section A considers direct liability by examining the TSKJ Nigeria joint venture and the avalanche of FCPA enforcement actions it provoked. Section B examines vicarious liability, a multi-faceted danger that can result from the acts of controlled joint ventures, joint-venture partners, and third-party agents acting on behalf of joint ventures. Section B also addresses the SEC's significant extension of agency theory in *Alcoa*. Section C discusses the unique risks posed by joint ventures that include state-owned enterprises as partners. Section D addresses conspiracy and aiding and abetting charges against foreign non-issuers—entities not generally subject to the FCPA, but which may incur liability for conspiring with or assisting covered joint-venture partners in a violation.

Part V provides a non-exhaustive list of risk-reduction strategies that joint ventures and their partners may use to minimize their FCPA exposure. These

¹⁴ See discussion *infra* Part VI.

¹⁵ See *id.*; see also Blake Puckett, *Clans and the Foreign Corrupt Practices Act: Individualized Corruption Prosecution in Situations of Systemic Corruption*, 41 GEO. J. INT'L L. 815, 858–59 (2010) (arguing, “businesses and business associations can . . . be advocates for change,” but “[t]o be able to do so, U.S. businesses must be able to successfully operate in challenging regions such as Central Asia where systemic corruption is a daily reality. This will require . . . a more flexible approach to anti-corruption enforcement.”).

¹⁶ See generally *infra* Parts I and VI.

strategies include comprehensive FCPA due diligence, compliance programs, and internal controls, as well as contractual and related measures, such as representations and warranties, annual compliance certifications, termination provisions, indemnification, and audit rights.

Part VI discusses the unintended consequences of enforcement uncertainty. Changing and increasingly aggressive interpretations of the FCPA may raise risks and compliance costs beyond what firms can bear, inadvertently deterring them from investing in high-risk jurisdictions most in need of reform. This result may undermine the purpose of the FCPA by isolating high-risk markets from anti-corruption and pro-competition norms.

I. JOINT VENTURES AND STRATEGIC ALLIANCES

A. Definitions and Structure

There is no uniform legal definition of “joint venture,”¹⁷ which is a fluid term “encompass[ing] virtually every type of arrangement, short of a merger, involving two or more firms.”¹⁸ “Consequently, defining a joint venture is more of an art than a science.”¹⁹ While many joint ventures assume the form of a separate legal entity that issues equity or other ownership interests to its

¹⁷ See, e.g., PAUL LUIKI, *Joint Ventures: Definitions and Legal Issues* 1–14, JOINT VENTURES IN THE INTERNATIONAL ARENA (Darrell Prescott & Salli A. Swartz eds., 2d. ed. 2010) at 1:

There is no single legal definition of the term ‘joint venture’ as such A joint venture is often defined as a joint undertaking by two existing businesses in which they share risk (that is, losses and liabilities), profits, control, and/or management. At the same time, the joint venture parties themselves remain independent.

¹⁸ John Anthony Chavez, *Joint Ventures in the European Union and the U.S.*, 44 ANTITRUST BULL. 959, 961 (1999). See also AMERICAN BAR ASSOCIATION, JOINT VENTURES: ANTITRUST ANALYSIS OF COLLABORATIONS AMONG COMPETITORS 5 (2006) (“A joint venture, defined broadly, encompasses any collaborative undertaking by which two or more entities devote their resources to pursuing a common objective.”); Howard H. Chang et al., *Some Economic Principles for Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 229 (1998) (“A joint venture emerges when two or more firms join forces to do the sorts of things that single firms do internally, such as conducting research and development, developing a new product, entering an industry, or securing scale economies through the concentration of production.”); J. Randolph Ayre, *Anatomy of a Joint Venture*, 1 PREVENTIVE L. REP. 1, 1 (1982) (“Reduced to its simplest form, a joint venture is an association of persons or entities organized to carry out a business venture for profit.”).

¹⁹ Brad Grant, *Joint Ventures in the Canadian Energy Industry*, 50 ALTA. L. REV. 373, 374 (2012).

member firms, others may be confined to “a contractual agreement relating to a particular project.”²⁰ Such contractual arrangements are often referred to as strategic alliances,²¹ although this characterization is in no way absolute.²² Joint ventures and strategic alliances will typically include, in varying degrees, “shared risk, returns, control, and some operational integration and mutual dependence—essentially, anything between, but not including, an arm’s length deal and a full merger.”²³

FCPA enforcement actions have tended to involve joint ventures structured as separate legal entities.²⁴ Unless indicated otherwise, the term “joint venture” in this Article refers to distinct legal entities subject to shared ownership and control by their partner firms.

B. The Appeal of Joint Ventures

Joint ventures are most effective when “one partner is relatively efficient in contributing one input while the second partner is more efficient in contributing the other input.”²⁵ The capacity to mutually exploit “input complementarities” creates advantages unavailable to firms acting independently.²⁶ Similarly, the ability to create economies of scale by leveraging the specialized resources and expertise of partner firms can create

²⁰ TARUN, *supra* note 5, at 107.

²¹ See Peter Hunt, Overview, STRUCTURING MERGERS AND ACQUISITIONS: A GUIDE TO CREATING SHAREHOLDER VALUE, § 15.01 at 1 (Wolters Kluwer, 2013) (“An alliance is a simple form of joint venture that may not involve the creation of a new entity to undertake the enterprise and may not involve equity ownership or a contribution of capital by either party.”).

²² See, e.g., Peter Pekár, Jr. & Marc S. Margulis, *Equity Alliances Take Centre Stage*, 14 BUS. STRATEGY REV. 50, 50–51 (2003) (defining a “corporate (strategic) alliance” as “an organisational and legal construct wherein ‘partners’ are motivated to act in concert and share core competencies,” which may be achieved contractually or through the purchase of debt or equity securities).

²³ *Strategic Partnering: Managing Joint Ventures and Alliances: Thought Leadership Roundtable on Digital Strategies*, Tuck School of Business, Dartmouth College (2006) at 1 n.1, available at <http://www.dartmouth.edu>.

²⁴ See discussion of enforcement actions against members of the TSKJ Nigeria joint venture *infra* Part IV.A; see also enforcement actions involving RAE Systems Inc. *infra* Part IV.B.1; International Business Machines Corp. *infra* Part IV.B.2; Weatherford International, Ltd. *infra* Part IV.C.1; Willbros Group, Inc. *infra* Part IV.C.3.

²⁵ Louis Silvia, *A Note on Joint Ventures in Which Firms Contribute Complementary Inputs 2* (Fed. Trade Comm’n, Bureau of Econ. Working Paper No. 152, 1987).

²⁶ *Id.*

cost savings and efficiency advantages.²⁷ Joint ventures also provide risk spreading.²⁸ While an opportunity may pose risks that cannot be justified by a single entity—causing the entity to forego the opportunity—a joint venture permits its partners to spread risk among them, thus (potentially) making the opportunity viable on a risk-adjusted basis.²⁹ This risk-spreading function allows a joint venture to “serve as a vehicle to initiate higher risk projects” than individual firms could otherwise undertake.³⁰

An increasingly global business environment contributes to the value of joint ventures. In addition to satisfying practical and often legal requirements that foreign investors must partner with local firms to conduct business in certain markets,³¹ joint ventures can offer “a mode of international expansion” through which outside investors benefit from the knowledge of local firms while retaining “some operational and strategic control” over the enterprise.³² In turn, local firms may obtain otherwise unavailable or prohibitively costly technological and business advantages.³³

That joint ventures can provide these benefits at lower cost and with less integration than traditional merger and acquisition (“M&A”) transactions is a strong factor driving their use.³⁴ Joint ventures “are often used as an

²⁷ See, e.g., Hunt, *supra* note 21, § 15.04 at 1; see also Rashida K. La Lande, *The Key Benefits of Forming a Joint Venture*, LAW360, Jan. 21, 2014, <http://www.gibsondunn.com/publications/Documents/La-Lande-Key-Benefits-Joint-Venture.pdf>.

²⁸ See, e.g., Talal Al-Emadi, *Joint Venture Contracts (JVCs) Among Current Negotiated Petroleum Contracts: A Literature Review of JVCs Development, Concept and Elements*, 1 GEO. J. INT'L.: THE SUMMIT 645, 657 (2010) (“Joint ventures . . . are viewed primarily as a mechanism of risk-sharing and hence risk-reduction between the co-venturers.”).

²⁹ See, e.g., Silvia, *supra* note 25, at 1.

³⁰ Hunt, *supra* note 21, § 15.03 at 1.

³¹ See *supra* note 5.

³² Paul W. Beamish & Nathaniel C. Lupton, *Managing Joint Ventures*, 23 ACAD. OF MGMT. PERSP. 75, 84 (May 2009).

³³ *Id.* at 85.

³⁴ *Id.* at 75 (explaining that joint ventures allow partner firms to benefit from complementary resources more cheaply than through acquisition); see also Alex Kyriakoulis, *Joint Ventures and Strategic Alliances: An Attractive Alternative to M&A*, ACQUISITION INT'L, July 2013, at 63 (observing that “the economic crisis appears to have been a catalyst for increased joint venture activity,” and “[j]oint ventures have become an increasingly popular alternative to mergers and acquisitions.”); Hunt, *supra* note 21, § 15.02 at 1 (discussing studies concluding that joint ventures are often “better received than mergers and acquisitions” and “have been established as a preferred means to access new markets, acquire technologies and diversify product lines”); Pekár & Margulis, *supra* note 22, at 57 (“Through co-operation, not acquisition, a company can break into new markets, obtain access to new technologies and gain economies of scale with, arguably, higher success and

alternative to mergers or acquisitions” when parties seek the efficiency and competitive advantages of collaboration but do “not wish to cede autonomy of their business or company.”³⁵ Joint ventures can be especially valuable to small and medium firms that are unable to expand through M&A.³⁶ Finally, joint ventures limit collaboration to specific, advantageous areas without necessitating the absorption of undesirable engagements, making them preferable to M&A transactions “when the desired assets are hard to disentangle from the nondesired ones.”³⁷

II. FCPA BACKGROUND

The FCPA is a Watergate-era response to revelations of significant corruption in some U.S. corporations’ overseas operations.³⁸ Congress designed the FCPA to attack this behavior on two fronts, reaching both corrupt payments to foreign officials as well as the concealment of such payments within corporate books and records.³⁹ The FCPA’s anti-bribery provisions⁴⁰ broadly prohibit paying, offering to pay, promising to pay, or authorizing the payment of money or anything of value to a foreign official⁴¹

at lower cost than through acquisition.”); Richard J. Hoskins, *Antitrust Analysis of Joint Ventures and Competitor Collaborations: A Primer for the Corporate Lawyer*, 10 U. MIAMI BUS. L. REV. 119, 119 (2002) (joint ventures “permit the kind of specialization of function and economies of scale that are otherwise available only through larger aggregations of capital and talent, such as result from mergers”); Chang et al., *supra* note 18 at 235–36 (joint ventures may be “preferable” to “using mergers and acquisitions to gain a foothold in a new market, especially when firms are attempting to diversify from their core business.”).

³⁵ Hunt, *supra* note 21, § 15.01 at 1.

³⁶ Beamish & Lupton, *supra* note 32, at 84–85. See also LUIKI, *supra* note 17, at 3 (“Joint ventures are popular with small and medium-sized enterprises, which often lack funding and personnel to expand via acquisitions or a stand-alone approach.”).

³⁷ LUIKI, *supra* note 17, at 1. See also Pekár & Margulis, *supra* note 22, at 56–57 (“While achieving full control, M&A transactions bring to the acquirer all of the acquired entity—both strengths and weaknesses—as well as redundancies and losing, marginal or superfluous business units requiring disposition in some form, usually divestiture or closure.”).

³⁸ See, e.g., John Ashcroft & John Ratcliffe, *The Recent and Unusual Evolution of an Expanding FCPA*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 25, 25 (2012).

³⁹ See, e.g., U.S. Dep’t of Justice Crim. Div. & Sec. & Exch. Comm’n Enforce. Div., *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> [hereinafter FCPA Resource Guide], at 3.

⁴⁰ 15 U.S.C. § 78dd-1.

⁴¹ The FCPA defines “foreign official” to include officers and employees of a foreign government or any department, agency, or instrumentality thereof, or of a public

for the purpose of obtaining an improper business advantage.⁴² The anti-bribery provisions apply to U.S. domestic concerns,⁴³ “issuers” under the Securities Exchange Act of 1934,⁴⁴ and foreign persons and entities that take an act in furtherance of a violation while inside United States territory.⁴⁵ The anti-bribery provisions contain one exception and two affirmative defenses.⁴⁶

The FCPA’s books and records⁴⁷ and internal control provisions⁴⁸ (together, the “accounting provisions”) apply only to issuers and officers, directors, employees, agents, or stockholders acting on their behalf.⁴⁹ The books and records provision requires an issuer to make and keep books, records, and accounts “in reasonable detail,” so as to accurately and fairly

international organization, or any person acting in an official capacity for or on behalf of such entities. The anti-bribery provisions also prohibit corrupt payments to “any foreign political party or official thereof or any candidate for foreign political office.” 15 U.S.C. § 78dd-1(a)(1)–(3), -2(a)(1)–(3), -3(a)(1)–(3).

⁴² The anti-bribery provisions are not limited to traditional notions of “business.” *See* United States v. Kay, 359 F.3d 738 (5th Cir. 2004) (reversing district court’s dismissal of indictment and affirming convictions of individuals charged with violating the anti-bribery provisions by making payments to obtain favorable tax treatment); *see also* United States v. Panalpina, Inc., No. 10-cr-765 (S.D. Tex. 2010) (anti-bribery charges filed in connection with improper payments to obtain customs clearing advantages); Sec. & Exch. Comm’n v. Panalpina, Inc., No. 10-cv-4334 (S.D. Tex. 2010) (civil claims relating to same conduct); FCPA Resource Guide, *supra* note 39, at 13.

⁴³ A “domestic concern” is a U.S. citizen, national, or resident, or a business entity with its principal place of business in the United States, or which is organized under the laws of a U.S. state or territory. 15 U.S.C. § 78dd-2(h)(1).

⁴⁴ The term “issuer” is defined *supra* note 1, and includes a foreign entity that lists American Depository Receipts on a U.S. stock exchange. *See, e.g.*, FCPA Resource Guide, *supra* note 39, at 11; *see also* Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J.L. & Bus. 845, 848 n.10 (2010) [hereinafter Jordan, *Recent Developments*].

⁴⁵ *See* 15 U.S.C. § 78dd-3.

⁴⁶ The anti-bribery provisions provide an “exception” for “any facilitating or expediting payment to a foreign official, political party, or party official . . . to expedite or to secure the performance of a routine governmental action . . .” 15 U.S.C. § 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A). Two affirmative defenses were added to the anti-bribery provisions when the FCPA was amended in 1988: (i) that a payment was legal under the written laws of the foreign jurisdiction, and (ii) that a payment reflects a “reasonable and bona fide expenditure” that was “directly related” to “the promotion, demonstration, or explanation of products or services,” or to “the execution or performance of a contract with a foreign government or agency thereof.” *Id.* § 78dd-1(c), -2(c), -3(c).

⁴⁷ *See* 15 U.S.C. § 78m(b)(2)(A).

⁴⁸ *See id.*

⁴⁹ 15 U.S.C. § 78m(a)–(b). *See also* Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 789 (2011).

reflect the issuer's transactions and the disposition of its assets.⁵⁰ The internal controls provision requires an issuer to devise and maintain a system of accounting controls sufficient to provide "reasonable assurances" that the issuer's transactions and the disposition of its assets occur pursuant to management's general or specific authorization and in accordance with standard accounting practices.⁵¹ Though they apply to all financial records of an issuer, regardless of whether a corrupt payment is involved, Congress designed the accounting provisions "to prevent the hiding of bribery through misrepresentation in accounting records."⁵²

FCPA enforcement is split between the DOJ and the SEC, both of which can assess large penalties for violations.⁵³ The DOJ is responsible for all criminal FCPA enforcement, including for violations of the accounting provisions by issuers and persons acting on their behalf.⁵⁴ The DOJ is also

⁵⁰ 15 U.S.C. § 78m(b)(2)(A).

⁵¹ The internal controls provision requires issuers to ensure that (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles or other applicable criteria, and to maintain accountability for assets; (iii) access to assets is permitted only with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with existing assets at reasonable intervals to detect and remedy any differences. 15 U.S.C. § 78m(b)(2)(B).

⁵² BRIAN P. LOUGHMAN & RICHARD A. SIBERY, *BRIBERY AND CORRUPTION* 21 (2012).

⁵³ For each violation of the FCPA's anti-bribery provisions, business entities are subject to a criminal fine of up to \$2 million, while individuals are subject to a fine of up to \$250,000 and imprisonment for up to five years. 15 U.S.C. §§ 78dd-2(g)(1)(A), -3(e)(1)(A); 78ff(c)(1)(A). For each violation of the accounting provisions, business entities are subject to a criminal fine of up to \$25 million, while individuals are subject to a fine of up to \$5 million and imprisonment for up to 20 years. 15 U.S.C. § 78ff(a). In practice, the U.S. Sentencing Guidelines and the Alternative Fines Act, 18 U.S.C. § 3571(d), often produce criminal FCPA penalties that greatly exceed these figures. *See, e.g.*, FCPA Resource Guide, *supra* note 39, at 68.

Civil violations of the anti-bribery provisions can result in a penalty of up to \$16,000 per violation for both business entities and individuals. 15 U.S.C. §§ 78dd-2(g)(1)(B), -3(e)(1)(B); 78ff(c)(1)(B); 17 C.F.R. § 201.1004 (providing inflation adjustment); FCPA Resource Guide, *supra* note 39, at 69. Civil violations of the accounting provisions can result in a penalty not to exceed the greater of (i) the gross amount of the pecuniary gain resulting from the violation, or (ii) a penalty within the range of \$7,500 to \$150,000 for a violation by an individual, or \$75,000 to \$725,000 for a business entity. 15 U.S.C. § 78u(d)(3). "Where a defendant has profited from a violation of law, [the] SEC can [also] obtain the equitable relief of disgorgement of ill-gotten gains and pre-judgment interest. . . ." FCPA Resource Guide, *supra* note 39, at 76.

⁵⁴ FCPA Resource Guide, *supra* note 39, at 4; *see also* Jordan, *Recent Developments*, *supra* note 44, at 852–53.

responsible for civil enforcement of the anti-bribery provisions as to domestic concerns, as well as foreign persons and entities that take an act in furtherance of an anti-bribery violation while inside the territory of the United States.⁵⁵ The SEC has civil enforcement authority for violations of the anti-bribery and accounting provisions by issuers and persons acting on their behalf.⁵⁶

Domestic concerns and issuers have always been subject to jurisdiction under the anti-bribery provisions if they use the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a violation.⁵⁷ The 1998 amendments to the FCPA⁵⁸ expanded the jurisdiction of the anti-bribery provisions over domestic concerns (including U.S. issuers) under “an alternative basis for jurisdiction . . . based on the nationality principle,” which applies to violations anywhere in the world, regardless of whether the U.S. mails or a means or instrumentality of interstate commerce is used in furtherance of a violation.⁵⁹

Persons or entities that are neither domestic concerns nor issuers can come within the jurisdiction of the anti-bribery provisions if they take any act in furtherance of a violation while inside the territory of the United States, regardless of whether the U.S. mails or a means or instrumentality of interstate commerce is used.⁶⁰ Issuers must comply with the accounting provisions based on their registration under the Securities Exchange Act, regardless of whether a transaction involves public or private counterparties, occurs inside United States territory, or involves a foreign official or an improper payment.⁶¹

Building on this background, Part III will explore particular elements of the FCPA’s anti-bribery provisions that are of special concern to joint

⁵⁵ FCPA Resource Guide, *supra* note 39, at 4; *see also* Jordan, *Recent Developments*, *supra* note 44, at 852–53.

⁵⁶ FCPA Resource Guide, *supra* note 39, at 4–5; *see also* Jordan, *Recent Developments*, *supra* note 44, at 852–53.

⁵⁷ FCPA Resource Guide, *supra* note 39, at 11.

⁵⁸ *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105–366, 112 Stat. 3302 (1998).

⁵⁹ FCPA Resource Guide, *supra* note 39, at 12.

⁶⁰ *Id.* at 11–12.

⁶¹ *See* Deming, *Record-Keeping Provisions*, *supra* note 12, at 468; *see also* Mathews, *supra* note 12, at 312; *see also* Robert W. Tarun, *Basics of the Foreign Corrupt Practices Act: What Every General Counsel, Transactional Lawyer and White Collar Criminal Lawyer Should Know* (Latham & Watkins LLP, Apr. 2006), available at http://www.lw.com/upload/pubcontent/_pdf/pub1287_1.pdf [hereinafter Tarun, *Basics*], at 8.

ventures and their partners. The accounting provisions—while reflected in a smaller number of discrete scenarios discussed in this Article—often emerge in conjunction with the anti-bribery provisions when an enforcement action involves an issuer. Accordingly, the accounting provisions are discussed at various points throughout this Article, receiving particular attention in Part IV.B.2.

III. PROBLEMATIC ELEMENTS OF THE ANTI-BRIBERY PROVISIONS

A. The Knowledge Standard

When knowledge of a circumstance “is required for an offense” under the FCPA, it “is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.”⁶² This construction of “knowledge” replaced an earlier formulation—“while knowing or having reason to know”—when the FCPA was amended in 1988.⁶³ While the “high probability” standard is intentionally narrower than its predecessor “reason to know” language, some have suggested that the expansive interpretations that the DOJ and SEC apply to knowledge under the FCPA amounts to “a return to the broader, pre-1988 language of the Act.”⁶⁴ Still, the post-1988 standard does not permit criminal liability based on negligence, mistake, or recklessness.⁶⁵ Rather, absent direct knowledge, an anti-bribery charge requires “*both* awareness of a

⁶² 15 U.S.C. § 78dd-1(f)(2)(B), -2(h)(B), -3(f)(B).

⁶³ See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1415–25 (1988).

⁶⁴ Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 546 (2001).

⁶⁵ See, e.g., TARUN, *supra* note 5, at 61 (explaining that willful blindness under the FCPA requires a decision to avoid learning relevant facts and “is not the equivalent of recklessness”); see also Judith L. Roberts, *Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will it Reduce the Compliance Burdens and Anticompetitive Impact?*, 1989 BYU L. REV. 491, 502 (1989) (knowledge required for anti-bribery charge is not satisfied by “mere negligence, mistake, ‘foolishness’ and probably even recklessness”). However, questions have been raised regarding whether the “willful blindness” standard is in practice closer to mere negligence rather than a knowing disregard. See Harry L. Clark & Jonathan W. Ware, *Limits on International Business in the Petroleum Sector: CFIUS Investment Screening, Economic Sanctions, Anti-Bribery Rules, and Other Measures*, 6 TEX. J. OIL GAS & ENERGY L. 75, 114 (2010) (arguing, “there is very little judicial precedent or regulatory guidance on application of the ‘high probability’ or conscious disregard standards under the FCPA,” and “in practice, the DOJ often seems to be guided by what is essentially the lower negligence standard.”).

‘high probability’ that a corrupt payment [will] be made *and* a ‘deliberate’ decision to avoid gaining information in a conscious effort to avoid learning the truth.”⁶⁶ As a result, the knowledge element of an anti-bribery violation can be established if a person “is willfully blind to, deliberately ignorant of, or consciously disregards facts indicating the presence of illegitimate payments.”⁶⁷

1. Willful Blindness, Deliberate Ignorance, and Conscious Disregard

The DOJ and the SEC may invoke willful blindness, deliberate ignorance, and conscious disregard⁶⁸ to satisfy the knowledge required for an FCPA offense by a principal when an anti-bribery violation is carried out by a third party.⁶⁹ This approach is supported by the view that “Congress anticipated the use of third-party agents in bribery schemes—for example, to avoid actual knowledge of a bribe,” and so “defined the term ‘knowing’ in a way that prevents individuals and businesses from avoiding liability by putting ‘any person’ between themselves and the foreign officials.”⁷⁰

⁶⁶ Kenneth Winer & Gregory Husisian, *Recent Opinion Sheds Light on the Relevance of Due Diligence to the FCPA’s Knowledge Requirement*, 4 CORP. ACCOUNTABILITY REP. 1, 5 (2009) (arguing that the willful blindness standard under the FCPA is “limited to circumstances where the party had something very close to actual knowledge”).

⁶⁷ Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 698 (2008). *See also* Cohen & Wolf, *supra* note 13, at 199 (a violation of the FCPA’s anti-bribery provisions requires a showing of knowledge, “either by being directly aware of the improper conduct or by being ‘willfully blind’ to it”); Friedman & Smithline, *Is “Conscious Avoidance” Sufficient to Establish Knowledge Under the FCPA?*, BUS. L. TODAY, Feb. 2012, at 3 (discussing “the government’s longstanding position that an individual may be prosecuted for a bribery offense even when there is no evidence” of “actual knowledge of the bribery scheme”).

⁶⁸ As willful blindness, deliberate ignorance, and conscious disregard are synonymous, this Article uses the term “willful blindness” to describe all situations in which a person or entity purposefully avoids acquiring knowledge of a fact or circumstance. *See* H.R. REP. NO. 100-576, at 919 (1988), available at <http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf> (providing, in connection with the 1988 amendments to the FCPA, that “[t]he compromise bill . . . encompasses the concepts of ‘conscious disregard’ or ‘willful blindness.’ The Conferees intend that the requisite ‘state of mind’ . . . include a ‘conscious purpose to avoid learning the truth.’”).

⁶⁹ *See, e.g.*, FCPA Resource Guide, *supra* note 39, at 22.

⁷⁰ *Id.* (quoting legislative history suggesting that Congress designed the FCPA’s “high probability” knowledge standard to prevent the “‘head-in-the-sand’ problem,” wherein corporate officers could “take refuge from the Act’s prohibitions by their unwarranted

The “willful blindness” construction Congress ultimately adopted arguably makes payments to joint ventures and joint-venture partners “the most challenging aspect” of FCPA compliance,⁷¹ as a lapse in due diligence can in effect supply the knowledge element of an anti-bribery charge.⁷² The risk is that an FCPA-covered entity can be charged with an anti-bribery violation for purposefully avoiding acquiring knowledge that funds provided to a joint venture or a partner will subsequently finance a bribe.⁷³

In assessing willful blindness, the DOJ and the SEC consider whether “red flags” indicating the possibility of corruption were present, and how a business entity responded to those indications.⁷⁴ The following red flags may be present in relationships with third parties, including joint ventures: (i) excessive commission payments; (ii) unreasonably large discounts provided to distributors; (iii) consulting agreements with vague descriptions of services provided; (iv) the third party is in a different line of business than that for which it was engaged; (v) the third party is related to or closely associated with a foreign official; (vi) a foreign official requested that the third party become involved in the transaction; (vii) the third party is a shell company incorporated in an offshore or tax haven jurisdiction; and (viii) the third party requests that payments be transmitted to offshore bank accounts.⁷⁵

obliviousness to any action (or inaction)” (quoting H.R. REP. NO. 100-576, at 920 (1988));
⁷¹ Harry L. Clark & Sanchitha Jayaram, *Intensified International Trade and Security Policies Can Present Challenges for Corporate Transactions*, 38 CORNELL INT’L L.J. 391, 403 (2005). *See also* Clark & Ware, *supra* note 65, at 78 (arguing that the FCPA is “particularly challenging” because of “its broad application to transfers to third parties (e.g., agents, co-venturers) that are used for illicit payments”).

⁷² *See, e.g.*, STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 65 (2011) [hereinafter DEMING, *NEW INTERNATIONAL NORMS*] (writing, “actual knowledge is not necessarily required [for an anti-bribery violation]. For example, inadequate due diligence in entering into the joint venture could be used to establish willful blindness as to prohibited conduct on the part of a joint venture partner.”); *see also* Mike Koehler, *The FCPA, Foreign Agents, and Lessons from the Halliburton Enforcement Action*, 36 OHIO N.U. L. REV. 457, 475 n.123 (2010) [hereinafter Koehler, *Foreign Agents*] (“[W]hile conducting effective due diligence is not a legal defense to an FCPA violation, a company’s failure to conduct due diligence on a foreign agent can expose a company to a ‘willful blindness’ finding,” which can support a violation under the anti-bribery provisions).

⁷³ *See, e.g.*, Clark & Jayaram, *supra* note 71, at 403.

⁷⁴ *See, e.g.*, FCPA Resource Guide, *supra* note 39, at 22, 24, 43, 60, 78.

⁷⁵ *Id.* at 22–23.

As “knowledge” under the FCPA includes not only what an entity knows in fact, but also what it *may have avoided knowing*, effective due diligence prior to entering into a joint venture is critical to reduce risk.⁷⁶

2. Corrupt Intent

A payment can only violate the FCPA’s anti-bribery provisions if made “corruptly.”⁷⁷ The term “corruptly” is nowhere defined in the FCPA,⁷⁸ but was intended by Congress to identify “an evil motive or purpose, an intent to wrongfully influence the recipient.”⁷⁹ The term limits the reach of the anti-bribery provisions to payments born of a wrongful purpose⁸⁰ and supplies the specific intent necessary for a charge.⁸¹ “Corrupt” intent is traditionally satisfied when an improper *quid pro quo* is present.⁸²

B. Instrumentalities of Foreign Government and the “Foreign Official” Question

The FCPA defines a “foreign official” as (i) “any officer or employee of a foreign government, department, agency, or instrumentality thereof,” (ii) officers or employees of public international organizations, or (iii) “any person acting in an official capacity for or on behalf of” the entities listed in (i) and (ii).⁸³ Far from straightforward, the construction of the term “foreign

⁷⁶ See discussion of due diligence *infra* Part V.

⁷⁷ See 15 U.S.C. § 78dd-1(a), (g); -2(a), (i)(1); -3(a).

⁷⁸ See, e.g., *United States v. Kozeny*, 493 F. Supp. 2d 693, 704 (S.D.N.Y. 2007).

⁷⁹ S. REP. NO. 95-114, at 10 (1977). See also H.R. REP. NO. 95-640, at 8 (1977); Westbrook, *supra* note 64, at 503 n.58 (discussing the interpretation of “corruptly” in *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991): “a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means”).

⁸⁰ See, e.g., Westbrook, *supra* note 64, at 503 n.58 (“The purpose of the payment is relevant in determining whether there has been an FCPA violation.”).

⁸¹ See *Kozeny*, 493 F. Supp. at 704 (the term “corruptly” in the FCPA requires more than “the element of ‘general intent’ present in most criminal statutes”).

⁸² See, e.g., Robert J. Meyer, *Charitable Donations Under the Foreign Corrupt Practices Act*, 1 FOREIGN CORRUPT PRACTICES ACT REP., § 13:3 at 13–6 (West 2010) (explaining that for an offer or payment to be made “for the purpose of” improperly influencing a foreign official, “there must be a *quid pro quo* between the giving of value and an official act or improper advantage The element of a *quid pro quo* is included, in part, in the ‘corrupt intent’ requirement.”); see also TARUN, *supra* note 5, at 11 (“Prosecutors invariably look in bribery cases to see if a recipient has personally benefitted or whether a target or subject has personally benefitted . . .”).

⁸³ 15 U.S.C. § 78dd-1(f)(1)(A), -2(h)(B)(2). A “public international organization” is defined

official”—the interpretation of which determines whether an anti-bribery violation is legally possible—has been called “the most contentious point of FCPA interpretation.”⁸⁴

Of the interpretive issues surrounding the definition of “foreign official,” the most important for joint-venture participants is the meaning of “instrumentality,” a term that the FCPA does not define.⁸⁵ The DOJ and the SEC broadly interpret “instrumentality” by including within its orbit business entities that are majority-owned or controlled by foreign governments, thereby transforming their employees into “foreign officials” under the FCPA.⁸⁶

The instrumentality inquiry does not end at “mere share ownership.”⁸⁷ Rather, the DOJ and the SEC routinely consider “the role performed by the entity or the government’s influence” over the entity.⁸⁸ Identifying and assessing operational control and influence requires significantly more analysis than simply considering equity stake, thus raising the level of scrutiny required before engaging in a joint venture.⁸⁹

as (i) an organization designated by executive order pursuant to section 1 of the International Organizations Immunities Act, 22 U.S.C. § 288, or (ii) “any other international organization” that the president designates by executive order. *Id.* § 78dd-1(f)(1), -2(h)(2)(B)(i)–(ii).

⁸⁴ Westbrook, *supra* note 64, at 531. See also Roman Darmer, *Amending the Foreign Corrupt Practices Act: Who is a “Foreign Official”?*, 4 FIN. FRAUD L. REP. 14, 18 (Jan. 2012) (“[T]he definition of the term ‘foreign official’ has become one of the key issues in FCPA prosecutions.”).

⁸⁵ See, e.g., TARUN, *supra* note 5, at 14 (“Nowhere does the [FCPA] define ‘instrumentality’ or provide guidance about what types of partially state-owned entities are foreign government ‘instrumentalities’ such that their employees are foreign officials.”).

⁸⁶ See FCPA Resource Guide, *supra* note 39, at 20–21 (discussing enforcement actions based on improper payments made to employees of state-owned enterprises); see also Clark & Ware, *supra* note 65, at 117 (“[T]he DOJ has made it clear that it considers employees of government-owned or controlled businesses . . . to be foreign officials for purposes of the FCPA.”).

⁸⁷ Westbrook, *supra* note 64, at 533.

⁸⁸ *Id.* See also Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 28 (2012) (FCPA enforcement actions have treated as instrumentalities of foreign governments “even [business entities] with publicly-traded shares and/or minority foreign government investment”); Jeremy Evans & Ananda Martin, *Recent Challenges to Definition of “Foreign Official” Reinforce Government’s Broad Interpretation*, STAY CURRENT (Paul Hastings LLP, June 2011), available at <http://www.paulhastings.com>.

⁸⁹ See Clinton R. Long, *Navigating the FCPA’s Ambiguous “Instrumentality” Provision: Lessons for the Energy Industry*, 12 RICH. J. GLOBAL L. & BUS. 393, 395 (2013) (“Determining whether [a state-owned enterprise] should be considered an instrumentality for FCPA purposes is a fact-specific question requiring a case-by-case analysis.”).

Identifying instrumentalities of foreign governments and exercising appropriate caution in dealings with their employees is complicated by the extensive interconnections between government and industry that exist in many parts of the world. Despite a global trend toward privatization, the importance of state-owned business enterprises is unlikely to dissipate.⁹⁰ A 2013 Office of Economic Cooperation and Development (“OECD”) policy paper revealed that the 204 largest state-owned enterprises produced sales equivalent to six percent of world gross domestic product from 2010 to 2011 (the period analyzed by the paper).⁹¹ Russia and China, both of which can supply rich investment opportunities, maintain economies structured around significant state intervention, with many of their largest business enterprises defined by state ownership and control.⁹² This environment is perilous to

⁹⁰ See, e.g., Mariana Pargendler et al., *In Strange Company: The Puzzle of Private Investment in State-Controlled Firms*, 46 CORNELL INT’L L.J. 569, 570 (2013) (“The wave of privatization that swept the world in the last decades has reduced but not eliminated government shareholdings in business corporations. State-owned enterprises . . . are a fixture of the variety of capitalism embraced by Brazil, Russia, India, and China, as well as other emerging economies.”); see also TARUN, *supra* note 5, at 14 (“Multinational companies often deal with foreign government partners, for example, joint ventures doing business with state-owned enterprises including oil, steel, telecommunications, and transportation companies.”). Tarun further notes that “it is currently estimated that 75 percent of all oil and gas reserves in the world are owned in whole or in part by state-owned entities.” *Id.*

⁹¹ Przemyslaw Kowalski et al., *State-Owned Enterprises: Trade Effects and Policy Implications 6* (OECD Trade Policy Working Paper Grp., Paper No. 147, 2013), available at <http://dx.doi.org/10.1787/5k4869ckqk7l-en>. Kowalski et al. identify Russia, China, the United Arab Emirates, Indonesia, Malaysia, Saudi Arabia, India, Brazil, Norway, and Thailand as countries with high concentrations of state-owned enterprises among their largest business organizations (based on equally weighted averages of sales, assets, and market values of each nation’s ten largest business entities). *Id.*

⁹² See, e.g., Li-Wen Lin & Curtis J. Milhaupt, *We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 699 (2013) (explaining that “the state sector dominates industries in China and is increasingly active in global markets,” and “[m]ore than half of the Chinese companies in the 2012 Fortune Global 500 are [state-owned enterprises] supervised by an organ of the central government.”); see also Andrew Weissmann & Alixandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, 2010 U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM 27 (Oct. 2010) (arguing that ambiguity concerning whether a business entity is considered an instrumentality of foreign government creates compliance challenges, “particularly in countries like China where most if not all companies are either partially or entirely owned by the state”); *The State Advances*, ECONOMIST, Oct. 6, 2012, available at <http://www.economist.com/node/21564274> (arguing that privatization and economic liberalization in China mask a heightened state role in the economy, with state-owned enterprises “more powerful than ever”); Marina De Kwant, *Emerging Oil and Gas Economies: Mitigating Legal, Political and Economic Risks of Foreign Investors in the Russian Federation (Part A)*, 14 INT’L TRADE & BUS. L. REV. 174, 185 (2011) (explaining that Russia has

business entities subject to the FCPA, as “virtually anyone can be a government official.”⁹³

1. Enforcement History

A torrent of costly FCPA enforcement actions against partners in the TSKJ Nigeria joint venture underscores the DOJ and SEC’s broad interpretation of the terms “instrumentality” and “foreign official.” The TSKJ cases resulted in significant settlements to resolve FCPA charges involving improper payments made to officials of Nigeria LNG Limited (“NLNG”).⁹⁴ NLNG was forty-nine percent owned by the Nigerian National Petroleum Corporation (“NNPC”), Nigeria’s state-owned oil company.⁹⁵ Despite NNPC’s minority stake in NLNG, the DOJ and the SEC took the position that NLNG was nonetheless an “instrumentality” of the Nigerian government and, accordingly, NLNG employees were “foreign officials” under the FCPA.⁹⁶

Operational control explains why NLNG employees were considered “foreign officials” despite the Nigerian government’s minority stake in the company. While retaining only a minority share of NLNG’s stock, NNPC appointed directors to NLNG’s board and had the power “to block [NLNG’s

experienced “a profound shift in relations between the oil industry and the State since 2003,” as President Vladimir Putin “reassert[ed] state control over the [energy] sector and tam[ed] the power and influence of the oligarchs that emerged from the controversial privatization of the 1990s”); Linda Braude & Jonathan Nelms, *FCPA Compliance in Russia*, 41 REV. SEC. & COMMODITIES REG. 169, 172 (2008) (“Russian companies that appear to operate like any private company on the surface may have sufficient state ownership or control to make their directors, officers, and employees” foreign officials under the FCPA).

⁹³ Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145, 151 (2011).

⁹⁴ Deferred Prosecution Agreement, Attach. A ¶ 13, United States v. JGC Corp., No. 11-cr-260 (S.D. Tex. filed Apr. 6, 2011); Deferred Prosecution Agreement Attach. A ¶ 13, United States v. Snamprogetti Netherlands B.V., No. 10-cr-460 (S.D. Tex. filed July 7, 2010); Complaint ¶ 9, Sec. & Exch. Comm’n v. ENI, S.p.A., No. 10-cv-2414 (S.D. Tex. filed July 7, 2010); Deferred Prosecution Agreement Attach. A ¶ 13, United States v. Technip S.A., No. 10-cr-439 (S.D. Tex. filed June 28, 2010); Complaint ¶ 9, Sec. & Exch. Comm’n v. Technip, No. 10-cv-2289 (S.D. Tex. filed June 28, 2010); Plea Agreement Ex. 3 ¶ 14, United States v. Kellogg Brown & Root LLC, No. 09-cr-71 (S.D. Tex. filed Feb. 11, 2009); Complaint ¶ 10, Sec. & Exch. Comm’n v. Halliburton Co. and KBR, Inc., No. 09-cv-399 (S.D. Tex. filed Feb. 11, 2009). As the facts of the various TSKJ settlements are substantially similar, this Article will rely on the *JGC* action unless otherwise necessary.

⁹⁵ Deferred Prosecution Agreement, Attach. A ¶ 13, *JGC*, No. 11-cr-260.

⁹⁶ *Id.*

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ability to] award . . . contracts.”⁹⁷ In situations like this, where a foreign government (or instrumentality thereof) lacks a majority equity stake in an entity but nonetheless exercises control over it—whether generally (by appointing directors) or in particular transactions (by the power to block contracts)—the DOJ and the SEC will likely treat the entity as an “instrumentality” of foreign government under the FCPA.⁹⁸

Another example of the role operational control plays in determining the outcome of the “instrumentality” question occurred in late 2010, when the DOJ and the SEC resolved FCPA charges against French telecommunications company Alcatel, S.A. (“Alcatel”) and three of its subsidiaries.⁹⁹ Only the SEC asserted an anti-bribery charge,¹⁰⁰ based on Alcatel’s majority stake in a joint venture called Alcatel Network Systems Malaysia Sdn. Bhd. (“Alcatel Malaysia”).¹⁰¹ Alcatel Malaysia was established to obtain telecom contracts in Malaysia, including from an entity called Telekom Malaysia Berhad (“Telekom Malaysia”).¹⁰² Alcatel was charged with violating

⁹⁷ *Id.*

⁹⁸ While “as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares,” there are “circumstances” in which instrumentality status may exist despite the absence of foreign government majority ownership or control. FCPA Resource Guide, *supra* note 39, at 21.

⁹⁹ Alcatel resolved the SEC’s anti-bribery, books and records, and internal control claims through a final judgment requiring \$45.3 million in civil penalties, disgorgement, and prejudgment interest, as well as installation of a compliance monitor for up to three years. Final Judgment ¶¶ V, VI, Sec. & Exch. Comm’n v. Alcatel-Lucent, S.A., No. 10-cv-24620 (S.D. Fla. filed Dec. 29, 2010). The DOJ’s books and records and internal control charges were resolved through a \$92 million criminal penalty, significant compliance undertakings, and the installation of a compliance monitor for a three-year term. Deferred Prosecution Agreement ¶¶ 6, 8–13, United States v. Alcatel-Lucent, S.A., No. 10-cr-20907 (S.D. Fla. filed Dec. 20, 2010). The Alcatel subsidiaries entered guilty pleas requiring each to pay more than \$500,000 in criminal fines to resolve charges of conspiracy to violate the FCPA’s anti-bribery, books and records, and internal control provisions. Plea Agreement ¶¶ 1, 15, United States v. Alcatel Centroamerica, S.A., No. 10-cr-20906 (S.D. Fla. filed Dec. 20, 2010); Plea Agreement ¶¶ 1, 15, United States v. Alcatel-Lucent France, S.A., No. 10-cr-20906 (S.D. Fla. filed Dec. 20, 2010); Plea Agreement ¶¶ 1, 15, United States v. Alcatel-Lucent Trade Int’l, A.G., No. 10-cr-20906 (S.D. Fla. filed Dec. 20, 2010).

¹⁰⁰ The DOJ likely declined to charge Alcatel with violating the anti-bribery provisions because such a charge could result in Alcatel being debarred from government contracts. See Steptoe & Johnson LLP, *Analysis: Alcatel-Lucent’s \$137 Million FCPA Settlements Reflect Expansive Jurisdiction, New Compliance Standards, International Cooperation, and Collateral Risks*, (Mar. 10, 2011) at 1–2, available at http://www.steptoe.com/publications-newsletter-pdf.html/pdf/?item_id=124.

¹⁰¹ Deferred Prosecution Agreement Attach. A ¶ 6, *Alcatel-Lucent*, No. 10-cr-20907; see also Complaint ¶ 14, *Alcatel-Lucent*, No. 10-cv-24620.

¹⁰² See Deferred Prosecution Agreement Attach. A ¶ 62, *Alcatel-Lucent*, No. 10-cr-20907.

the FCPA's anti-bribery provisions following improper payments Alcatel Malaysia made to employees of Telekom Malaysia in exchange for non-public information concerning public tender transactions.¹⁰³

Like NLNG in the TSKJ cases, Telekom Malaysia was not majority-owned by a foreign government, as the Malaysian Ministry of Finance retained only a forty-three percent interest in the company.¹⁰⁴ Also like the TSKJ cases, the Malaysian government's minority stake in Telekom Malaysia was coupled with "veto power" over all major expenditures.¹⁰⁵ In addition, the Minister of Finance held "the status of a 'special shareholder'" of Telekom Malaysia, and "[m]ost senior Telekom Malaysia officers were political appointees," including its Chairman and Director.¹⁰⁶ Based on these factors, the SEC alleged that Telekom Malaysia was "government-owned."¹⁰⁷ The DOJ, while declining to bring an anti-bribery charge, alleged that Telekom Malaysia "was controlled by the government of Malaysia," such that the "officers, directors and employees of Telekom Malaysia were 'foreign officials' within the meaning of the FCPA."¹⁰⁸

A central lesson from the TSKJ and Alcatel cases¹⁰⁹ is that the absence of a majority equity stake held by a foreign government does not conclude the

¹⁰³ Deferred Prosecution Agreement Attach. A ¶¶ 62–64, *Alcatel-Lucent*, No. 10-cr-20907; Complaint ¶¶ 68–80, *Alcatel-Lucent*, No. 10-cv-24620.

¹⁰⁴ Deferred Prosecution Agreement Attach. A ¶ 21, *Alcatel-Lucent*, No. 10-cr-20907; Complaint ¶ 56, *Alcatel-Lucent*, No. 10-cv-24620.

¹⁰⁵ Deferred Prosecution Agreement Attach. A ¶ 21, *Alcatel-Lucent*, No. 10-cr-20907; Complaint ¶ 56, *Alcatel-Lucent*, No. 10-cv-24620.

¹⁰⁶ Deferred Prosecution Agreement Attach. A ¶ 21, *Alcatel-Lucent*, No. 10-cr-20907; Complaint ¶ 56, *Alcatel-Lucent*, No. 10-cv-24620.

¹⁰⁷ Complaint ¶ 56, *Alcatel-Lucent*, No. 10-cv-24620.

¹⁰⁸ Deferred Prosecution Agreement Attach. A ¶¶ 21, 62, *Alcatel-Lucent*, No. 10-cr-20907.

¹⁰⁹ There is an additional enforcement action that may provide guidance concerning the extent of foreign state ownership that, standing alone, may result in an entity being deemed an "instrumentality" of foreign government under the FCPA. In 2011, New York software company Comverse Technology, Inc. ("Comverse") resolved FCPA accounting provision charges resulting from a wholly-owned Israeli subsidiary's inaccurate recording of payments to employees of the Hellenic Telecommunications Organization S.A. ("OTE"), an entity "controlled and partially owned by the Greek government." Letter from U.S. Dep't of Justice to Daniel J. Horwitz, attorney for Comverse, (Apr. 6, 2011), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-comverse/04-06-11comverse-mpa.pdf> [hereinafter *Comverse Non-Prosecution Agreement*], App. A ¶ 12; Complaint ¶¶ 10, 21, Sec. & Exch. Comm'n v. Comverse Tech., Inc., No. 11-cv-1704 (E.D.N.Y. filed Apr. 6, 2011) (alleging that "the Greek Government was OTE's largest single shareholder and owned more than one-third of OTE's issued share capital.').

The DOJ and the SEC alleged that the subsidiary inaccurately recorded improper payments as "commissions," when in fact they were used to secure \$10 million in

“instrumentality” or “foreign official” inquiries under the FCPA. Instead, one can expect the DOJ and the SEC to look beyond mechanical determinations of ownership toward fluid indications of operational control. When the level of foreign government control over an entity mimics that which could exist in a traditional majority-ownership scenario, the DOJ and the SEC will likely treat the entity as an “instrumentality” of foreign government—and its employees as “foreign officials”—under the FCPA.

2. *Judicial Guidance*

While typically occupying a limited role in interpreting the FCPA,¹¹⁰ courts have had occasion to consider the circumstances in which an entity qualifies as an “instrumentality” of foreign government under the statute. Unfortunately, the handful of existing opinions has formed a morass of fact-specific considerations that do little to clarify the “instrumentality” issue. The most significant decision comes from the United States Court of Appeals for the Eleventh Circuit, which in 2014 affirmed the convictions and sentences of two former executives of Terra Communications Corp. (“Terra”), a Florida corporation.¹¹¹ Joel Esquenazi (Terra’s President and CEO) and Carlos Rodriguez (Executive Vice President of Operations) were convicted in 2011

purchase orders from OTE. Converse Non-Prosecution Agreement App. A ¶¶ 11, 24–25; Complaint ¶¶ 19, 21, *Converse*, No. 11-cv-1704. Neither the DOJ nor the SEC charged Converse with bribery, which strongly suggests that they did not view the Greek government’s approximate 33 percent interest in OTE, standing alone, as sufficient to render OTE an “instrumentality” of the Greek government and its employees “foreign officials” under the FCPA. Charges were accordingly limited to violations of the accounting provisions, which do not require a corrupt payment or the involvement of a foreign official. *See, e.g.*, Deming, *Record-Keeping Provisions*, *supra* note 12, at 468; *see also* Mathews, *supra* note 12, at 312; Tarun, *Basics*, *supra* note 61, at 8.

¹¹⁰ *See, e.g.*, Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 1009 (2009) (arguing that “FCPA law” largely develops through privately-negotiated agreements, subject to little or no judicial scrutiny.”); *see also* Darmer, *supra* note 84, at 19 (“Until recently, case law, especially from the appellate courts, concerning many of the key terms within the FCPA has been sparse or nonexistent.”); Ronald E. Wood & Jennifer L. Roche, *The Expanding Definition of “Foreign Official” and its FCPA Compliance Implications*, 2 FCPA REP. (Proskauer Rose LLP, May 29, 2013) at 2, *available at* <http://www.proskauer.com> (referring to the “dearth of judicial opinions” interpreting the FCPA).

¹¹¹ *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014). For additional context, *see* Press Release, U.S. Dep’t of Justice, Two Telecommunications Executives Convicted by Miami Jury on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Aug. 5, 2011), *available at* <http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html>.

on several criminal charges, including violating the FCPA's anti-bribery provisions by making improper payments to officials of Telecommunications D'Haiti, S.A.M. ("Teleco"), an entity that the DOJ alleged was an instrumentality of the government of Haiti.¹¹² Esquenazi was sentenced to fifteen years imprisonment—the longest FCPA-related prison sentence to date—while Rodriguez was sentenced to seven years in prison.¹¹³

In affirming the convictions and sentences, the Eleventh Circuit first addressed defendants' challenges to the district court's jury instructions concerning the meaning of the term "instrumentality" within the FCPA.¹¹⁴ Noting that the term is undefined by the FCPA and has escaped definition by federal appeals courts, the Eleventh Circuit applied the canon of *noscitur a sociis*, or "a word is known by the company it keeps."¹¹⁵ The court considered the company "instrumentality" keeps within the text of the FCPA—"agency" and "department"—and concluded that "an entity must be under the control or the dominion of the government to qualify as an 'instrumentality' within the FCPA's meaning," and that the entity "must be doing the business of the government."¹¹⁶ Accordingly, the court defined an "instrumentality" of foreign government under the FCPA as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."¹¹⁷

Foreign government control, the first element in the *Esquenazi* test, requires an examination of several factors, including (i) the government's formal designation of the entity; (ii) whether the government owns a majority stake in the entity; (iii) the government's ability to "hire and fire" the entity's principals; (iv) the extent to which the entity's profits inure to the government; (v) the extent to which the government "funds the entity if it fails to break even"; and (vi) "the length of time these indicia have existed."¹¹⁸

The second element of the *Esquenazi* test, whether an entity performs a governmental function, turns on an additional set of factors, including (i) whether the entity "has a monopoly over the function it exists to carry out";

¹¹² *Esquenazi*, 752 F.3d at 917–18.

¹¹³ *Id.* at 920.

¹¹⁴ *Id.* at 927.

¹¹⁵ *Id.* at 921 (internal quotation marks omitted).

¹¹⁶ *Id.* at 922.

¹¹⁷ *Id.* at 925. Realizing that this definition raises "fact-bound questions," the court did "not purport to list all of the factors that might prove relevant" to resolving the instrumentality question. *Id.*

¹¹⁸ *Esquenazi*, 752 F.3d at 925.

(ii) whether the foreign government subsidizes the entity's costs; (iii) whether the entity provides services "to the public at large" in its country of operation; and (iv) whether the government and the public of the relevant foreign country "generally perceive the entity to be performing a governmental function."¹¹⁹

Applying its two-part test, the Eleventh Circuit concluded that the lower court's jury instructions were proper.¹²⁰ Defendants' challenges to the instructions revolved around the argument that the jury had been permitted to find that Teleco was an instrumentality of the Haitian government "based only on the fact that Teleco was a government-owned entity that performed a service, without any determination that the service it performed was a governmental function."¹²¹ The Eleventh Circuit rejected this argument, concluding that the instructions "make plain that provision of a service by a government-owned or controlled entity is not by itself sufficient" to demonstrate that an entity is an instrumentality of a foreign government under the FCPA.¹²² Rather, the jury instructions properly limited instrumentalities of a foreign government to entities that perform a governmental function.¹²³ Defendants' favored interpretation of "instrumentality"—which "categorically exclude[d] government-controlled entities that provide telephone service, like Teleco"—was "too narrow[.]"¹²⁴

Like the opinions that preceded it,¹²⁵ *Esquenazi* does little to clarify the "instrumentality" issue. As the available judicial guidance offers few

¹¹⁹ *Id.* at 926.

¹²⁰ *Id.* at 927–28. Defendants asserted other challenges to their FCPA convictions and sentences, including that the FCPA is unconstitutionally vague and that the requisite knowledge for an FCPA violation was absent. These challenges also failed. *See id.* at 928–32.

¹²¹ *Id.* at 927. *See also* Br. of Appellant Joel Esquenazi, No. 11-15331 (11th Cir. filed May 9, 2012) at 34 (arguing, "this Court should construe 'instrumentality' to require the Government to prove that a state-owned enterprise performs a governmental function before payments made to that entity are deemed within the sweep of the FCPA."); Br. of Appellant Carlos Rodriguez, No. 11-15331 (11th Cir. filed May 9, 2012) at 44 (arguing, "Congress intended the definition of 'foreign official' to apply to traditional government officials, not employees of state-owned enterprises such as Teleco.").

¹²² *Esquenazi*, 752 F.3d at 927.

¹²³ *Id.* at 927–28.

¹²⁴ *Id.* at 922, 928 n.10. Defendants filed an unsuccessful petition for *certiorari* with the United States Supreme Court. *Esquenazi*, petition for cert. filed, No. 14-189 (U.S. Aug. 14, 2014); Order List (U.S. Oct. 6, 2014) at 40, available at <http://www.supremecourt.gov/orders/courtorders/100614zor.pdf>.

¹²⁵ *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); *United States v. Carson*, 2011 U.S. Dist. LEXIS 88853 (C.D. Cal. May 18, 2011). *Aguilar* identified several "non-

limitations on the circumstances in which an entity can qualify as an “instrumentality” of foreign government under the FCPA—and may broaden the scope of the term through a web of factors arguably malleable to nearly any situation—joint ventures and their partners must exercise caution even when dealing with entities that do not at first glance appear to be owned or controlled by a foreign government.¹²⁶ This is especially true when conducting business in countries where the state plays a significant role in the economy.¹²⁷

IV. THE FCPA AND JOINT VENTURES

Part IV is composed of four sections, each devoted to a scenario that can expose joint ventures, joint-venture partners, and majority-interest holders in joint ventures to significant FCPA enforcement risks. Section A addresses direct liability. Section B addresses vicarious liability. Section C addresses joint ventures with state-owned enterprise partners. Section D addresses conspiracy and aiding and abetting charges against foreign non-issuers that conspire with or assist an FCPA-covered joint-venture partner in a violation.

A. Scenario I: Direct Liability

No set of enforcement actions better demonstrates the potentially enormous risks of participating in a joint venture that lacks adequate FCPA

exclusive” factors that support treating a state-owned entity as an instrumentality of foreign government under the FCPA: (i) the provision of services to citizens; (ii) “key” officers and directors of the entity are or were appointed by a foreign government; (iii) financing occurs through government appropriations or taxes; (iv) the entity “is vested with and exercises exclusive or controlling power to administer its designated functions”; and (v) the entity is “widely perceived and understood” to be performing “official (*i.e.*, governmental) functions.” 783 F. Supp. 2d at 1115.

Carson similarly reasoned that the “instrumentality” determination “is a fact-specific question that depends on the nature and characteristics of the business entity,” and applied the following factors to determine whether an entity is an instrumentality of foreign government under the FCPA: (i) the foreign government’s “characterization of the entity and its employees”; (ii) the foreign government’s “degree of control” over the entity; (iii) the purpose of the entity; (iv) whether the entity “exercises exclusive or controlling power to administer its designated functions”; (v) the “circumstances surrounding the entity’s creation”; and (vi) the foreign government’s “extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).” 2011 U.S. Dist. LEXIS, at **11–12, 30.

¹²⁶ FCPA risk-reduction strategies are discussed *infra* Part V.

¹²⁷ See *supra* note 90 and associated text.

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compliance measures than the TSKJ Nigeria joint venture cases,¹²⁸ which resulted in more than \$1.7 billion in fines and civil penalties.¹²⁹ In 1990, JGC Corporation (“JGC”), Kellogg Brown & Root LLC (“KBR”), Technip S.A. (“Technip”), and Snamprogetti Netherlands B.V. (“Snamprogetti”) formed a joint venture to bid on contracts to design and build liquefied natural gas (“LNG”) facilities on Bonny Island, Nigeria.¹³⁰ The TSKJ joint venture was organized through three special purpose vehicles based in Portugal.¹³¹ The first two were owned equally by the four joint-venture partners.¹³² The third, through which TSKJ entered into consulting and other agreements with third-party agents, was owned fifty percent by M.W. Kellogg Ltd. (which itself was owned fifty-five percent by KBR and forty-five percent by JGC), and twenty-five percent each by Technip and Snamprogetti.¹³³ Hence, each of the

¹²⁸ As explained *supra* note 94, because the allegations among the TSKJ enforcement actions are substantially similar, this Article relies on the DOJ’s criminal action against JGC unless otherwise necessary. *See* United States v. JGC Corp., No. 11-cr-260 (S.D. Tex. 2011).

¹²⁹ The \$1.7 billion figure is inclusive of FCPA settlements involving the four TSKJ partners as well as an agent of the joint venture. *See* Press Release, U.S. Dep’t of Justice, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty (Apr. 6, 2011), *available at* <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html>; *see also* Press Release, U.S. Dep’t of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine (Feb. 11, 2009), *available at* <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html>; Press Release, Sec. & Exch. Comm’n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* <http://www.sec.gov/news/press/2009/2009-23.htm>; Press Release, U.S. Dep’t of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (July 7, 2010), *available at* <http://www.justice.gov/opa/pr/2010/July/10-crm-780.html>; Press Release, Sec. & Exch. Comm’n, SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials with Carloads of Cash (July 7, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-119.htm>; Press Release, U.S. Dep’t of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$240 Million Criminal Penalty (June 28, 2010), *available at* <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>; Press Release, Sec. & Exch. Comm’n, SEC Charges Technip with FCPA Violations (June 28, 2010), *available at* <http://www.sec.gov/news/press/2010/2010-110.htm>; Press Release, U.S. Dep’t of Justice, Marubeni Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$54.6 Million Criminal Penalty (Jan. 17, 2012), *available at* <http://www.justice.gov/opa/pr/2012/January/12-crm-060.html>. Marubeni Corporation was an agent of the TSKJ joint venture. Deferred Prosecution Agreement Attach. A ¶ 12, United States v. Marubeni Corp., No. 12-cr-22 (S.D. Tex. filed Jan. 17, 2012).

¹³⁰ Deferred Prosecution Agreement Attach. A ¶ 2, JGC, No. 11-cr-260.

¹³¹ *Id.* ¶ 8.

¹³² *Id.*

¹³³ *Id.* ¶¶ 7–8.

four partners owned approximately twenty-five percent of the TSKJ joint venture,¹³⁴ and profits, revenues, and expenses were “generally . . . shared equally” among them.¹³⁵

Pursuing the Bonny Island LNG project brought TSKJ into contact with Nigeria LNG Limited (“NLNG”), an entity the Nigerian government established in the 1980s to capture and sell Nigeria’s natural gas assets.¹³⁶ NLNG was responsible for awarding the engineering, procurement, and construction (“EPC”) contracts for LNG infrastructure development.¹³⁷ The Nigerian government’s ownership in NLNG was limited to forty-nine percent, which it retained through the Nigerian National Petroleum Corporation (“NNPC”), a state-owned oil and gas company responsible for the overall development and regulation of Nigeria’s oil and gas assets.¹³⁸ Multinational oil companies owned the remaining fifty-one percent of NLNG.¹³⁹

Between 1995 and 2004, TSKJ entered into four EPC contracts with NLNG, through which TSKJ would earn \$6 billion for building six pipeline “trains” that could transport and process the Bonny Island LNG assets.¹⁴⁰ TSKJ received the first EPC contract “through an ostensibly competitive international tender,” while the other three contracts were awarded “on a sole-source, negotiated basis.”¹⁴¹

The means by which TSKJ secured these contracts resulted in an FCPA enforcement nightmare for the joint venture and its partners. As the SEC alleged, TSKJ and its partners “entered into sham ‘consulting’ or ‘services’ agreements with intermediaries who would then funnel their purportedly legitimate fees to Nigerian government officials” in exchange for awarding EPC contracts to TSKJ.¹⁴² The third-party agents who allegedly served as conduits for the payments included Jeffrey Tesler, a U.K. solicitor, and his corporate vehicle, Tri-Star Investments, Ltd. (“Tri-Star”), as well as an

¹³⁴ KBR, through its majority stake in M.W. Kellogg Ltd., owned slightly more than 25 percent of the joint venture. *Id.*

¹³⁵ *Id.* at ¶ 2.

¹³⁶ Deferred Prosecution Agreement Attach. A ¶ 13, *JGC*, No. 11-cr-260.

¹³⁷ *Id.*

¹³⁸ *Id.* ¶¶ 12–13.

¹³⁹ *Id.* ¶ 13.

¹⁴⁰ *Id.* ¶ 14. A “train” is pipeline infrastructure that allows natural gas to be transported from wellheads, converted into LNG, and delivered to tankers. *Id.*

¹⁴¹ *Id.*

¹⁴² Complaint ¶ 2, *ENI*, No. 10-cv-2414.

unnamed Japanese consulting company.¹⁴³ As alleged in the charging documents, TSKJ transmitted more than \$180 million in improper payments to Tesler and the Japanese company while knowing that a portion would be provided to Nigerian officials to secure EPC contracts.¹⁴⁴

KBR's guilty plea in particular demonstrates that the absence of majority ownership or control of a joint venture will not insulate a partner from criminal FCPA liability if direct participation in an anti-bribery violation can be shown. Of TSKJ's three special purpose vehicles, "Madeira Company 3"—the entity through which the joint venture entered into contracts with third-party agents—was owned fifty percent by M.W. Kellogg, which in turn was fifty-five percent owned by KBR, a TSKJ partner with a non-controlling interest in the joint venture.¹⁴⁵ KBR thus held an indirect, non-controlling stake in Madeira Company 3.¹⁴⁶ According to the DOJ, "KBR held its interest . . . indirectly . . . rather than directly, as part of KBR's intentional effort to insulate itself from FCPA liability."¹⁴⁷ Further, while Albert "Jack" Stanley—serving at various times as KBR's President, CEO, and Chairman—was a director of two of the TSKJ special purpose vehicles, KBR "avoided placing U.S. citizens on the board of managers of Madeira Company 3 as a further . . . intentional effort to insulate itself from FCPA liability."¹⁴⁸ Like senior executives from the other three TSKJ partners, Stanley was a member of TSKJ's Steering Committee, which "made major decisions on behalf of [TSKJ], including whether to hire agents to assist [TSKJ] in winning EPC contracts . . ."¹⁴⁹

While KBR retained only an indirect, non-controlling interest in Madeira Company 3, the involvement of "officers and employees at the highest level of KBR . . . in the joint venture and its business," combined with KBR's "level of operational control and knowledge" of TSKJ's activity, proved sufficient for FCPA anti-bribery charges.¹⁵⁰ KBR's resulting guilty plea is a stark reminder of the dangers posed by joint ventures that lack adequate

¹⁴³ Deferred Prosecution Agreement, Attach. A ¶¶ 9–11, 15–36, *JGC*, No. 11-cr-260.

¹⁴⁴ *Id.* ¶¶ 10–11.

¹⁴⁵ *Id.* ¶¶ 7–8.

¹⁴⁶ Plea Agreement Ex. 3 ¶ 9, *Kellogg Brown & Root*, No. 09-cr-71.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* ¶¶ 2–3, 9.

¹⁴⁹ *Id.* ¶ 4.

¹⁵⁰ Roger M. Witten et al., *Updates in Global Anti-Bribery Enforcement* (Wilmer Cutler Pickering Hale and Dorr LLP, May 13, 2009) at 2–3, available at <http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=89347>.



FCPA compliance systems, and a warning that corporate machinations designed to limit exposure are unlikely to succeed when actual involvement in a violation can be shown.

B. Scenario II: Vicarious Liability

1. The Anti-Bribery Provisions

A business entity may, depending on the circumstances, be held vicariously liable for FCPA violations committed by a joint venture, a joint-venture partner, or an agent acting on behalf of a joint venture.¹⁵¹ Vicarious liability traditionally applies in situations where a business entity authorized, directed, or controlled acts that violate the FCPA's anti-bribery provisions.¹⁵²

This simple formula often becomes complicated in practice, because direct evidence of authorization, direction, or control may be absent or unavailable. The analysis in such cases often turns to the FCPA's prohibition on corruptly offering, giving, or promising anything of value to "any person, while knowing" that all or a portion thereof will be offered, given, or promised, "directly or indirectly," to a foreign official.¹⁵³ In this situation, liability "is predicated on knowledge" of the anti-bribery violation.¹⁵⁴

¹⁵¹ See, e.g., Kathryn Nickerson, Senior Counsel, Office of the Chief Counsel for Int'l Commerce, U.S. Dep't of Commerce, What the U.S. Government Can Do to Assist U.S. Companies with Respect to Transnational Corruption, Address at the N.C. Bar Ctr., 2011 Export Law 101 (Cary, N.C., June 9, 2011) at 10, available at <http://www.commerce.gov> (stating, "U.S. companies can be held responsible under the FCPA for acts in furtherance of bribes to foreign public officials by their joint venture partners or agents."); see also Braude & Nelms, *supra* note 92, at 175–76 (writing, "[a]quiring a company—or joining with a . . . company in a joint venture—means that the business practices of that company effectively become your business practices in the eyes of the U.S. authorities.").

¹⁵² See, e.g., Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 296 (2007); see also Gregory M. Williams, *The Alcoa FCPA Settlement: Are We Entering Strict Liability Anti-Bribery Regime?*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Feb. 5, 2014), available at http://www.wileyrein.com/public_document.cfm?id=31116&key=23G0.

¹⁵³ 15 U.S.C. § 78dd-1(a)(3), -2(a)(3), -3(a)(3). See also Marceau, *supra* note 152, at 297.

¹⁵⁴ Marceau, *supra* note 152, at 297. See also Lucinda A. Low & John E. Davis, *The FCPA in Investment Transactions*, 1 FOREIGN CORRUPT PRACTICES ACT REP., § 5:23 (West 2d ed. 2014) ("Under the vicarious liability provisions [of the FCPA], the U.S. company's potential liability" following a joint venture or joint-venture partner's violation of the anti-bribery provisions "will turn on whether it had 'knowledge' of or 'authorized' the payment."); see also Leslie A. Shubert, *The Risks of FCPA Joint Venture Liability*, LAW360,

Critically, a joint-venture partner with knowledge of a violation by the joint venture or by another partner may incur vicarious liability for the violation, even where majority ownership or control is absent.¹⁵⁵ At the same time, the risk is especially high that a controlling entity—presumed to have the power to prevent a violation—will be found to have instead “authorized” it through knowing acquiescence.¹⁵⁶

July 25, 2012, <http://www.law360.com/articles/361936/the-risks-of-fcpa-joint-venture-liability> (“Investors in joint ventures can be liable for anti-bribery violations if they or their agents had actual or constructive knowledge of the illegal acts, or if they otherwise authorized, directed or controlled the illegal activity.”); *see also* Lucinda A. Low & Owen J. Bonheimer, *Enforcement of the U.S. Foreign Corrupt Practices Act: Extraterritorial Reach and the Effects of International Standards*, Address at the Int’l Bar Assoc. Annual Conf. (Chi., Illinois, September 19, 2006) at 6, *available at* <http://www.steptoe.com> (discussing vicarious liability in the context of joint ventures and explaining, “[t]he risk that the FCPA-subject party may acquire ‘knowledge’ or authorize risky actions may be even greater in a shared enterprise than in the agency context.”).

¹⁵⁵ *See* Shubert, *supra* note 154 (“The standard for liability under the FCPA’s anti-bribery provisions is the same for both majority and minority owners of joint ventures because liability hinges most often on a joint venture partner’s knowledge, not on its level of influence or control over the joint venture.”); *see also* Low & Davis, *supra* note 154, § 5:24 (explaining that “level of ownership, or even lack of active management . . . is not likely to be dispositive” as to anti-bribery liability, as “[e]ven without it, a U.S. partner with knowledge of the activity or an ability to veto the action at the board or shareholder level” could incur liability); Mara V.J. Senn & Jennifer Hogan, *Recent Enforcement Trends Indicate Increased FCPA Peril for Private Equity Firms*, BLOOMBERG, Nov. 1, 2011, *available at* <http://about.bloomberglaw.com/practitioner-contributions/fcpa-peril-for-private-equity-firms/> (“A shareholder with knowledge of a bribery problem can be held liable under the FCPA, regardless of the degree of ownership or control.”).

¹⁵⁶ *See* DEMING, *NEW INTERNATIONAL NORMS*, *supra* note 72, at 65:

Under the anti-bribery provisions, whether an entity owns less than a controlling interest in a foreign affiliate is not determinative for establishing vicarious liability The distinction between a controlled and noncontrolled affiliate relates only to the likelihood that an entity is apt to have knowledge of the prohibited conduct and to have been in a position to have authorized or acquiesced to it. Where an entity has a controlling interest, and is actively involved in the management of the affiliate, it is more likely to become aware of the prohibited conduct. In such a circumstance, if the parent fails to take immediate action to repudiate the prohibited conduct, the failure may be construed as an implicit authorization of the prohibited conduct.

See also Low & Davis, *supra* note 154, § 5:24 (“In its managing role, the U.S. company or its officers may have direct responsibility for actions taken or a greater chance to authorize or acquire (or be imputed with) ‘knowledge’ of illegal activities.”).

FCPA enforcement actions against RAE Systems Inc. (“RAE Systems”), a Delaware corporation and U.S. issuer, underscore the heightened risk of vicarious liability posed by majority ownership or control of a joint venture.¹⁵⁷ RAE Systems acquired majority stakes in two joint ventures through large investments in two Chinese companies: KLH (Beijing) Co., Limited (“KLH”), which resulted in the RAE-KLH joint venture, and Coal Mine Safety Instruments (Fushun) Co., Ltd. (“Fushun”), which resulted in the RAE-Fushun joint venture.¹⁵⁸ RAE Systems initially acquired a sixty-four percent interest in RAE-KLH in 2004, eventually increasing its holdings to ninety-six percent in mid-2006.¹⁵⁹ In December 2006, RAE Systems acquired a seventy percent stake in RAE-Fushun.¹⁶⁰

The FCPA problems that would eventually plague RAE Systems began prior to the formation of the RAE-KLH and RAE-Fushun joint ventures. Through pre-investment due diligence, RAE Systems uncovered several concerning facts about KLH: (i) KLH’s “primary” clients were departments of the Chinese government and large state-owned enterprises; (ii) KLH sales personnel financed their operations through cash advances that KLH later reimbursed; and, most significantly, (iii) KLH sales personnel had in fact used cash advances “to bribe government officials in order to obtain or retain business.”¹⁶¹

The SEC alleged that despite being “aware of significant indications of ongoing bribery at RAE-KLH,” RAE Systems “failed to effectively investigate these indications, or red flags, and to stop the bribery from continuing.”¹⁶² While RAE Systems provided FCPA compliance training to RAE-KLH employees and instructed them to discontinue corrupt payments, the DOJ in its accounting provisions action took the position that “such steps

¹⁵⁷ See Letter from U.S. Dep’t of Justice to Carlos F. Ortiz & Roy K. McDonald, attorneys for RAE Systems (Dec. 10, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-systems/12-10-10rae-systems.pdf> [hereinafter RAE Systems Non-Prosecution Agreement]; Complaint, Sec. & Exch. Comm’n v. RAE Sys. Inc., No. 10-cv-2093 (D.D.C. filed Dec. 10, 2010); Press Release, Sec. & Exch. Comm’n, SEC Files Settled FCPA Case Against RAE Systems Inc. (Dec. 10, 2010), available at <http://www.sec.gov/litigation/litreleases/2010/lr21770.htm>.

¹⁵⁸ RAE Systems Non-Prosecution Agreement, *supra* note 157, App. A ¶¶ 3–4; Complaint ¶¶ 1, 8–9, RAE Sys., No. 10-cv-2093.

¹⁵⁹ RAE Systems Non-Prosecution Agreement, *supra* note 157, App. A ¶ 3; Complaint ¶ 8, RAE Sys., No. 10-cv-2093.

¹⁶⁰ RAE Systems Non-Prosecution Agreement, *supra* note 157, App. A ¶ 4; Complaint ¶¶ 9, 29, RAE Sys., No. 10-cv-2093.

¹⁶¹ Complaint ¶ 10, RAE Sys., No. 10-cv-2093.

¹⁶² *Id.* ¶ 3.

were half-measures,” as RAE Systems “did not impose sufficient internal controls or make sufficient changes to high-risk practices.”¹⁶³

The situation was worse when RAE Systems formed the RAE-Fushun joint venture in December 2006. The Non-Prosecution Agreement between RAE Systems and the DOJ explicitly stated, “RAE Systems did not conduct pre-acquisition corruption due diligence” before forming the joint venture.¹⁶⁴ According to the DOJ, in addition to Fushun’s “high-risk” location and “numerous” government customers, due diligence was especially critical in light of RAE Systems’s recent “experience with KLH.”¹⁶⁵ As with RAE-KLH, improper payments continued unabated after formation of the RAE-Fushun joint venture.¹⁶⁶

While the ultimate settlement amounts were relatively modest—a \$1.7 million penalty paid to the DOJ and about \$1.2 million in disgorgement paid to the SEC¹⁶⁷—the enforcement actions against RAE Systems are nonetheless important.¹⁶⁸ In particular, the SEC’s action makes clear that majority ownership of a joint venture—and the knowledge such status often conveys—can expose an owner to liability for the joint venture’s anti-bribery violations despite the absence of direct participation in corrupt conduct.¹⁶⁹

a. “Reimbursement” Risk

An additional scenario of concern involves the risk that a routine payment or distribution—whether made to a joint venture or to a partner, or in fulfillment of a specific legacy contract—may be treated as a

¹⁶³ RAE Systems Non-Prosecution Agreement, *supra* note 157, App. A ¶ 13.

¹⁶⁴ *Id.* ¶ 14.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*; Complaint ¶¶ 30–31, 35–36, *RAE Sys.*, No. 10-cv-2093.

¹⁶⁷ Press Release, Sec. & Exch. Comm’n, SEC Files Settled FCPA Case Against RAE Systems Inc., *supra* note 157, at 1.

¹⁶⁸ While this Section focuses on the FCPA’s anti-bribery provisions, the enforcement actions against RAE Systems also reveal the vicarious liability risks that controlling issuers face under the accounting provisions. *See* FCPA Resource Guide, *supra* note 39, at 42 (citing the SEC’s action against RAE Systems as an example of the principle that an issuer is responsible for the books and records of its controlled subsidiaries and joint ventures). For further discussion of vicarious liability under the accounting provisions, *see infra* Part VI.B.2.

¹⁶⁹ Complaint ¶ 3, *RAE Sys.*, No. 10-cv-2093 (holding RAE Systems responsible for “payments . . . made exclusively in China . . . by Chinese employees of RAE-KLH and RAE-Fushun,” on grounds that RAE Systems was aware of ongoing bribery at the joint ventures).

reimbursement for past improper payments.¹⁷⁰ This includes, for example, the “payment of a commission due an agent who had previously assisted in obtaining a contract for [a] foreign partner,”¹⁷¹ as well as capital contributions and distributions necessary to finance a joint venture or compensate partners.¹⁷² The presence of “red flags” increases the risk that such payments may result in violations of the FCPA’s anti-bribery provisions.¹⁷³

The DOJ addressed the issue of legacy corruption and contemporary payments in Opinion Procedure Release No. 01-01.¹⁷⁴ The Requestor, an American company, planned to enter into a 50-50 joint venture with a French company.¹⁷⁵ The Requestor and the French company would share equally in the profits and losses of the joint venture, and both would contribute “pre-existing contracts and transactions to the joint venture.”¹⁷⁶ Certain contracts to be contributed by the French company were procured prior to the effective date of a French anti-corruption law.¹⁷⁷

In addition to undertaking “a number of precautions” designed to mitigate any corruption risks posed by these contracts, the Requestor asked the DOJ whether it would “be deemed to have violated the FCPA by entering into the joint venture should it later become apparent that one or more of the contracts contributed by the French company were obtained or maintained through bribery.”¹⁷⁸ Indeed, the French company represented that “none of the contracts and transactions to be contributed by [it] were procured in violation of applicable anti-bribery or other laws.”¹⁷⁹

The DOJ responded that because “the French company’s representation is not limited to violations of the [French anti-corruption law],” the DOJ interpreted the representation “to mean that the contracts were obtained without violation of either French law or the anti-bribery laws of all the jurisdictions of the various government officials” who could have influenced the award of the contracts.¹⁸⁰ Yet, if the French company’s representations

¹⁷⁰ See DEMING, NEW INTERNATIONAL NORMS, *supra* note 72, at 65.

¹⁷¹ TARUN, *supra* note 5, at 112.

¹⁷² See DEMING, NEW INTERNATIONAL NORMS, *supra* note 72, at 65.

¹⁷³ See *supra* Part III.A.1 for a discussion of red flags and the knowledge required for an anti-bribery charge.

¹⁷⁴ DEP’T OF JUSTICE OPINION PROCEDURE RELEASE 01-01 (May 24, 2001) at 1.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ DEP’T OF JUSTICE OPINION PROCEDURE RELEASE 01-01 (May 24, 2001) at 2.

were in fact limited to “then-applicable French law, the Requestor, as an American company, may face liability under the FCPA if it *or the joint venture* knowingly take[s] any act in furtherance of a payment to a foreign official with respect to previously existing contracts,” even if such payments would have been legal under French law at the time the contracts were executed.¹⁸¹

Opinion Procedure Release 01-01 demonstrates that the Requestor could be held vicariously liable for improper payments by the joint venture in fulfillment of legacy contracts obtained by a partner despite the Requestor holding a non-controlling fifty-percent interest in the joint venture.¹⁸² The key lesson for business entities is that thorough FCPA due diligence must reach not only business partners, but also the contracts and commitments they will contribute to any joint venture. Release 01-01 also supports the notion that anti-corruption representations and warranties and related contractual protections can reduce FCPA exposure in joint ventures.¹⁸³

b. An Expanding Agency Doctrine

The January 9, 2014 SEC enforcement action against Alcoa raises potent implications for business entities that own a majority stake in or possess operational control over joint ventures or joint-venture partners.¹⁸⁴ *Alcoa* is a complex case that resulted from the conduct of Alcoa World Alumina and Chemicals (“AWAC”), an unincorporated joint venture created by Alcoa and Alumina Limited (“Alumina”) in 1995.¹⁸⁵ Alcoa held an unspecified majority stake in AWAC; Alumina held an unspecified minority

¹⁸¹ *Id.* (emphasis added).

¹⁸² *Id.*

¹⁸³ The Requestor limited its FCPA exposure to latent contract risk by, among other initiatives, securing anti-corruption representations and warranties from the French company, placing a termination provision in the joint venture agreement, and installing controls around the retention of agents by the joint venture. *Id.* Importantly, the DOJ did not view the termination provision as entirely satisfactory because it was triggered by a “materially adverse effect,” which the DOJ suggested might be “unduly restrictive.” *Id.* at 2 (internal quotation marks omitted). Strategies that can reduce FCPA risks in joint ventures are discussed *infra* Part V.

¹⁸⁴ Cease and Desist Order, *In re Alcoa Inc.*, Exch. Act Rel. No. 71261 (Jan. 9, 2014), available at <http://www.sec.gov/litigation/admin/2014/34-71261.pdf>. See also Information, United States v. Alcoa World Alumina LLC, No. 14-cr-7 (W.D. Pa. filed Jan. 9, 2014); Plea Agreement, *Alcoa World Alumina*, No. 14-cr-7 (W.D. Pa. filed Jan. 9, 2014).

¹⁸⁵ Cease and Desist Order ¶ 6, *Alcoa*, Exch. Act Rel. No. 71261; Information ¶ 5, *Alcoa World Alumina*, No. 14-cr-7.

interest.¹⁸⁶ AWAC, in turn, operated through a group of affiliated companies, each of which was “owned by Alcoa and Alumina in proportion to their respective ownership interests in the AWAC enterprise.”¹⁸⁷

Two of the entities within the AWAC enterprise allegedly became involved in a series of improper transactions for the purpose of selling alumina to Aluminum Bahrain B.S.C. (“Alba”), an instrumentality of the government of Bahrain.¹⁸⁸ In numerous instances over a twenty-year period, Alcoa of Australia Limited and Alcoa World Alumina LLC (together, the “AWAC Subsidiaries”) used shell companies owned or controlled by “Consultant A”—an “international middleman” with “close contacts” to members of Bahrain’s Royal Family—as sales agents and distributors to sell alumina to Alba.¹⁸⁹ Consultant A used inflated prices to finance bribes to Alba officials and a senior Bahraini official.¹⁹⁰ Bribes were also funded by large commission payments that the AWAC Subsidiaries provided to Consultant A.¹⁹¹ Over its lifetime, the scheme financed more than \$110 million in corrupt payments.¹⁹²

In a second scenario, Alcoa attempted to negotiate a joint venture with Alba whereby alumina from the AWAC Subsidiaries’ refineries would be exchanged with aluminum provided by Alba.¹⁹³ An Alcoa executive retained Consultant A to lobby an Alba official who also served as a senior member of the government of Bahrain.¹⁹⁴ The SEC alleged that Alcoa agreed to pay Consultant A an \$8 million “success fee” for providing negotiation “advice and assistance” if the joint venture succeeded.¹⁹⁵

¹⁸⁶ Cease and Desist Order ¶ 6, *Alcoa*, Exch. Act Rel. No. 71261; Information ¶ 5, *Alcoa World Alumina*, No. 14-cr-7.

¹⁸⁷ Cease and Desist Order ¶ 6, *Alcoa*, Exch. Act Rel. No. 71261; Information ¶ 5, *Alcoa World Alumina*, No. 14-cr-7.

¹⁸⁸ Cease and Desist Order ¶¶ 1,10, *Alcoa*, Exch. Act Rel. No. 71261; Information ¶ 14, *Alcoa World Alumina*, No. 14-cr-7.

¹⁸⁹ Cease and Desist Order ¶¶ 2, 9, 14–15, 21–23, 30, *Alcoa*, Exch. Act Rel. No. 71261; Information ¶¶ 9, 29, *Alcoa World Alumina*, No. 14-cr-7.

¹⁹⁰ Cease and Desist Order ¶¶ 23–24, 28, 37, *Alcoa*, Exch. Act Rel. No. 71261; Information ¶¶ 23–24, 28–29, 38–39, 43, 47, 51, 60–62, 82, *Alcoa World Alumina*, No. 14-cr-7.

¹⁹¹ Cease and Desist Order ¶ 37, *Alcoa*, Exch. Act Rel. No. 71261; Information ¶¶ 23, 30–33, 35–37, 42–43, 45, 50–51, 62, *Alcoa World Alumina*, No. 14-cr-7.

¹⁹² Cease and Desist Order ¶ 37, *Alcoa*, Exch. Act Rel. No. 71261.

¹⁹³ Information ¶ 65, *Alcoa World Alumina*, No. 14-cr-7.

¹⁹⁴ Cease and Desist Order ¶ 25, *Alcoa*, Exch. Act Rel. No. 71261; Information ¶ 65, *Alcoa World Alumina*, No. 14-cr-7.

¹⁹⁵ Cease and Desist Order ¶ 25, *Alcoa*, Exch. Act Rel. No. 71261; Information ¶ 65, *Alcoa World Alumina*, No. 14-cr-7.

The following year, Alcoa and Alba—which acted through the official that Consultant A was hired to lobby—entered into a Memorandum of Understanding (“MOU”) providing that Alcoa would make an equity investment in Alba, and would sell alumina to the government of Bahrain (Alba’s majority shareholder), either “directly or through an associated company of Alcoa satisfactory to [the government of Bahrain] and Alcoa.”¹⁹⁶ A few weeks after the MOU was executed, Consultant A transferred \$2 million to the official’s bank account in Switzerland.¹⁹⁷

Enforcement actions were eventually brought against Alcoa World Alumina LLC (“AWA”) and Alcoa, based on the theory that both entities “consciously disregarded” and were “willfully blind” to the probability that Consultant A would pay bribes to foreign officials.¹⁹⁸ AWA resolved the DOJ’s action by pleading guilty to a single count of violating the FCPA’s anti-bribery provisions, resulting in a \$209 million criminal penalty and \$14 million in forfeiture.¹⁹⁹ The SEC charged Alcoa with violating the FCPA’s anti-bribery, books and records, and internal control provisions, resulting in a Cease and Desist Order imposing \$175 million in disgorgement.²⁰⁰ In total, the DOJ and the SEC assessed \$384 million in fines and penalties, placing the Alcoa cases among the most costly ever brought under the FCPA.²⁰¹

More significantly, the SEC’s strategy in *Alcoa* reflects the crystallization of an expansive agency theory that sidesteps traditional requirements for vicariously imposing anti-bribery liability on business entities with majority stakes in or operational control of other entities.²⁰² To incur liability for an

¹⁹⁶ Cease and Desist Order ¶ 27, *Alcoa*, Exch. Act Rel. No. 71261 (internal quotation marks omitted); Information ¶ 68, *Alcoa World Alumina*, No. 14-cr-7.

¹⁹⁷ Information ¶ 69, *Alcoa World Alumina*, No. 14-cr-7. The joint venture negotiations ultimately collapsed, and Consultant A never received the success fee. *Id.* ¶ 68; Cease and Desist Order ¶ 27, *Alcoa*, Exch. Act Rel. No. 71261.

¹⁹⁸ Information ¶¶ 28, 60, 77, 83, *Alcoa World Alumina*, No. 14-cr-7; Cease and Desist Order ¶¶ 2, 19, 37, *Alcoa*, Exch. Act Rel. No. 71261.

¹⁹⁹ Plea Agreement ¶¶ 1, 8, 35(a), *Alcoa World Alumina*, No. 14-cr-7. The DOJ did not bring charges against Alcoa of Australia Limited (the other AWAC Subsidiary), likely due to jurisdictional constraints.

²⁰⁰ Cease and Desist Order at 9 ¶¶ D–E; 10 ¶ I; 11 ¶ B, *Alcoa*, Exch. Act Rel. No. 71261. The SEC deemed \$14 million of the disgorgement amount satisfied by the \$14 million DOJ forfeiture amount. Press Release, Sec. & Exch. Comm’n, SEC Charges Alcoa with FCPA Violations, *supra* note 2.

²⁰¹ See, e.g., Mahoney, *supra* note 2.

²⁰² Marceau wrote in 2007 that a strict agency approach to vicarious liability under the FCPA “has remained beyond the scope of the Justice Department’s broad reading of the FCPA,” but that the DOJ’s “relatively unchecked approach to FCPA liability” required business entities “to anticipate” such an approach. Marceau, *supra* note 152, at 298, 300.

anti-bribery violation committed by an agent, a controlling entity traditionally must have knowledge of the violation or must participate in it by authorizing, directing, or controlling the agent's conduct with respect to the violation.²⁰³ The SEC's approach in *Alcoa* suggests a powerful departure from this requirement, as the Cease and Desist Order expressly acknowledges that it "contains no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme," but nonetheless provides that Alcoa "violated [the FCPA's anti-bribery prong] *by reason of its agents*."²⁰⁴ The charge is predicated on the AWAC Subsidiaries being "'agents' of Alcoa . . . acting within the scope of their authority when participating in the bribe scheme."²⁰⁵

The SEC's agency theory is rooted in Alcoa's generalized control of the AWAC Subsidiaries. According to the Cease and Desist Order, (i) Alcoa appointed the majority of seats on the AWAC Subsidiaries' "Strategic Counsel," a management body chaired by the head of an Alcoa business line; (ii) Alcoa and one of the AWAC Subsidiaries "transferred personnel between them," including alumina sales personnel; (iii) Alcoa "set the business and financial goals" and "coordinated the legal, audit, and compliance functions" of the AWAC joint venture; (iv) employees of the AWAC Subsidiaries with responsibility for the Alba alumina business "functionally" reported to the global head of Alcoa's alumina refining business; (v) Alba was a significant Alcoa customer; (vi) members of Alcoa's senior management had met with Alba officials and Consultant A concerning the Alba relationship and the proposed joint venture; and (vii) Alcoa was aware that Consultant A was an agent and distributor of one of the AWAC Subsidiaries, and Alcoa senior management approved contracts between the AWAC Subsidiaries and Consultant A.²⁰⁶ With the exception of (vi) and (vii), which "describe what would appear to be innocuous activities," the SEC's allegations are limited "to Alcoa's control over the [AWAC Subsidiaries] generally, rather than any allegedly improper conduct."²⁰⁷

Alcoa is not the first enforcement action in which the SEC (or the DOJ) has revealed a willingness to apply an expansive agency theory as the basis for imposing vicarious liability under the FCPA's anti-bribery provisions. As Gregory M. Williams explains, the 2012 FCPA Resource Guide tested the waters by announcing that "traditional agency principles" could expose parent

²⁰³ See *supra* Part IV.B.1. See also Williams, *supra* note 152, at 2.

²⁰⁴ Cease and Desist Order at 10 ¶ F, *Alcoa*, Exch. Act Rel. No. 71261 (emphasis added).

²⁰⁵ *Id.*

²⁰⁶ *Id.* ¶ 6; at 10 ¶ F; ¶ 12.

²⁰⁷ Williams, *supra* note 152, at 3.

entities to vicarious liability for anti-bribery violations committed by their subsidiaries.²⁰⁸ The theory is that because the “fundamental characteristic of agency is control,” the DOJ and the SEC “evaluate the parent’s control—including the parent’s knowledge and direction of the subsidiary’s actions, both generally and in the context of the specific transaction—when evaluating whether a subsidiary is an agent of the parent.”²⁰⁹

The transaction-specific control requirement suffered its first serious blow the year after the FCPA Resource Guide was published.²¹⁰ In April 2013, the DOJ charged Ralph Lauren Corporation (“RLC”) with bribery based on allegations that its Argentinian subsidiary had made corrupt payments to foreign officials.²¹¹ The DOJ’s decision to charge RLC with violating the FCPA’s anti-bribery provisions was a notable step toward agency-driven vicarious liability because every allegation concerned acts committed by the subsidiary and its general manager.²¹² Nowhere was RLC alleged to have participated in or to have possessed knowledge of the bribery scheme.²¹³ The DOJ did not provide any explanation for its charging decision (and declined to expressly allege an agency relationship between RLC and the subsidiary), but the result of the case is that RLC was held vicariously liable

²⁰⁸ *Id.* at 2 (citing FCPA Resource Guide, *supra* note 39, at 27).

²⁰⁹ FCPA Resource Guide, *supra* note 39, at 27.

²¹⁰ In an earlier enforcement action, the SEC advanced an agency theory to hold Tyco International, Ltd. (“Tyco”) vicariously liable for improper payments made by an indirect, wholly-owned subsidiary. Complaint ¶¶ 7, 25, Sec. & Exch. Comm’n v. Tyco Int’l, Ltd., No. 12-cv-1583 (D.D.C. filed Sept. 24, 2012). The SEC alleged an agency relationship between Tyco and the subsidiary because Tyco officers also served as officers of the subsidiary, including as its president. *Id.* ¶ 25. While alleging that “there is no indication that any of these individuals knew of the illegal conduct . . . through the corporate structure used to hold [the subsidiary] and through the dual roles of these officers, Tyco controlled [the subsidiary],” such that the subsidiary “was Tyco’s agent for purposes of the . . . transaction, and the transaction was squarely within the scope of [the subsidiary’s] agency.” *Id.* The SEC’s theory in *Tyco*, while representing an aggressive use of agency to impose vicarious liability on a controlling entity, nonetheless tethered the agency relationship to the particular transaction at issue. *See id.*

²¹¹ Letter from U.S. Dep’t of Justice to Thomas A. Hanusik, attorney for RLC (Apr. 22, 2013), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/ralph-lauren/Ralph-Lauren.-NPA-Executed.pdf> [hereinafter RLC DOJ Non-Prosecution Agreement]. The SEC also brought an enforcement action against RLC under the FCPA’s accounting provisions. Non-Prosecution Agreement between SEC and Ralph Lauren Corp. (Apr. 22, 2013), available at <http://www.sec.gov/news/press/2013/2013-65-mpa.pdf>.

²¹² *See* RLC DOJ Non-Prosecution Agreement, *supra* note 211, Attach. A.

²¹³ *Id.*

not because of anything RLC did or knew, but merely because it possessed general control over the subsidiary.²¹⁴

The agency theory that the SEC espoused in *Alcoa* is broader and more concerning than the approach advanced by the FCPA Resource Guide and applied in *Ralph Lauren*. While the FCPA Resource Guide at least contemplates analysis of a controlling entity's knowledge and direction of the specific transaction at issue, the SEC in *Alcoa* states directly that no such allegations existed.²¹⁵ And if the DOJ's allegations in *Ralph Lauren* left unresolved the question of what (if any) transaction-specific facts must be alleged to support agency-driven vicarious liability under the anti-bribery provisions, *Alcoa* would seem to answer: "None."²¹⁶

In breaking with the traditional use of "control inherent in an agency relationship merely as indicia of the culpable knowledge required for criminal liability,"²¹⁷ *Alcoa* suggests that generalized control alone may be sufficient to hold entities vicariously liable under the FCPA's anti-bribery provisions.²¹⁸ This expansive approach to agency theory has been criticized for "abrogat[ing] basic tenets of corporate liability" that limit agency-driven vicarious liability to two primary situations: (i) alter ego cases, in which corporate formalities are disregarded, and (ii) cases where the controlled entity "acts as the agent of [the controller] for a specific purpose."²¹⁹ In the traditional parent-subsidary context, a "subsidiary does not become the agent of its parent merely because the parent company has control over the subsidiary through equity ownership," as an agency relationship requires a demonstration "that the subsidiary in fact acted at the direction or authorization of

²¹⁴ The DOJ likely charged RLC with an anti-bribery violation because jurisdiction could not be established as to the Argentinian subsidiary. Philip Urofsky, *The Ralph Lauren FCPA Case: Are There Any Limits to Parent Corporation Liability?*, BLOOMBERG, May 13, 2013, available at <http://about.bloomberglaw.com/practitioner-contributions/the-ralph-lauren-fcpa-case-are-there-any-limits-to-parent-corporation-liability/>.

²¹⁵ Cease and Desist Order at 10 ¶ F, *Alcoa*, Exch. Act Rel. No. 71261.

²¹⁶ See *id.*

²¹⁷ Marceau, *supra* note 152, at 299.

²¹⁸ Cease and Desist Order at 10 ¶ F, *Alcoa*, Exch. Act Rel. No. 71261.

²¹⁹ Williams, *supra* note 152, at 3. See also *Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997) (piercing the corporate veil under New York law requires a showing that one entity "exercised complete domination over the [other] corporation with respect to the transaction at issue" and "that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil"); *Am. Fed'n of State v. Bristol-Myers Squibb Co.*, 948 F. Supp. 2d 338, 360 (S.D.N.Y. 2013) (providing, "insurers lack the requisite type of transaction-specific control over insureds to create an . . . agency relationship for purposes of commercial bribery doctrine.").

the parent."²²⁰ By departing from these traditional principles, *Alcoa* injects uncertainty into FCPA enforcement and leaves "few, if any, circumstances that fail to satisfy the purported 'agency' inquiry."²²¹

2. *The Accounting Provisions*

An issuer's liability for another entity's violation of the FCPA's books and records and internal control provisions turns on majority ownership of the entity.²²² Because "an issuer's books and records include those of its consolidated subsidiaries and affiliates," an issuer is responsible for "ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions."²²³ An issuer can therefore incur liability for a majority-owned entity's violation of the accounting provisions regardless of whether the issuer participated in or even possessed knowledge of the violation.²²⁴

The FCPA exposure to which an issuer can become subject by obtaining a majority stake in another entity is illustrated by the SEC's 2011 case against International Business Machines Corporation ("IBM").²²⁵ The SEC alleged that employees at certain IBM subsidiaries and majority-owned joint ventures provided improper payments and other inducements to South Korean and Chinese officials between 1998 and 2009.²²⁶ Many of the SEC's allegations about conduct in South Korea related to payments made by employees of LG IBM PC Co., Ltd. ("LG-IBM"), a joint venture in which IBM held a fifty-one percent indirect interest.²²⁷

²²⁰ Michael R. Geroe, *Complying with U.S. Antibribery Laws*, 31 INT'L L. 1037, 1043 (1997) (emphasis added).

²²¹ Williams, *supra* note 152, at 3.

²²² See FCPA Resource Guide, *supra* note 39, at 43. See also Complaint ¶¶ 2, 4, *RAE Sys.*, No. 10-cv-2093 (asserting books and records and internal control claims based on majority stakes in two joint ventures).

²²³ FCPA Resource Guide, *supra* note 39, at 43. See also Barbara Crutchfield George & Kathleen A. Lacey, *Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 503, 517 (2006) ("A corporation covered by the [FCPA] that owns more than 50 percent of [a] subsidiary would have to require that subsidiary to comply fully with the financial reporting and internal control provisions of the statute.").

²²⁴ See, e.g., Cohen & Wolf, *supra* note 13, at 199.

²²⁵ Sec. & Exch. Comm'n v. Int'l Bus. Mach. Corp., 11-cv-563 (D.D.C. 2011).

²²⁶ Complaint ¶ 1, *Int'l Bus. Mach.*, 11-cv-563 (D.D.C. filed Mar. 18, 2011).

²²⁷ *Id.* ¶¶ 2, 12.

In one situation, LG-IBM allegedly agreed to sell 1,500 personal computers to a South Korean government entity.²²⁸ Certain problems with the computers were discovered through a “benchmarking test” that imperiled the sale, prompting an LG-IBM sales manager to contact the government entity’s Director of Planning “to ask for help in winning” the contract.²²⁹ The contract was awarded to LG-IBM, after which the sales manager allegedly instructed an LG-IBM business partner to show “gratitude” by providing \$14,000 to the Director.²³⁰ The payment was allegedly financed through inflated installation fees that a business partner charged to LG-IBM.²³¹

In another situation, an employee of LG-IBM allegedly submitted an artificially low bid in a public tender for a contract to supply personal computers to the same South Korean government entity.²³² After winning the tender, the LG-IBM employee provided a new bid sheet—offering nearly \$30,000 more than the winning bid—directly to an official of the government entity.²³³ Once LG-IBM was awarded the contract, a business partner again inflated installation fees charged to LG-IBM and used the excess funds to finance improper payments to the foreign official.²³⁴

The SEC charged IBM with violating the FCPA’s books and records and internal control provisions.²³⁵ As IBM is an issuer that held a fifty-one percent indirect majority stake in LG-IBM, the SEC was not required to allege that IBM participated in or possessed knowledge of the accounting provision violations at LG-IBM.²³⁶ Instead, IBM was held vicariously liable because LG-IBM’s inaccurate books and records were included within IBM’s own consolidated financial statements.²³⁷ IBM also incurred liability under the FCPA’s internal controls provision for failing to implement systems sufficient to detect and prevent the improper payments at LG-IBM.²³⁸ The case was resolved through a consent agreement whereby IBM agreed to pay \$8 million

²²⁸ *Id.* ¶ 18.

²²⁹ *Id.*

²³⁰ *Id.* ¶¶ 18–19.

²³¹ *Id.* ¶ 19.

²³² Complaint ¶¶ 21–22, *Int’l Bus. Mach.*, 11-cv-563.

²³³ *Id.* ¶ 23.

²³⁴ *Id.* ¶ 24.

²³⁵ *Id.* ¶¶ 36–41.

²³⁶ *See, e.g.*, FCPA Resource Guide, *supra* note 39, at 43.

²³⁷ *See, e.g., id.*

²³⁸ Complaint ¶ 34, *Int’l Bus. Mach.*, No. 11-cv-563. *See also* Koehler, *Foreign Agents*, *supra* note 72, at 463 (discussing vicarious liability for issuers based on “the theory that [an] agent would not have participated in the improper payment scheme if it was subject to effective internal controls”).

in disgorgement and pre-judgment interest, along with a \$2 million civil penalty.²³⁹

IBM demonstrates that a majority stake in a joint venture alone is sufficient for the SEC to hold an issuer vicariously liable for the books and records and internal control violations of the joint venture, even where all improper conduct occurs in a foreign country and is not authorized, directed, or controlled by the issuer.²⁴⁰ The accounting provisions are built for cases like this: where an issuer has no involvement in or knowledge of a corrupt scheme sufficient to sustain an anti-bribery charge.²⁴¹ Indeed, the SEC more than a decade earlier brought a similar accounting provisions case against *IBM* following improper payments made by a wholly-owned Argentinian subsidiary “[w]ithout the knowledge or approval of any *IBM* employee in the United States.”²⁴²

a. Issuers Without a Majority Interest

An issuer with a minority stake in another entity is required to “proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances,” to cause the entity to comply with the accounting provisions of the FCPA.²⁴³ Pertinent circumstances include “the relative degree of the issuer’s ownership” and “the laws and practices governing the business operations of the country” in which the entity is located.²⁴⁴ An issuer that “demonstrates good faith efforts to use [its] influence shall be conclusively

²³⁹ Press Release, Sec. & Exch. Comm’n, *IBM to Pay \$10 Million in Settled FCPA Enforcement Action*, (Mar. 18, 2011), available at <http://www.sec.gov/litigation/litreleases/2011/lr21889.htm>.

²⁴⁰ See also Complaint ¶¶ 8, 18–22, Sec. & Exch. Comm’n v. *ITT Corp.*, No. 09-cv-272 (D.D.C. filed Feb. 11, 2009). In *ITT*, the SEC asserted books and records and internal control claims based on improper payments made by an issuer’s 60 percent-owned Chinese joint venture and eventual wholly-owned subsidiary. Nowhere did the SEC allege that the issuer participated in or possessed knowledge of the payments or the associated accounting provision violations.

²⁴¹ See Tarun, *Basics*, *supra* note 61, at 8.

²⁴² Complaint ¶ 12, *Int’l Bus. Mach.*, No. 00-cv-3040 (D.D.C. filed Dec. 21, 2000). See also Complaint ¶ 1, Sec. & Exch. Comm’n v. *Chiquita Brands Int’l, Inc.*, No. 01-cv-2079 (D.D.C. filed Oct. 3, 2001) (asserting FCPA books and records and internal control claims against an issuer “as a result of the conduct of its Colombian subsidiary,” which made and inaccurately recorded illicit payments “without the knowledge or consent of any Chiquita employees within the United States and in contravention of Chiquita’s policies . . .”).

²⁴³ 15 U.S.C. § 78m(b)(6).

²⁴⁴ *Id.*

presumed to have complied” with its obligations under the accounting provisions.²⁴⁵

While there is scarce guidance concerning what an issuer must do to satisfy its good faith obligations, it is clear that “[a]n issuer’s duty to influence [another entity’s] behavior increases directly with the degree to which it can exercise control over the [entity].”²⁴⁶ This principle was demonstrated in *SEC v. BellSouth Corp.*, a 2002 enforcement action arising out of a U.S. issuer’s operations in Nicaragua and Venezuela.²⁴⁷ The SEC alleged that BellSouth Corp. (“BellSouth”) established a forty-nine percent interest in Telefonía Celular de Nicaragua, S.A. (“Telefonía”), a Nicaraguan corporation that ceded operational control to an indirect, wholly-owned BellSouth subsidiary.²⁴⁸ Relying on the FCPA’s good faith influence requirement for an issuer holding a minority stake in another entity, the SEC alleged that BellSouth “held less than 50 percent of the voting power of Telefonía, but through its operational control, had the ability to cause Telefonía to comply with the FCPA’s books and records and internal controls provisions.”²⁴⁹

The SEC’s approach in *BellSouth* demonstrates that “influence” reflects operational control in addition to the percentage of voting shares an issuer holds. There are, however, limits. An SEC Commissioner explained in a 1981 speech that “compliance is expected” where an issuer holds “between 20 percent and 50 percent ownership” of another entity, “subject to some demonstration by the issuer that this does not amount to control.”²⁵⁰ But “[i]f

²⁴⁵ *Id.*

²⁴⁶ See, e.g., Deming, *Record-Keeping Provisions*, *supra* note 12, at 474–75; see also Carl Pacini, *The Foreign Corrupt Practices Act: Taking a Bite Out of Bribery in International Business Transactions*, 17 *FORDHAM J. CORP. & FIN. L.* 545, 576 (2012).

²⁴⁷ Complaint, Sec. & Exch. Comm’n v. BellSouth Corp., 02-cv-113 (N.D. Ga. filed Jan. 15, 2002).

²⁴⁸ *Id.* ¶ 10.

²⁴⁹ See Cease-and-Desist Order, *In re BellSouth Corp.*, Exch. Act Rel. No. 45279 (Jan. 15, 2002), available at <http://www.sec.gov/litigation/admin/34-45279.htm>. BellSouth paid a \$150,000 civil penalty to resolve the matter. Sec. & Exch. Comm’n v. BellSouth Corp., Lit. Rel. No. 17310 (Jan. 15, 2002), available at <http://www.sec.gov/litigation/litreleases/lr17310.htm>.

²⁵⁰ Harold M. Williams, Chairman, Sec. & Exch. Comm’n Enforce. Div., Speech before the SEC Developments Conference of the American Institute of Certified Public Accountants: The Accounting Provisions of the Foreign Corrupt Practices Act: An Analysis (Jan. 13, 1981), in 46 *FED. REG.* 11544, 11547 (Feb. 9, 1981). See also Lloyd H. Feller, *An Examination of the Accounting Provisions of the FCPA*, 9 *SYRACUSE J. INT’L L. & COM.* 245, 252 (1982) (writing, “[u]nder the equity method of accounting, one is deemed to have significant influence [for purposes of FCPA liability] if one owns between twenty and fifty percent of the subsidiary.”). Feller was Co-Chairman of the ABA’s ad hoc

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there is less than 20 percent ownership, [the SEC] will shoulder the burden to affirmatively demonstrate control.”²⁵¹

Issuers must consider the potential FCPA consequences of obtaining an equity interest in or operational control of a joint venture (or other entity). As *BellSouth* demonstrates, acquiring less than a majority stake does not guarantee protection from vicarious liability under the accounting provisions.

C. Scenario III: Joint Ventures with State-Owned Enterprises

1. “Conduit” Risk

A particularly dangerous scenario posed by entering into a joint venture with a state-owned enterprise is that the joint venture could be used as a conduit for funneling improper payments to foreign officials. The harsh consequences that can result from a “conduit” situation are reflected in FCPA enforcement actions against Swiss oil services company and issuer Weatherford International Ltd. (“Weatherford”) and one of its subsidiaries in 2013.²⁵²

The DOJ and the SEC alleged that Weatherford Services, Ltd. (“WSL”), a wholly-owned Bermudian subsidiary of Weatherford, transferred numerous improper payments to Angolan officials through a joint venture.²⁵³ WSL’s operations in Angola brought it into contact with Sonangol, the state-owned oil company responsible for awarding oil and gas contracts.²⁵⁴ In 2004, Sonangol officials offered Weatherford one hundred percent of the Angolan well screens market if it would establish a joint venture with partners chosen by the officials.²⁵⁵ The following year, WSL entered into a joint venture with two Angolan entities selected by the Sonangol officials.²⁵⁶

Committee on Revision of the FCPA. While Commissioner Williams and Feller were commenting prior to the 1988 amendments that added the “good faith” language to the FCPA, no subsequent commentary appears to contradict them.

²⁵¹ Williams, *supra* note 250, at 11547.

²⁵² *See* United States v. Weatherford Int’l Ltd., No. 13-cr-733 (S.D. Tex. 2013); United States v. Weatherford Servs., Ltd., No. 13-cr-734 (S.D. Tex. 2013); Sec. & Exch. Comm’n v. Weatherford Int’l, Ltd., No. 13-cv-3500 (S.D. Tex. 2013).

²⁵³ Complaint ¶¶ 11, 17, *Weatherford Int’l*, No. 13-cv-3500 (S.D. Tex. filed Nov. 26, 2013).

²⁵⁴ *Id.* ¶ 11.

²⁵⁵ *Id.* ¶ 17. *See also* Deferred Prosecution Agreement Attach. A ¶ 15, *Weatherford Int’l*, No. 13-cr-733 (S.D. Tex. filed Nov. 26, 2013).

²⁵⁶ Complaint ¶ 17, *Weatherford Int’l*, No. 13-cv-3500.

The Sonangol officials controlled one of the entities; the other was controlled by a relative of another Angolan official (together, the “Angolan Companies”).²⁵⁷ The named principals of the Angolan Companies included additional foreign officials, the spouse of a foreign official, and other relatives of foreign officials.²⁵⁸ In negotiating the terms of the joint venture, Weatherford dealt directly with the Sonangol officials who had selected the Angolan Companies as partners.²⁵⁹

The DOJ alleged that the joint-venture agreement was signed without Weatherford or WSL having “conducted any meaning due diligence of either joint venture partner.”²⁶⁰ WSL and one of the Angolan Companies each received a forty-five percent interest in the joint venture, while the other Angolan Company received a ten percent interest.²⁶¹

Once operational, the joint venture allegedly served as a vehicle through which WSL channeled payments to Angolan officials in exchange for “lucrative contracts,” “inside information about competitors’ pricing,” and the re-assignment to the joint venture of contracts previously awarded to WSL competitors.²⁶² The Angolan Companies “did not contribute capital, expertise, or labor to the joint venture,” while the foreign officials controlling them were considered the “real partners.”²⁶³ As the DOJ alleged, “[t]he sole purpose of [the Angolan Companies], in fact, was to serve as conduits through which WSL funneled hundreds of thousands of dollars in payments to the foreign officials controlling them.”²⁶⁴

The DOJ charged WSL with violating the FCPA’s anti-bribery provisions, resulting in a guilty plea and a \$420,000 fine.²⁶⁵ The DOJ charged Weatherford with criminal violations of the internal controls provision for failing to implement systems to prevent the compliance breakdowns at WSL, resulting in a criminal fine exceeding \$86 million and imposition of a

²⁵⁷ *Id.* ¶ 17.

²⁵⁸ *Id.* ¶ 18; Deferred Prosecution Agreement Attach. A ¶ 15, *Weatherford Int’l*, No. 13-cr-733.

²⁵⁹ Complaint ¶ 22, *Weatherford Int’l*, No. 13-cv-3500; Deferred Prosecution Agreement Attach. A ¶ 16, *Weatherford Int’l*, No. 13-cr-733.

²⁶⁰ Deferred Prosecution Agreement Attach. A ¶ 17, *Weatherford Int’l*, No. 13-cr-733; *see also* Complaint ¶ 21, *Weatherford Int’l*, No. 13-cv-3500.

²⁶¹ Complaint ¶ 18, *Weatherford Int’l*, No. 13-cv-3500.

²⁶² Deferred Prosecution Agreement Attach. A ¶ 17, *Weatherford Int’l*, No. 13-cr-733 (alleging that Angolan officials received improper payments “from WSL through the joint venture”); *see also* Complaint ¶ 23, *Weatherford Int’l*, No. 13-cv-3500.

²⁶³ Deferred Prosecution Agreement Attach. A ¶ 18, *Weatherford Int’l*, No. 13-cr-733.

²⁶⁴ *Id.* ¶ 19.

²⁶⁵ Plea Agreement ¶¶ 1, 5, *Weatherford Servs.*, No. 13-cr-734 (S.D. Tex. filed Nov. 26, 2013).

compliance monitor.²⁶⁶ Weatherford settled the SEC's civil claims for violating the FCPA's anti-bribery, books and records, and internal control provisions through a consent agreement requiring a civil penalty exceeding \$1.8 million, plus disgorgement and prejudgment interest exceeding \$65 million.²⁶⁷

These costly consequences highlight the dangers present in jurisdictions that require (whether practically or legally) foreign investors to engage local partners in order to conduct business within the jurisdiction. The Weatherford enforcement actions reflect a difficult situation, as Sonangol—which employed the foreign officials who recommended the Angolan Companies for the joint venture—was responsible for approving oil services contracts in Angola.²⁶⁸ While it may be difficult to avoid similar dynamics in certain markets, business entities subject to the FCPA must thoroughly consider the risks of engaging prospective local partners, and should include contractual provisions in joint-venture agreements to limit their FCPA exposure.²⁶⁹

The Weatherford enforcement actions also demonstrate the need for heightened due diligence when “red flags” of corruption are present. Numerous red flags warranted enhanced scrutiny prior to WSL entering into the joint venture, including that (i) the business opportunity and the joint-venture partners were located in a jurisdiction known to pose a high risk of corruption;²⁷⁰ (ii) the prospective joint-venture partners were recommended by and closely affiliated with foreign officials; and (iii) the opportunity itself—at one hundred percent of a product market—elevated the risk that competitive forces alone were not at play.²⁷¹

²⁶⁶ Deferred Prosecution Agreement Attach. A ¶¶ 6, 8–14 *Weatherford Int'l*, No. 13-cr-733.

²⁶⁷ Complaint ¶¶ 59–67, *Weatherford Int'l*, No. 13-cv-3500; Consent of Defendant ¶ 3, *Weatherford Int'l*, No. 13-cv-3500 (S.D. Tex. filed Nov. 26, 2013). An additional \$31 million in disgorgement was deemed satisfied by payment of the same amount in connection with a two-year deferred prosecution agreement between Weatherford and the U.S. Attorney's Office for the Southern District of Texas relating to export control violations. *Id.* See also Press Release, U.S. Dep't of Justice, Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations (Nov. 26, 2013), available at <http://www.justice.gov/opa/pr/2013/November/13-crm-1260.html>.

²⁶⁸ Complaint ¶ 11, *Weatherford Int'l*, No. 13-cv-3500.

²⁶⁹ FCPA risk-reduction strategies are discussed *infra* Part V.

²⁷⁰ Angola ranks 153 out of 177 countries in a widely-used index of public corruption. *Corruption Perceptions Index 2013*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/whatwedo/pub/cpi_2013.

²⁷¹ Cf. Ronald MacLean Abaroa, *Towards 2005: Profits, People, and the Future of the Regulatory State in the Free Market Model*, 30 LAW & POL'Y INT'L BUS. 131, 136 (1999) (explaining that

2. "Routine" Payments Risk

An additional risk for joint ventures that contain state-owned partners is that seemingly "routine" payments may violate the FCPA's anti-bribery provisions. Compensating employees, officers, and directors of a joint venture that includes a state-owned enterprise partner is immediately perilous, as these persons will qualify as foreign officials under the FCPA if employed by the state-owned partner, and may be treated as foreign officials if the joint venture itself is majority-owned or controlled by the state-owned partner.²⁷² Making routine dividend payments to state-owned partners of the joint venture may raise similar concerns.²⁷³ Absent adequate controls, such payments can expose joint ventures and their partners to significant risks under the anti-bribery and accounting provisions of the FCPA.

At least two DOJ Opinion Procedure Releases have addressed compensation payments made to joint-venture employees, officers, and directors who qualify as foreign officials under the FCPA. The first involved an American company that entered into a joint venture with "a business venture owned and operated by a quasi-commercial entity" that was "wholly-owned and supervised by the government of a former Eastern bloc country."²⁷⁴ The foreign partner was responsible for financing the joint venture, while the American company would contribute management expertise.²⁷⁵

The joint venture would select a board of directors composed of representatives from the American company and the foreign partner.²⁷⁶ Directors selected from the foreign partner would receive fees of roughly \$1,000 per month, which approximated their "regular income" from employment by the foreign partner.²⁷⁷ The American company requested the DOJ's opinion concerning "whether this proposed arrangement would violate

"corruption is likely to exist when a monopoly is coupled with discretionary power and there is a lack of accountability.").

²⁷² See *infra* Part IV.C.3. See also DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 08-01 (Jan. 15, 2008) at 4 (general manager of joint venture with state-owned majority partner considered a foreign official).

²⁷³ See, e.g., Complaint ¶ 55, *Weatherford Int'l*, No. 13-cv-3500 (alleging that "[p]ayments to Sonangol executives through the joint venture were misrecorded as legitimate dividend payments.").

²⁷⁴ DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 93-01 (April 20, 1993) at 1.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

the FCPA with respect to the payment of the directors' fees and expenses, given . . . that the foreign directors are also employees of a state-owned and controlled entity."²⁷⁸

The DOJ's determination not to bring an enforcement action reflected the process by which the foreign company directors would be compensated. While the joint venture or an entity owned by the American company would in the first instance pay the foreign directors' fees, "the fees ultimately will be reimbursed by the foreign partner" out of the foreign partner's share of joint venture profits, or from its other funds.²⁷⁹ As a result, the directors' fees were unlikely to reflect improper incentives from the American company. Moreover, the payments were reasonable in amount—and thus less likely to function as bribes—because they approximated the foreign directors' regular compensation.²⁸⁰ Finally, the American company represented that it would provide the foreign partner with FCPA compliance education, although this element was likely less important than the structure of the payments.²⁸¹

A similar Opinion Procedure Release issued two years later addressed whether the formation of an investment banking joint venture between an American company and several foreign entities would trigger an FCPA enforcement action.²⁸² One of the partners of the proposed joint venture was "the family investment company" of a relative of the leader of the country in which the joint venture would operate.²⁸³ In addition to being related to a foreign leader, the relative—who was also a "prominent businessperson with significant managerial experience and responsibilities"—held "public and political party offices."²⁸⁴ The proposed joint venture would retain the relative and a member of his or her immediate family as officers to assist the joint venture "in making important contacts in the country, providing investment advice and management consulting services, and develop[ing] . . . new business."²⁸⁵

As a joint-venture partner, the relative's investment company would earn a share of profits "received as a result of the government projects awarded to

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 93-01 (April 20, 1993) at 1.

²⁸¹ *See id.*

²⁸² DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 95-03 (Sept. 14, 1995).

²⁸³ *Id.* at 1.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

the Joint Venture.”²⁸⁶ In addition, the relative and an immediate family member would each receive annual compensation payments of \$100,000 to \$250,000 for serving as officers of the joint venture.²⁸⁷

Despite the high-risk nature of the proposed joint venture, the DOJ represented that it did not presently intend to bring an enforcement action.²⁸⁸ This determination flowed from several factors, including (i) the American partner’s “irrevocable power” to appoint the most senior joint venture official, who would have the authority to order audits of the joint venture;²⁸⁹ (ii) anti-corruption compliance representations made by the relative and the relative’s family member;²⁹⁰ (iii) constraints on meetings with foreign officials; and (iv) accurate bookkeeping requirements for the joint venture.²⁹¹

In addition to these controls, the relative’s government and political party duties were unrelated to the interests of the American joint-venture partner, or to “any decisions to award business in connection with the government projects sought by the Joint Venture.”²⁹² Nor did the relative have the authority to appoint, promote, or compensate any foreign official who could award business to the joint venture.²⁹³ Finally, the relative was a prominent and experienced businessperson, thus supplying a legitimate reason for his or her involvement in the joint venture.²⁹⁴

Taken together, Opinion Procedure Releases 93-01 and 95-03 provide a rough schematic for safely compensating joint-venture employees, officers, and directors who may qualify as foreign officials under the FCPA. Establishing effective controls over high-risk payments to ensure that bribes are not being concealed is essential to reducing FCPA exposure. Additional initiatives such as anti-corruption representations and warranties, audit rights, and anti-corruption compliance training can further reduce the risk of an FCPA violation.²⁹⁵

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ DEP’T OF JUSTICE OPINION PROCEDURE RELEASE 95-03 (Sept. 14, 1995) at 2.

²⁸⁹ *Id.* at 1.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 2.

²⁹² *Id.* at 1.

²⁹³ *Id.*

²⁹⁴ DEP’T OF JUSTICE OPINION PROCEDURE RELEASE 95-03 (Sept. 14, 1995) at 1. *Cf. Weatherford Int’l*, No. 13-cv-3500 (state-owned enterprise joint-venture partners selected by foreign officials despite absence of apparent substantive value or expertise); *Weatherford Int’l*, No. 13-cr-733 (same); *Weatherford Servs.*, No. 13-cr-734 (same).

²⁹⁵ FCPA risk-reduction strategies are discussed *infra* Part V.

3. Joint Ventures Majority-Owned or Controlled by a State-Owned Enterprise

Joint ventures that are majority-owned or controlled by a state-owned enterprise can raise an especially difficult FCPA compliance issue surrounding the status of the joint venture's non-governmental partners. The very limited guidance on the issue is buried within a set of cases involving Willbros Group, Inc. ("Willbros"),²⁹⁶ and in particular a 2006 criminal information filed against Jim Bob Brown, a Willbros executive.²⁹⁷ Willbros encountered FCPA trouble in connection with the Eastern Gas Gathering System ("EGGS") project in Nigeria.²⁹⁸ The EGGS project, a two-phase pipeline development initiative designed to transport natural gas across difficult terrain, was valued at \$387.5 million.²⁹⁹ To bid on the EGGS project, Willbros arranged for an indirect subsidiary, Willbros West Africa, Inc., to form a joint venture (the "Consortium") with a German construction company recently identified as Bilfinger SE ("Bilfinger").³⁰⁰ In December 2003, the Consortium submitted a successful proposal to the operator of another joint venture that was responsible for awarding contracts relating to the EGGS project (the "Joint Venture"), resulting in an executed contract seven months later.³⁰¹

²⁹⁶ See *United States v. Willbros Grp., Inc. and Willbros Int'l, Inc.*, No. 08-cr-287 (S.D. Tex. 2008); *United States v. James K. Tillery, et al.*, No. 08-cr-22 (S.D. Tex. 2008); *United States v. Jason Edward Steph*, No. 07-cr-307 (S.D. Tex. 2007); *United States v. Jim Bob Brown*, No. 06-cr-316 (S.D. Tex. 2006); *Sec. & Exch. Comm'n v. Willbros Grp., Inc., et al.*, No. 08-cv-1494 (S.D. Tex. 2008).

²⁹⁷ Information, *Brown*, No. 06-cr-316 (S.D. Tex. filed Sept. 11, 2006).

²⁹⁸ See *id.* ¶ 6; see also Information ¶ 8, *Willbros Grp.*, No. 08-cr-287 (S.D. Tex. filed May 14, 2008).

²⁹⁹ Information ¶ 9, *Willbros Grp.*, No. 08-cr-287. Phase 1 of the EGGS project involved engineering, procurement, and construction of a pipeline from Nigeria's Soku Gas Plant to the Bonny Island LNG plant. An optional component of Phase 1 involved the application of a protective polyethylene-concrete coating to the pipeline. EGGS Phase 2 involved the construction of a pipeline from an area identified as "Gbaran/Ubie node" to Soku. *Id.*

³⁰⁰ *Id.* ¶ 25. See also Mike Koehler, *Of Note from the Bilfinger Enforcement Action*, FCPA PROFESSOR (Dec. 11, 2013), <http://www.fcprofessor.com/category/bilfinger> (writing, "Bilfinger was mentioned in the Willbros enforcement action as 'a German construction company, a subsidiary or affiliate of a multinational construction services company based in Mannheim, Germany.'"). See also *United States v. Bilfinger SE*, No. 13-cr-745 (S.D. Tex. 2013).

³⁰¹ Information ¶ 26, *Brown*, No. 06-cr-316.

The operator of the Joint Venture, Shell Petroleum Development Co. of Nigeria, Ltd. (“SPDC”), was a wholly non-governmental entity³⁰² holding a thirty-percent interest in the Joint Venture, while TOTAL held a ten-percent stake, Agip Oil held five percent, and the Nigerian National Petroleum Corporation (“NNPC”)—an instrumentality of the Nigerian government—held fifty-five percent.³⁰³ According to the DOJ, “[b]ecause NNPC held majority ownership of, and exercised effective control over, the Joint Venture, the Joint Venture was an instrumentality of the Government of Nigeria under the FCPA.”³⁰⁴ The DOJ also took the position that, “[a]s the operator of the Joint Venture, SPDC acted in an official capacity for and on behalf of an instrumentality of the Government of Nigeria.”³⁰⁵

Other allegations extend beyond characterizing the Joint Venture as an instrumentality of a foreign government. Rather, the DOJ alleged that the Willbros subsidiaries and Bilfinger made improper payments “to Nigerian government officials, to wit, officials of NNPC, [a subsidiary of NNPC] and SPDC, *each of whom was a foreign official*” under the FCPA.³⁰⁶ By including officials of SPDC, this allegation is a far cry from the great majority of FCPA enforcement actions, which involve improper inducements directed to employees of foreign government agencies or state-owned enterprises.³⁰⁷

Troubling effects can follow if the *Brown* Information is correctly read to suggest that employees of a wholly non-governmental entity can be converted into foreign officials under the FCPA if the entity enters into or acts as the operator of a joint venture that is majority-owned or controlled by a state-owned enterprise. Such a result risks being overly dependent on malleable situations, leading to unpredictable outcomes in the “instrumentality” and “foreign official” inquiries. For instance, are SPDC employees foreign officials in all circumstances (an untenable position), or only when conducting business on behalf of the Joint Venture? Even the latter result would make SPDC’s employees entirely unlike the foreign officials at issue in other FCPA enforcement actions.³⁰⁸ For example, while Sonangol—entirely owned by the

³⁰² SPDC was a wholly-owned subsidiary of Royal Dutch Shell plc during the relevant period. Royal Dutch Shell plc Form 20-F for the fiscal year ended December 31, 2005, at 34, 199.

³⁰³ Information ¶ 6, *Brown*, No. 06-cr-316.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* ¶ 16, *Brown*, No. 06-cr-316 (emphasis added).

³⁰⁷ See, e.g., enforcement actions against members of the TSKJ Nigeria joint venture, *supra* Part IV.A; see also enforcement actions against RAE Systems and Alcoa, *supra* Part IV.B.1; enforcement actions against Weatherford and a subsidiary, *supra* Part IV.C.1.

³⁰⁸ See, e.g., Complaint ¶ 11, *Weatherford Int’l*, No. 13-cv-3500 (referring to Sonangol as “the

Angolan government and staffed with high-ranking Angolan officials—may engage in both public and private transactions, it could not reasonably be argued that Sonangol's employees are only foreign officials in certain situations.³⁰⁹

Fortunately, the *Brown* Indictment appears to stand alone within decades of enforcement actions that have drawn clearer (if jagged) lines around the question of when an entity qualifies as an instrumentality of foreign government under the FCPA.³¹⁰ If the *Brown* Information serves an enduring purpose, it is to warn of the potential FCPA risks that can develop when a joint venture is majority-owned or controlled by a state-owned enterprise.

D. Scenario IV: Foreign Non-Issuers

All scenarios discussed in this Article have involved U.S. domestic concerns or corporate issuers (whether U.S. or foreign). Indeed, the text of the FCPA does not impose liability on foreign non-issuers unless an act in furtherance of an anti-bribery violation is taken or made to occur inside the territory of the United States.³¹¹ However, this does not necessarily insulate a foreign non-issuer from liability if it participates in a corrupt scheme from beyond U.S. territory, as the government can assert conspiracy and aiding and abetting charges against foreign non-issuers that conspire with or assist persons or entities that are subject to the FCPA.³¹²

The DOJ's enforcement action against JGC for its role in the TSKJ Nigeria joint venture is one such example.³¹³ JGC is a Japanese company and non-issuer,³¹⁴ which would appear to remove it from jurisdiction under any

Angolan state-owned oil company," a description that remains constant regardless of any particular transaction).

³⁰⁹ *See id.*

³¹⁰ *See supra* Part III.B.

³¹¹ 15 U.S.C. § 78dd-3(a)(3).

³¹² FCPA Resource Guide, *supra* note 39, at 34.

³¹³ *See* Deferred Prosecution Agreement, *JGC*, No. 11-cr-260.

³¹⁴ *See id.* Attach. A ¶ 1.

provision of the FCPA.³¹⁵ In fact, JGC initially “declin[ed] to cooperate with the [DOJ] based on jurisdictional arguments.”³¹⁶

Despite jurisdictional constraints on a substantive anti-bribery charge (and the inability of the SEC to bring a claim under the accounting provisions),³¹⁷ the DOJ charged JGC with conspiracy to violate the anti-bribery provisions for scheming with the domestic concern and issuer partners of TSKJ, and with aiding and abetting substantive violations by KBR, a domestic concern.³¹⁸ The linchpin of the charge was JGC’s role in assisting KBR to wire funds through correspondent bank accounts³¹⁹ in New York.³²⁰ JGC resolved the matter by paying a penalty of nearly \$219 million, undertaking extensive remediation efforts, and retaining a compliance consultant for a two-year term.³²¹

The *JGC* enforcement action removes any doubt that a foreign non-issuer “may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company . . . did not take

³¹⁵ See, e.g., DEMING, NEW INTERNATIONAL NORMS, *supra* note 72, at 65 (“The anti-bribery provisions do not generally apply to foreign entities unless they are issuers subject to the FCPA. This even includes controlled foreign entities of U.S. entities that are subject to the FCPA.” Absent a U.S. nexus for an anti-bribery violation, employees and agents of a foreign non-issuer “are also not subject to the anti-bribery provisions if [they] are neither domestic concerns nor issuers”).

³¹⁶ Deferred Prosecution Agreement ¶ 4, *JGC*, No. 11-cr-260.

³¹⁷ JGC is a non-issuer, which precluded the SEC from asserting a books and records or internal controls claim. 15 U.S.C. § 78m(a)–(b).

³¹⁸ Information ¶¶ 16–22, *JGC*, No. 11-cr-260. See also Shearman & Sterling LLP, *U.S. v. JGC Corporation*, <http://fcpa.shearman.com/?s=matter&mode=form&cid=16a46a3203cfcae67ef5fadf22251f10> (last visited Sept. 12, 2014) (explaining that *JGC* represents the “widening jurisdictional scope of the FCPA,” as JGC is neither a domestic concern nor an issuer, and jurisdiction in the case “was based on JGC’s role in aiding and abetting a domestic concern, and conspiring to execute the bribery scheme with co-conspirators who are domestic concerns or issuers”).

³¹⁹ Transmitting funds through U.S. correspondent bank accounts amounts to “foreign transactions between two foreign banks, passing through the U.S. along the way.” Marsha Z. Gerber & Richard Craig Smith, *JGC Corporation Settles FCPA Charges: DOJ’s Expansive Jurisdictional Reach Results in Stiff Penalties* (Norton Rose Fulbright LLP, Apr. 8, 2011), available at <http://www.nortonrosefulbright.com/>.

³²⁰ Deferred Prosecution Agreement Attach. A ¶ 46, *JGC*, No. 11-cr-260. *JGC* is not the only case to contemplate an expanded approach to territorial jurisdiction under the FCPA’s anti-bribery provisions. See Information ¶¶ 24, 26(c), *United States v. Magyar Telekom, Plc*, No. 11-cr-597 (E.D. Va. filed Dec. 29, 2011) (appearing to base jurisdiction for anti-bribery violations by a foreign issuer on e-mail messages sent to servers inside the United States).

³²¹ Deferred Prosecution Agreement ¶¶ 6, 8–10; Attach. C & D, *JGC*, No. 11-cr-260.

any act in furtherance of the corrupt payment while in the territory of the United States.”³²² Jurisdiction for a conspiracy charge is especially broad, as the DOJ “generally has jurisdiction over all conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States.”³²³

The government’s flexible arsenal of charges requires even foreign non-issuers to carefully consider conspiracy and aiding and abetting risks that may be posed by joint ventures (and other business relationships) with FCPA-covered entities. The significant fines assessed in *JGC* underscore the need to identify and address any lurking risks posed by such relationships.

V. RISK-REDUCTION STRATEGIES

Numerous strategies are available to help joint ventures and their partners reduce the FCPA risks discussed in this Article.³²⁴ While every joint venture is different and must approach compliance through the lens of its particular structure, risk profile, and financial situation, the strategies outlined below—when properly implemented—have generally been viewed favorably by the DOJ and the SEC.³²⁵

Comprehensive due diligence is the bedrock of FCPA risk-reduction for joint ventures, their partners, and the entities that own or control them.³²⁶ Joint ventures that may include as partners or conduct business with state-owned enterprises should undertake comprehensive due diligence concerning prospective partners, any legacy contracts or obligations that may be contributed to the joint venture, and any third-party agents that may act on

³²² FCPA Resource Guide, *supra* note 39, at 34. *See also* Complaint ¶¶ 54–60, Sec. & Exch. Comm’n v. Panalpina, Inc., No. 10-cv-4334 (S.D. Tex. filed Nov. 4, 2010) (alleging that a foreign non-issuer violated the anti-bribery provisions by acting as an agent of its issuer customers, and aided and abetted them in violating the accounting provisions).

³²³ FCPA Resource Guide, *supra* note 39, at 34

³²⁴ The list of risk-reduction strategies discussed in this Article is not intended to be exhaustive.

³²⁵ *See, e.g.*, Deferred Prosecution Agreement Attach. C.1 & C.2, United States v. Pfizer H.C.P. Corp., No. 12-cr-169 (D.D.C. filed Aug. 7, 2012) (providing FCPA compliance initiatives, including due diligence procedures, contractual provisions, and representations and warranties).

³²⁶ *See, e.g.*, FCPA Resource Guide, *supra* note 39, at 60 (explaining that “[r]isk-based due diligence is particularly important with third parties and will . . . be considered by DOJ and SEC in assessing the effectiveness of a company’s compliance program.”); *see also* Shubert, *supra* note 154 (discussing the need for “comprehensive FCPA/anti-corruption due diligence on potential joint venture partners prior to forming a joint venture”).

behalf of the joint venture.³²⁷ The discovery of any “red flags” should trigger heightened due diligence to ensure that corruption risks are thoroughly examined and redressed.³²⁸

After successful completion of due diligence, any joint venture that is ultimately formed should promptly implement a comprehensive FCPA compliance program that includes books and records and internal control requirements.³²⁹ A training program should be implemented to ensure that joint venture employees understand their compliance obligations.³³⁰ Internal controls should be periodically tested to confirm that they are functioning properly.³³¹ A process for anonymously reporting suspected FCPA violations should be implemented in conjunction with an anti-retaliation policy.³³²

FCPA risks can be further reduced by including various contractual provisions within joint-venture agreements and contracts with third parties. First, all joint-venture partners and third-party agents should provide anti-corruption representations and warranties affirming that they have not and will not take any act in furtherance of an FCPA violation.³³³ Representations and warranties should be followed by periodic certifications through which joint-venture partners and agents again affirm that they have not and will not violate the FCPA.³³⁴

Joint-venture agreements should also include termination provisions that allow partners to withdraw from or terminate the joint venture if another partner or the joint venture violates the FCPA, or has made misrepresentations about (or otherwise concealed) past violations.³³⁵

³²⁷ See, e.g., Chow, *supra* note 5, at 581 (explaining that companies conducting business in China must “exercise due diligence in determining whether a business entity is fully privatized or whether the state continues to have any ownership interest”).

³²⁸ See *supra* Part III.A.1.

³²⁹ See discussion of enforcement actions against RAE Systems, *supra* Part IV.B.1.

³³⁰ See TARUN, *supra* note 5, at 109 (“Joint venture partners are wise to require FCPA/anti-bribery training of their staffs, to conduct regular audits, and to enforce a strong ‘tone at the top.’”).

³³¹ See, e.g., Information ¶¶ 39, 64, 77–78, *United States v. Siemens Aktiengesellschaft*, No. 8-cr-367 (D.D.C. filed Dec. 12, 2008) (alleging that “paper” compliance program was ineffective, as “notwithstanding the promulgation of some written policies . . . senior management provided little corresponding . . . guidance”).

³³² See FCPA Resource Guide, *supra* note 39, at 61.

³³³ A list of specific representations and warranties that could be included in joint-venture agreements is available from Tom Fox, *Foreign Business Partners Under the FCPA*, ACCELUS (Thomson Reuters, Jan. 2012) at 6.

³³⁴ *Id.* at 7.

³³⁵ See Shubert, *supra* note 154, at 2.

Depending on the circumstances, termination provisions may be structured as material breaches of contract with no opportunity to cure, allowing a partner to cleanly exit the relationship.³³⁶

Indemnification provisions can add another layer of protection by requiring joint-venture partners and agents to cover the costs of any FCPA investigation or enforcement action triggered by their conduct.³³⁷ Indemnification cannot, however, erase the reputational harm³³⁸ and collateral consequences that may result from an FCPA enforcement action.³³⁹

Finally, audit rights can be an effective means of ensuring that books and records are accurate and that internal controls are well-functioning.³⁴⁰ Audit rights should extend to FCPA compliance systems in addition to financial books and records.³⁴¹ Negotiating for audit rights of a joint venture or partner can be difficult and will likely require flexibility by the requestor.³⁴² If audit rights are established, they should be used; allowing them to linger in disuse will likely be viewed unfavorably if a compliance problem develops.³⁴³

VI. THE UNINTENDED CONSEQUENCES OF ENFORCEMENT UNCERTAINTY

Increasingly expansive interpretations of the FCPA as well as the practical and often legal need to partner with local (and sometimes state-owned) enterprises³⁴⁴ can place transnational joint ventures and their partners in an unenviable position. Investment decisions can too easily become Faustian

³³⁶ See Fox, *supra* note 333, at 6. It may not be desirable in all situations to structure termination provisions in this manner.

³³⁷ See *id.*

³³⁸ See, e.g., Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance,"* 2012 WIS. L. REV. 689, 696 (2012) ("Even the announcement that a firm is the subject of an FCPA investigation can produce significant reputational harm.").

³³⁹ See, e.g., FCPA Resource Guide, *supra* note 39, at 70–71 (discussing debarment from government contracts and loss of export privileges as potential consequences of being found to have violated the FCPA).

³⁴⁰ See Fox, *supra* note 333, at 6.

³⁴¹ *Id.*

³⁴² See Angela M. Xenakis, *Contracting with Third-Party Reps: FCPA Risks*, LAW360, Aug. 1, 2012, <http://www.law360.com/articles/361944/contracting-with-third-party-reps-fcpa-risks>.

³⁴³ *Id.* (providing that the DOJ and the SEC "will look unfavorably on companies that have included audit rights [in agreements with third parties] but not exercised them when there are red flags").

³⁴⁴ See *supra* note 5.

bargains, as pursuing business opportunities in certain markets or through particular corporate structures can significantly elevate FCPA enforcement risks. The resulting dynamic sets at odds two interwoven objectives—promoting anti-corruption as an end in itself and facilitating competition, respectively—such that aggressively pursuing the first may push the second further away. This is contrary to what the architects of the FCPA intended in designing the anti-bribery provisions as tools to enhance economic competitiveness,³⁴⁵ a goal the DOJ and the SEC continue to promote today.³⁴⁶

An uncertain horizon appears when FCPA enforcement becomes unmoored from the statute's text and purpose. In such an environment, even

³⁴⁵ See S. REP. NO. 95-114, at 4 (1977) (“Foreign corporate bribes . . . affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.”); H.R. REP. NO. 95-640, at 4–5 (1977) (“The payment of bribes . . . short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service . . .”). Of course, the FCPA has in practice experienced a complicated relationship with economic competitiveness, primarily due to the criticism that American companies subject to the statute cannot adequately compete with foreign firms constrained by no similar limitations. See, e.g., E.C. Lashbrooke, Jr., *The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem*, 12 CORNELL INT’L L.J. 227, 235 (1979) (arguing that “refusal of U.S. businesses to pay bribes will put [them] at a competitive disadvantage to foreign firms that are willing and able to make payments.”). President Clinton acknowledged these concerns in signing the International Anti-Bribery and Fair Competition Act, which amended the FCPA in 1998. He remarked that while bribery is “contrary to basic principles of fair competition and harmful to efforts to promote economic development . . . [f]oreign competitors . . . did not have similar restrictions and could engage in . . . corrupt activity without fear of penalty.” Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 2 PUB. PAPERS 2011 (Nov. 10, 1998). President Clinton lauded the 1997 OECD Convention on Combating Bribery of Foreign Public Officials (“OECD Convention”) for requiring member nations to criminalize foreign bribery, thus leveling an “uneven playing field.” *Id.*

³⁴⁶ As Lanny A. Breuer (former Assistant Attorney General for the Criminal Division of the DOJ) and Robert S. Khuzami (former Director of Enforcement of the SEC) wrote in the foreword to the FCPA Resource Guide:

When business is won or lost based on how much a company is willing to pay in bribes rather than on the quality of its products and services, law-abiding companies are placed at a competitive disadvantage For these and other reasons, enforcing the FCPA is a continuing priority at the [DOJ] and the [SEC].

Lanny A. Breuer & Robert S. Khuzami, *Foreword to FCPA Resource Guide*, *supra* note 39, at iv. See also *FCPA Resource Guide*, *supra* note 39, at 3 (“Corruption is anti-competitive, leading to distorted prices and disadvantaging honest businesses that do not pay bribes.”).

the strongest and most expensive compliance systems may fail to spare business entities from potentially massive fines and burdensome remedial measures. There is no better example than the SEC's decision to charge Alcoa with violating the FCPA's anti-bribery provisions based on an agency-based vicarious liability theory that significantly departed from traditional notions of corporate liability.³⁴⁷ Shattering traditional enforcement molds requires firms to craft increasingly far-reaching and nuanced compliance systems, none of which can guarantee protection from an enforcement action.

Aggressive and morphing enforcement theories—which can render obsolete a previously effective compliance strategy—create costly uncertainty that risks tipping the scales against an investment or transaction.³⁴⁸ The costs of managing enforcement uncertainty disproportionately affect business opportunities in emerging markets, where the anti-corruption and pro-competition norms underlying the FCPA are often weakest.³⁴⁹ As rising compliance costs, high-risk jurisdictions, and an uncertain enforcement landscape converge, FCPA-compliant firms may decide to limit their exposure to or even disengage from emerging markets.³⁵⁰ According to some empirical research, “harsh enforcement” of the FCPA has indeed “discouraged U.S. companies from investing in regions where corruption is perceived to be widespread.”³⁵¹

This unintended consequence—in addition to compromising growth and economic development—risks undermining the anti-corruption and pro-competition norms that are at the heart of the FCPA. When FCPA-compliant firms decline to pursue business in a particular market, “black knights’ will move in to fill the void.”³⁵² As rising compliance costs and enforcement risks

³⁴⁷ See discussion *supra* Part IV.B.1.b.

³⁴⁸ See Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 295–98, 305–07 (2010).

³⁴⁹ See, e.g., *A Tale of Two Laws*, ECONOMIST, Sept. 17, 2011, available at <http://www.economist.com/node/21529103> (referring to studies showing that the risk of an FCPA enforcement action “is a hefty deterrent to doing business in poor countries”); see also Michael B. Runnels & Adam M. Burton, *The Foreign Corrupt Practices Act and New Governance: Incentivizing Ethical Foreign Direct Investment in China and Other Emerging Economies*, 34 CARDOZO L. REV. 295, 309 (2012) (arguing that the severity of FCPA enforcement has resulted in “extreme caution before entering markets in high-risk countries”).

³⁵⁰ See Dionne Searcey, *In Antibribery Law, Some Fear Inadvertent Chill on Business*, WALL ST. J., Aug. 6, 2009, available at <http://online.wsj.com/news/articles/SB124952459432309943> (discussing remarks from University of Richmond law professor Andy Spalding).

³⁵¹ Runnels & Burton, *supra* note 349, at 309.

³⁵² Searcey, *supra* note 350 (“If U.S. corporations stop investing in emerging markets, then other nations that . . . aren’t as committed to fighting bribery will step up their

push compliant “white knights” from high-risk markets, opportunities to instill anti-corruption and pro-competition norms within those markets also dissipate. The resulting consequence is that corruption may be left to “proliferate in emerging markets.”³⁵³ As the drafters of the FCPA recognized, competitive markets—and the competitive positions of U.S. firms—wither in the face of unchecked corruption.³⁵⁴

The United States became the world’s “leading norm entrepreneur” in the anti-corruption space when it enacted the FCPA nearly forty years ago.³⁵⁵ Whether by genuine agreement or out of a desire for perceived economic or political advantage, the values underlying the FCPA have largely resonated abroad, beginning with ratification of the OECD Convention in 1997.³⁵⁶ Yet despite significant progress, public corruption remains a persistent scourge that cannot be remedied by lawmaking alone. Rather, it is necessary to recognize that instilling norms abroad may be more readily achieved through natural business incentives than by enforcement from afar.³⁵⁷ Business opportunities that organically push entities toward FCPA-compliant firms and away from graft may prove most effective at cementing anti-corruption and pro-competition norms in overseas markets.³⁵⁸

Joint ventures are especially good vehicles for carrying norms to new markets, as they require close business relationships and shared management structures that can be conducive to value exchange.³⁵⁹ As high-risk markets often bar access to outside investors absent a relationship with local (and sometimes state-owned) enterprises,³⁶⁰ joint ventures are ideally situated to enter challenging markets and turn the tide against corruption.

investments.”); see also *A Tale of Two Laws*, *ECONOMIST*, *supra* note 349 (arguing that if firms subject to rigorous anti-corruption laws are deterred from conducting business in certain markets, “[f]irms from less fussy places . . . will happily fill the gap.”).

³⁵³ Searcey, *supra* note 350.

³⁵⁴ See *supra* note 345.

³⁵⁵ Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 *OHIO ST. L.J.* 1253, 1272 (2012).

³⁵⁶ See, e.g., Lee C. Buchheit & Ralph Reisner, *Why Has the FCPA Prospered?*, 18 *NW. J. INT’LL. & BUS.* 263, 266 (1998) (explaining that the OECD Convention and related initiatives “were largely inspired by the policies embedded in the Foreign Corrupt Practices Act”).

³⁵⁷ See Puckett, *supra* note 15, at 857–58 (explaining that the U.S. Agency for International Development and other organizations “are recognizing that businesses and business associations can . . . be advocates for change” in the anti-corruption context).

³⁵⁸ See *id.*

³⁵⁹ See generally *supra* Part I.

³⁶⁰ See *supra* note 5.

CONCLUSION

Numerous high-risk scenarios make the FCPA a minefield for transnational joint ventures. Close collaboration with local entities meets aggressive enforcement to create hazardous situations for firms with overseas ambitions. Spiraling compliance risks posed by joint ventures, joint-venture partners, and agents acting on behalf of joint ventures have significantly raised the costs of conducting business internationally. Evolving enforcement theories that fracture prior understandings of corporate liability introduce yet more uncertainty into business relationships already bristling with risk. And while joint ventures and their partners have numerous FCPA risk-reduction strategies available to them, no due diligence program, compliance system, or contractual remedy can insure against an unpredictable enforcement landscape.

Transnational joint ventures facilitate collaborative relationships and shared objectives, making them ideal vehicles for promoting the anti-corruption and pro-competition norms underlying the FCPA. But joint ventures cannot fulfill this role if the risks of conducting business in particular markets become too severe or the costs of compliance run too high. Applying the FCPA in a consistent and predictable manner will encourage cross-border collaboration while avoiding a dark consequence: the very goals of the statute being undermined by its enforcement.