

FCPA LIABILITY FOR THIRD-PARTY CONDUCT

*IDENTIFYING PITFALLS
AND MINIMIZING RISK*

Third-party business partners help multinational companies service new markets through their local expertise, contacts, and experience. Yet companies may face liability under the Foreign Corrupt Practices Act (FCPA) for improper payments made by these third parties. To effectively manage these relationships and the compliance risks they pose, counsel must understand common red flags and theories of liability, as well as how third-party conduct impacts an FCPA investigation.



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To facilitate the delivery of goods and services to markets across the globe, multinational companies rely on an array of agents, consultants, distributors, and other third parties operating overseas. These third-party business partners may provide local expertise, experience, and connections, and may satisfy jurisdictions' local requirements that foreign companies collaborate with local entities. However, these same entities may bring legal and reputational risk to the companies that engage them. Misconduct by third parties can be more challenging to identify or prevent than misconduct carried out by company employees (see *Box, Common Red Flags for Third-Party Business Partners*).

The FCPA prohibits not only direct corrupt payments to a foreign official to obtain or retain business but also indirect corrupt payments made using third parties. Indeed, some of the largest FCPA enforcement actions have involved third-party payments.

Like most FCPA enforcement actions involving corporate entities, FCPA cases premised on third-party liability theories are more commonly settled than litigated. Companies tend to settle FCPA cases to mitigate potential monetary penalties and to avoid the severe collateral consequences that may accompany a criminal conviction. Because so few companies put the government to its proof, case law on the government's third-party liability theories is sparse.

With few court-imposed bounds and plenty of potentially suspect business arrangements, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have been increasingly attuned to complex schemes involving third parties that act as conduits for improper payments. Given this scrutiny and companies' need to rely on third parties in many parts of the world, the risks and rewards of engaging third-party business partners are significant. To balance those risks and

rewards, companies and their counsel must understand how the FCPA may ensnare companies for third-party conduct, including:

- The types of conduct governed by the FCPA.
- The theories of liability for third-party misconduct under the FCPA.
- The types of third-party business partners that commonly merit scrutiny.
- The distinctive characteristics of company investigations involving allegations of third-party misconduct.
- Best practices for minimizing FCPA liability when working with third-party business partners.



Search [Potential FCPA Liability for Third-Party Conduct](#) for the complete online version of this resource, which includes recent examples of cases involving third-party conduct that triggered FCPA liability and information on DOJ guidance addressing FCPA compliance programs and third-party management.

FCPA OVERVIEW

The FCPA contains two key components:

- Anti-bribery provisions.
- Accounting provisions.

These provisions work in concert to impose liability on certain individuals and entities that engage in foreign bribery, or fail to maintain accurate books and records or implement prophylactic accounting controls.



Search [The Foreign Corrupt Practices Act: Overview](#) for more on the FCPA.

ANTI-BRIBERY PROVISIONS

The FCPA's anti-bribery provisions make it illegal for certain individuals and entities to:

- Make, offer, promise, or authorize corrupt payments or transfer anything else of value to foreign officials to obtain or retain business.
- Offer, give, or authorize the transfer of anything of value to "any person, while knowing that all or a portion of such ... thing of value will be offered, given, or promised directly or indirectly, to any foreign official" to obtain or retain business.

(15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3.)

The FCPA therefore can ensnare individuals or companies that directly or indirectly provide anything of value to foreign government officials.

The individuals and entities covered by the FCPA's anti-bribery provisions include:

- **Issuers.** These are companies that have securities registered with the SEC or must file periodic reports with the SEC, including foreign companies that list American Depositary Receipts on US stock exchanges (15 U.S.C. § 78dd-1).
- **Domestic concerns.** These are natural persons who are US citizens, nationals, or residents and business entities that:
 - have their principal place of business in the US; or

- are organized under the laws of a US state, territory, possession, or commonwealth.

(15 U.S.C. § 78dd-2.)

- **Certain persons acting within US territory.** This includes any person who uses US mail or any means or instrumentality of interstate commerce or does any other act while in US territory in furtherance of prohibited conduct (15 U.S.C. § 78dd-3). In practice, this provision reaches individuals who use instrumentalities of interstate commerce, including:

- telephone calls;
- faxes;
- emails; and
- interstate and international bank wire transfers.

(DOJ and SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act, at 11 (Nov. 14, 2012) (FCPA Resource Guide).) For example, the DOJ invoked US jurisdiction based on a company's transmission of an email to the US that attached a budget document containing a line item for improper payments to foreign officials (Information ¶¶ 15-17, *United States v. Syncor Taiwan, Inc.*, No. 2:02-cr-1244 (C.D. Cal. Dec. 5, 2002)).

The anti-bribery provisions apply not only to the covered individual or entity (that is, an issuer or a domestic concern) but also to any officer, director, employee, agent, or stockholder that acts on behalf of the covered individual or entity (15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3).

ACCOUNTING PROVISIONS

The FCPA's accounting provisions require certain individuals and entities to:

- Make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of its assets.
- Devise and maintain a system of internal accounting controls sufficient to:
 - provide reasonable assurances that unauthorized payments are not made; and
 - enable the issuer to prepare financial statements according to generally accepted accounting principles.

(15 U.S.C. § 78m(b)(2).)

The individuals and entities covered by the FCPA's accounting provisions include:

- **Issuers.** Issuers may be held criminally or civilly liable for their own failures and for those of other entities they control, such as:
 - subsidiaries;
 - joint ventures; and
 - affiliates.

Where an issuer controls more than 50% of the voting power of a non-issuer entity, it can be held liable for that entity's failures to comply with the FCPA's books and records and internal accounting controls requirements. Where an issuer holds 50% or less of the entity's voting power, it must only "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause the

entity to devise and maintain a system of internal controls consistent with" the FCPA's accounting provisions. (15 U.S.C. § 78m(b)(6); see below *Joint Ventures with Issuers*.)

- **Non-issuers.** Officers, directors, and subsidiaries of an issuer may be held criminally or civilly liable if they:
 - knowingly circumvent or knowingly fail to implement a system of internal accounting controls (15 U.S.C. § 78m(b)(5));
 - knowingly falsify any book, record, or account (15 U.S.C. § 78m(b)(5)); or
 - directly or indirectly falsify or cause to be falsified an issuer's books and records (17 C.F.R. § 240.13b2-1).

THEORIES OF LIABILITY: ANTI-BRIBERY PROVISIONS

The government commonly pursues FCPA enforcement actions against companies based on the conduct of their third-party business partners under the theories of:

- Direct participation.
- Authorization.
- Knowledge.
- Agency.
- Aiding and abetting.
- Conspiracy.

DIRECT PARTICIPATION IN THIRD-PARTY MISCONDUCT

The government may target a company for the corrupt acts of a third party if the company participated in the third party's improper conduct. Participation could include directing an agent's misconduct. (FCPA Resource Guide, at 27.)

AUTHORIZATION OF THIRD-PARTY MISCONDUCT

The FCPA's anti-bribery provisions prohibit companies from authorizing a third party to pay any money or give anything of value to a foreign official for the purpose of obtaining, retaining, or directing business (15 U.S.C. §§ 78dd-1(a), 78dd-2(a), and 78dd-3(a)).

Although the FCPA does not define "authorization," the statute's legislative history indicates that authorization can be either express or implied (H.R. Rep. No. 95-640, at 8 (1977)). The government has asserted that a company is liable for FCPA violations if it provides something of value to a third party while aware or substantially certain that the third party will offer, give, or promise something of value to a foreign official.

KNOWLEDGE OF THIRD-PARTY MISCONDUCT

The FCPA defines "knowing" as an awareness or a firm belief that either:

- A person is engaged in the conduct.
- Particular circumstances exist.
- A particular result is substantially certain to occur. (15 U.S.C. § 78dd-2(h)(3)(A)(i), (ii).)

The government may establish knowledge by showing that the defendant was aware of a "high probability of the existence" of

COMMON RED FLAGS FOR THIRD-PARTY BUSINESS PARTNERS

The FCPA Resource Guide published by the DOJ and the SEC identifies red flags associated with third-party business partners, including:

- Excessive commissions to third-party agents or consultants.
- Unreasonably large discounts or margins for third-party distributors.
- Third-party consulting agreements that include only vaguely described services.
- Third-party consultants that are in a different line of business than that for which they are being engaged.
- Third parties that are related to or closely associated with a foreign official.
- Third parties that became part of a transaction due to a foreign official's express request.
- Third parties that are merely shell companies incorporated in offshore jurisdictions.
- Third parties that request payment to offshore bank accounts.

(FCPA Resource Guide, at 22-23.)



Search [New FCPA Guidance Released by the DOJ and SEC](#) for more on the FCPA Resource Guide, which uses hypotheticals, enforcement action examples, and applicable case law to illustrate how businesses and individuals can comply with the FCPA, detect and prevent violations, and implement effective compliance programs.

that conduct, unless the defendant "actually believe[d]" the conduct was not occurring (15 U.S.C. § 78dd-2(h)(3)(B)).

The government contends that the FCPA imposes liability on those with actual knowledge of wrongdoing as well as those who purposefully avoid actual knowledge (FCPA Resource Guide, at 22). Courts have agreed and construed "knowing" to include deliberate ignorance (also referred to as willful blindness or conscious avoidance) (see *United States v. King*, 351 F.3d 859, 866-67 (8th Cir. 2003) (approving a deliberate ignorance jury instruction in an FCPA prosecution)).

AGENCY LIABILITY

Companies may be held liable for a third party's FCPA violations under traditional agency principles. Under the principle of *respondeat superior*, a company is liable for the acts of its agents, including its officers and employees, where the acts are both:

- Undertaken within the scope of the agency relationship.
- Intended, at least in part, to benefit the company.

In these situations, the government may impute an agent's actions and knowledge to the principal. The government is not required to prove the principal's independent knowledge or corrupt intent. (FCPA Resource Guide, at 27.)

To determine whether a third party qualifies as a covered entity's agent, the government focuses on the extent of the covered entity's control over the third party. The government considers the covered entity's knowledge and direction of the third party's actions both generally and in the context of the specific actions under investigation. A formal relationship between the covered entity and the third party is one key factor in the agency analysis, but the DOJ and the SEC also consider the practical realities of how the two entities interact. (FCPA Resource Guide, at 27-28.)

The government has asserted that various types of third parties were agents of defendant companies, including foreign:

- Subsidiaries.
- Consultants.
- Attorneys.

AIDING AND ABETTING AN FCPA VIOLATION

Under federal law, individuals or companies that aid or abet a crime are considered as culpable as if they had directly committed the crime. Because aiding and abetting is not an independent crime, the government also must prove that a substantive FCPA violation occurred.

For aiding and abetting liability, the government must prove that:

- A crime (such as an FCPA violation) was committed by someone other than the defendant.
- Before or at the time the crime was committed, the defendant aided, counseled, commanded, induced, or procured the person who committed the crime.
- The defendant intended to facilitate the crime.

(18 U.S.C. § 2; see DOJ, Justice Manual, Criminal Resource Manual § 2474.)

Generally, the "defendant must share the principal's criminal intent and engage in some affirmative conduct designed to aid the venture" (*United States v. Gallo*, 927 F.2d 815, 822 (5th Cir. 1991)).

CONSPIRACY TO VIOLATE THE FCPA

In contrast to aiding and abetting, conspiracy is an independent crime. Individuals and companies can be held liable for conspiring to violate the FCPA, even if they cannot be charged with a substantive FCPA violation.

A conspiracy under 18 U.S.C. § 371 requires the government to prove:

- Two or more persons had an agreement to achieve a common objective.
- The objective of the common agreement was illegal.
- The defendant knowingly and voluntarily participated in that common agreement.
- A conspirator committed an overt act in furtherance of the illegal objective.

(See *United States v. Snype*, 441 F.3d 119, 142 (2d Cir. 2006).)

The common agreement does not have to be written, oral, or explicit and may be inferred from facts and circumstances (see, for example, *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975); *United States v. Amiel*, 95 F.3d 135, 144 (2d Cir. 1996)).

In criminal cases, courts have held that a company can conspire with its employees, officers, agents, or other individuals or entities associated with it (see, for example, *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 978-79 (9th Cir. 1994); *United States v. Peters*, 732 F.2d 1004, 1008 (1st Cir. 1984)). However, there must be at least two individuals involved in the conspiracy for a conspiracy charge. An employee, acting alone on the company's behalf, cannot conspire with the company. (See *United States v. Sain*, 141 F.3d 463, 475 (3d Cir. 1998); *Peters*, 732 F.2d at 1008 n.6.)

Similarly, in certain types of civil conspiracy cases, some courts have applied the intracorporate conspiracy doctrine. Under this

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doctrine, an entity cannot conspire with its employees, officers, agents, or other individuals or entities closely associated with it (see, for example, *Pizza Mgmt., Inc. v. Pizza Hut, Inc.*, 737 F. Supp. 1154, 1165-66 (D. Kan. May 11, 1990)). Some courts, however, have refused to apply the doctrine to certain types of claims (see *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989) (refusing to apply the doctrine in an action brought under the Racketeering Influenced and Corrupt Organizations Act); *Stathos v. Bowden*, 728 F.2d 15, 20-21 (1st Cir. 1984) (refusing to apply the doctrine in a civil rights action)).

The overt act does not need to be a criminal act or even a substantial one. Any preparatory step taken that is helpful to the agreement's objective can satisfy the requirement. (See, for example, *Iannelli*, 420 U.S. at 785 n.17 (observing that the overt act "can be innocent in nature, provided it furthers the purpose of the conspiracy"); *United States v. Khamis*, 674 F.2d 390, 393 (5th Cir. 1982) (holding that opening bank accounts met the overt act requirement).)

In the government's view, a conspiracy charge widens the FCPA's jurisdictional net because, in conspiracy cases, the US "generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act" within the US. The DOJ and the SEC also contend that non-issuer foreign companies "may be subject to substantive FCPA charges," including liability for "reasonably foreseeable substantive FCPA crimes committed by a co-conspirator in furtherance of the conspiracy." (FCPA Resource Guide, at 12, 34.)

In 2018, however, the Second Circuit rejected the DOJ's expansive interpretation of the FCPA's jurisdictional sweep, holding that the government may not use theories of conspiracy or complicity to bring FCPA charges against a foreign national unless the foreign national either:

- Was an agent, employee, officer, director, or shareholder of a US issuer or company.
- Acted illegally while in the US.

The court allowed the government to continue its case under the theory that the defendant was an agent of a US company. (*United States v. Hoskins*, 902 F.3d 69, 72, 97 (2d Cir. 2018).)

Although *Hoskins* involved an individual defendant, the court's reasoning also applies to prosecutions of foreign companies. In any government investigation involving non-US companies, counsel should carefully analyze *Hoskins* and potential arguments against US jurisdiction.

The exposure to punishment under FCPA conspiracy charges can be as significant as under the statute's substantive provisions. For example, in December 2016, Rolls-Royce plc entered into a deferred prosecution agreement with the DOJ and agreed to pay nearly \$170 million as a criminal penalty to resolve FCPA violations. Rolls-Royce admitted to conspiring to violate the FCPA by paying bribes through third parties to foreign officials in multiple countries in exchange for confidential information and contracts. In related proceedings, Rolls-Royce settled with the UK's Serious Fraud Office and Brazil's Ministério Público Federal. In total, Rolls-Royce agreed to pay more than \$800 million in criminal penalties. (Press Release, DOJ,

Rolls-Royce plc Agrees to Pay \$170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017).)

THEORIES OF LIABILITY: ACCOUNTING PROVISIONS

Issuers and covered individuals can be held liable for failing to comply with the FCPA's:

- **Books and records provisions.** Issuers must appropriately and accurately record payments to third parties, such as agents, consultants, and distributors.
- **Internal controls provisions.** Issuers must implement and maintain internal controls to mitigate third-party risks.

Issuers also can be held directly liable for their subsidiaries' failures to comply with these provisions (see above *Accounting Provisions*). Therefore, issuers must oversee their subsidiaries' books and records compliance and ensure that their subsidiaries implement and maintain adequate internal controls.

IDENTIFYING HIGH-RISK THIRD PARTIES

Certain categories of third parties can present significant corruption risks, including:

- Sales agents and consultants.
- Distributors.
- Freight forwarders.
- Customs brokers and customs agents.
- Joint venture participants.



Search [Supply Chain Overview](#) for more on these high-risk third parties and other supply chain participants.

LOCAL SALES AGENTS AND CONSULTANTS

Companies operating overseas often rely on local sales agents and consultants to open doors and complete deals. For example, they can provide:

- In-country personnel with local language skills.
- Insight regarding customers':
 - decision-makers;
 - tender processes;
 - technical specifications;
 - needs; and
 - expectations.

For these contributions, local sales agents and consultants receive compensation. These payments are often tied, directly or indirectly, to successful sales, which may lead to or incentivize misconduct.

The FCPA Resource Guide details several consultant-specific corruption red flags, such as:

- Excessive commissions, which may be used to make improper payments.
- Consulting agreements for only vaguely described services, which may represent an attempt to cover up improper payments.

- Third-party consultants operating in different lines of business than their engagement, which may suggest that the consultants cannot perform the services retained and instead were hired to make improper payments.

(FCPA Resource Guide, at 22-23.)

DISTRIBUTORS

Distributors typically purchase products from a company and resell the products in local markets. Depending on the terms of the agreement, a distributor's responsibilities, other than reselling, may include:

- Promotion.
- Marketing.
- Logistics.

Distributors are commonly involved in arm's-length transactions of:

- A purchase from the product's manufacturer.
- A sale to the ultimate customer.



Search [Distributors and Dealers](#) for more on distributors and key issues to consider when setting up a distribution or reseller agreement.

Search [Distribution Agreement \(Pro-Seller, Short Form\)](#) and [Exclusive Distribution Agreement \(Pro-Distributor, Short Form\)](#) for sample agreements between a manufacturer and a distributor, with explanatory notes and drafting tips.

A distributor earns a profit on the margin, which is the difference between what it paid to the manufacturer and what it charged the customer. If the manufacturer prices its products at an artificially low level (or credits the distributor for some expenses), the distributor may be able to maintain its profit margins on sales to customers while retaining an additional sum that could be used for improper payments.

Given this dynamic, the government considers unreasonably large discounts to third-party distributors to be a corruption red flag because it suggests that the manufacturer deliberately sold its products at a price point that would give the distributor funds to use for improper payments. (FCPA Resource Guide, at 22, 64.)

Although the government views discounts with suspicion, price reductions are commonplace and can appropriately compensate distributors for their legitimate promotional, marketing, or logistical activities. Companies should assess whether a particular discount increases the risk or appearance of improper payments.

FREIGHT FORWARDERS

Freight forwarders act as agents to move cargo for companies and also advise companies about:

- Import rules.
- Available shipping methods.
- The required documentation for transporting cargo in international trade.

(US Commercial Service, A Basic Guide to Exporting, at 221 (11th ed. 2015).)



Search [Logistics: Freight Forwarding](#) for information on the role and regulation of domestic and international freight forwarders in the transportation network and the supply chain.

Search [Freight Forwarding Agreement](#) for a sample agreement between a freight forwarder and a shipper requesting freight forwarding services, with explanatory notes and drafting tips.

The government may consider the following to be corruption red flags in connection with a company's retention of a freight forwarder:

- Requests for a success fee, that is, a premium paid for navigating cargo through foreign territories. Compensation arrangements based on success fees can encourage a freight forwarder to make improper payments to foreign officials to ensure that cargo gets through, which guarantees the freight forwarder its success fee.
- Existing relationships between the freight forwarder or its executives and customs personnel in the local jurisdiction.
- Flat fees for the freight forwarder's services that are unsupported by invoices for the fees. This may provide freight forwarders an unreasonably high margin that could provide extra funds for bribes.
- Unorthodox payment requests, including that payments be made:
 - in cash; or
 - by wire transfers to shell companies.
- False, duplicative, or inflated invoices.
- A freight forwarder's poor reputation or inexperience in the local market.

CUSTOMS AGENTS AND CUSTOMS BROKERS

Customs agents and customs brokers typically assist companies with transactions related to the entry of merchandise into foreign countries, including the payment of any duties, taxes, or other charges related to the merchandise's entry.



Search [Logistics: Transportation Service Providers Overview](#) for more on customs brokers.

The FCPA Resource Guide identifies the following red flags in connection with a company's use of a customs agent or customs broker:

- Requests for excessive commissions.
- Existing ties to customs officials.

(FCPA Resource Guide, at 22.)

Additional red flags include:

- Success fees for navigating cargo through customs.
- Flat fees that are unsupported by invoices.
- Contractual agreements that only vaguely describe the work the agent or broker will perform.

JOINT VENTURE PARTICIPANTS

Joint ventures are business undertakings by two or more persons or entities. Joint ventures may be structured in many

ways, including jointly owned companies, partnerships, and limited liability companies, resulting in various degrees of control for each joint venture participant.



Search [Joint Ventures: Overview](#) for key considerations when creating a joint venture, including reasons for entering into a joint venture and commonly used joint venture structures.

The government can hold a joint venture itself liable for FCPA violations, as well as a US company or an individual that is a party to the joint venture and the directors on the joint venture's board. Certain aspects of joint ventures may raise the risk of FCPA liability, including:

- Foreign entity participants.
- Issuer participants.
- A participant's ability to exit a joint venture.
- Compensation paid to the joint venture's directors.

Joint Ventures with Foreign Entities

Common joint ventures that are subject to potential FCPA liability include joint ventures with:

- **State-owned enterprises (SOEs).** Joint ventures with SOEs are common in countries where the government dominates certain markets or resources. For example, in the oil industry, a US company may be required to partner with an SOE to tap oil deposits under state control. Various markets in China similarly require partnerships with SOEs.
- **Foreign private companies.** Companies often partner with foreign private businesses because the local entity may have market knowledge, contacts, or infrastructure that make a joint venture more advantageous than starting from scratch. Companies also might be obligated or highly incentivized to partner with foreign private companies to access certain markets in a foreign jurisdiction. For example, in Brazil, companies participating in public bids often partner with local Brazilian companies to satisfy rules requiring that a certain percentage of the contract be executed with Brazilian labor and resources. Although foreign private companies may not have the same proximity to foreign government officials as SOEs, a company considering entering into a joint venture should still vet:
 - the foreign company's relationships with local government officials, including its board members' relationships;
 - any commissions the foreign company paid to agents;
 - any discounts the foreign company gave to distributors; and
 - the foreign company's compliance with the FCPA and local anti-corruption laws.

Regardless of whether a joint venture involves an SOE or a foreign private company, various participants in the venture and the joint venture itself can be liable for violating the FCPA, conspiring to do so, or aiding and abetting FCPA violations (see above *Theories of Liability: Anti-Bribery Provisions*).

Joint Ventures with Issuers

If a joint venture participant is an issuer, the degree of the issuer's control over the joint venture determines its potential

exposure under the FCPA's accounting provisions. An issuer that holds more than 50% of the voting power of another entity can be liable for violations of the FCPA's accounting provisions.

However, if the issuer joint venture participant has 50% control or less, then it must only "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause [the joint venture] to devise and maintain a system of internal accounting controls" consistent with the FCPA's requirements. The FCPA notes that relevant factors in assessing the issuer's circumstances include:

- The "relative degree of the issuer's ownership of the domestic or foreign" joint venture entity.
- The "laws and practices governing the business operations of the country" where the joint venture entity is located.

While the FCPA further provides that "[a]n issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied" with the accounting provisions, the statute does not define good faith. (15 U.S.C. § 78m(b)(6).) Although the FCPA focuses on an issuer's percentage of voting power, the good faith presumption may be inapplicable if an issuer effectively controls the joint venture and can require it to comply with the statute's accounting provisions.

Ability to Exit the Joint Venture

Given the risks associated with foreign joint ventures, the government has urged companies to ensure that they can walk away from ventures or partners that fail to comply with applicable anti-corruption laws. Companies should negotiate for unambiguous language permitting penalty-free departure from a joint venture if a partner violates anti-corruption laws. Without this language, a company could be motivated to remain in a venture and participate in conduct that violates the FCPA.

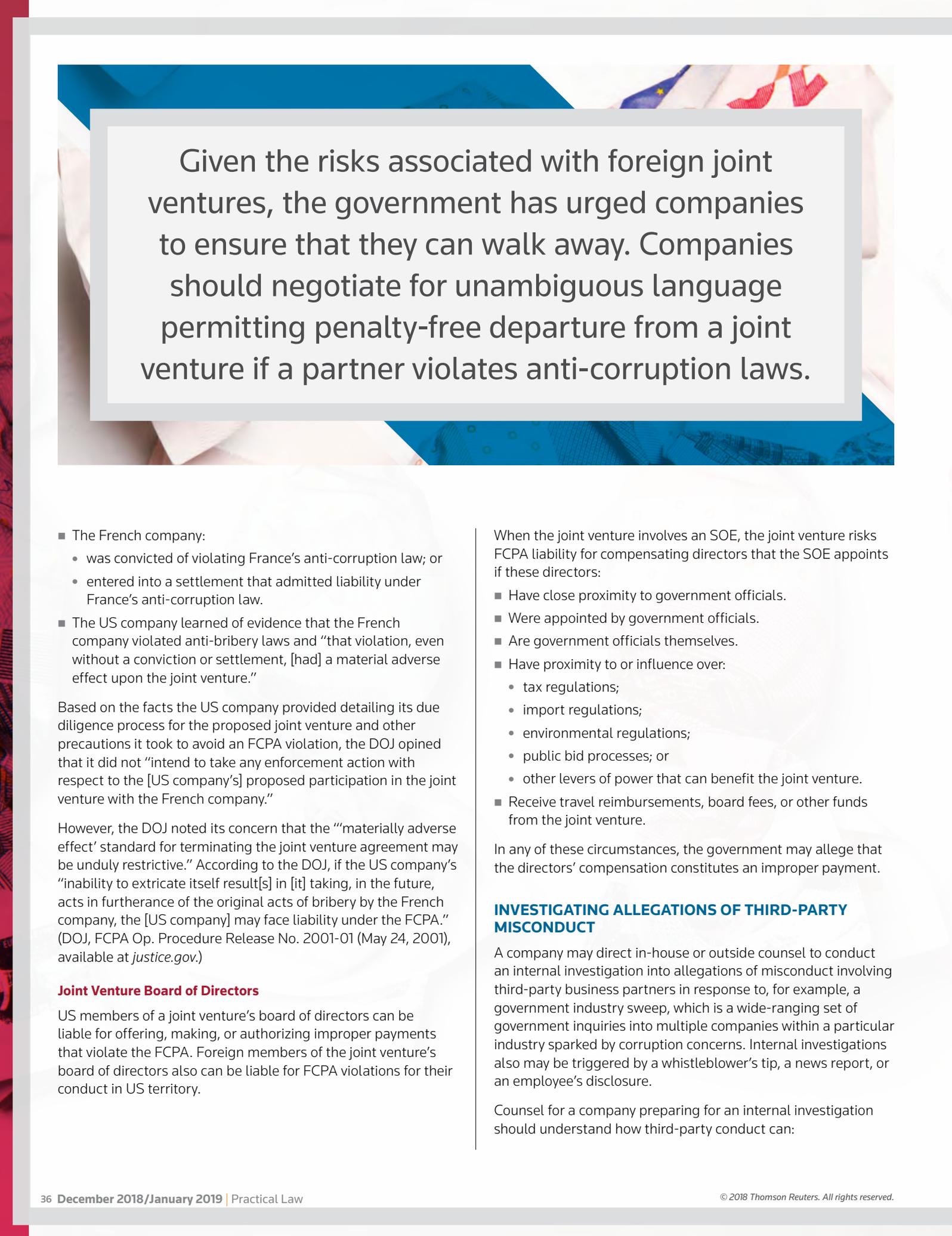


Search [Joint Ventures: Exits and Terminations](#) for more on exit and termination provisions in joint venture agreements and the primary issues to consider when drafting and negotiating these provisions.

The DOJ addressed this issue in a May 2001 opinion release regarding a US company's prospective joint venture with a French entity. The DOJ's release procedure enables "issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective — not hypothetical — conduct conforms with the Department's present enforcement policy regarding the anti-bribery provisions" of the FCPA (28 C.F.R. § 80.1).

The release concerned a US company's request for guidance on whether the DOJ would pursue an FCPA action regarding a prospective joint venture in which the US company and a French company would each be 50% owners and contribute contracts and transactions. The US company detailed the steps it had taken to "avoid a knowing violation" of the FCPA and asked whether it would be deemed to have violated the FCPA if one of the contracts the French company contributed was later discovered to have been obtained or maintained through bribery.

The joint venture agreement stated that the US company could terminate or refuse to satisfy its obligations with the prospective French joint venture partner if:



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- The French company:
 - was convicted of violating France's anti-corruption law; or
 - entered into a settlement that admitted liability under France's anti-corruption law.
- The US company learned of evidence that the French company violated anti-bribery laws and "that violation, even without a conviction or settlement, [had] a material adverse effect upon the joint venture."

Based on the facts the US company provided detailing its due diligence process for the proposed joint venture and other precautions it took to avoid an FCPA violation, the DOJ opined that it did not "intend to take any enforcement action with respect to the [US company's] proposed participation in the joint venture with the French company."

However, the DOJ noted its concern that the "'materially adverse effect' standard for terminating the joint venture agreement may be unduly restrictive." According to the DOJ, if the US company's "inability to extricate itself result[s] in [it] taking, in the future, acts in furtherance of the original acts of bribery by the French company, the [US company] may face liability under the FCPA." (DOJ, FCPA Op. Procedure Release No. 2001-01 (May 24, 2001), available at justice.gov.)

Joint Venture Board of Directors

US members of a joint venture's board of directors can be liable for offering, making, or authorizing improper payments that violate the FCPA. Foreign members of the joint venture's board of directors also can be liable for FCPA violations for their conduct in US territory.

When the joint venture involves an SOE, the joint venture risks FCPA liability for compensating directors that the SOE appoints if these directors:

- Have close proximity to government officials.
- Were appointed by government officials.
- Are government officials themselves.
- Have proximity to or influence over:
 - tax regulations;
 - import regulations;
 - environmental regulations;
 - public bid processes; or
 - other levers of power that can benefit the joint venture.
- Receive travel reimbursements, board fees, or other funds from the joint venture.

In any of these circumstances, the government may allege that the directors' compensation constitutes an improper payment.

INVESTIGATING ALLEGATIONS OF THIRD-PARTY MISCONDUCT

A company may direct in-house or outside counsel to conduct an internal investigation into allegations of misconduct involving third-party business partners in response to, for example, a government industry sweep, which is a wide-ranging set of government inquiries into multiple companies within a particular industry sparked by corruption concerns. Internal investigations also may be triggered by a whistleblower's tip, a news report, or an employee's disclosure.

Counsel for a company preparing for an internal investigation should understand how third-party conduct can:

- Raise distinct challenges in internal investigations.
- Impact a company's decision to make voluntary disclosures to the government.
- Affect a company's negotiations with the government to resolve the investigation.



Search [Mapping an FCPA Strategy: Internal Investigations and Enforcement Proceedings](#) for more on dealing with third parties that have violated the FCPA, investigating FCPA allegations, self-reporting FCPA violations to the government, and resolving FCPA allegations.

CHALLENGES INVESTIGATING ALLEGED THIRD-PARTY MISCONDUCT

A company's internal investigation of third-party misconduct can present unique challenges in accessing relevant information. Many third parties have no obligation to cooperate with an investigation. Depending on the type of third party and the company's relationship with it, the company may have varying degrees of access to:

- Key individuals.
- Documents.
- Emails.
- Telephone logs.
- Calendar entries.
- Sales data and paperwork, such as invoices.
- Other necessary information.

Counsel should review the company's audit rights relating to the third-party business partner and assess whether other forms of commercial leverage may result in the third party's cooperation, for example:

- Refusing to execute future contracts with the third-party supplier.
- Removing the third-party supplier from the company's preferred vendor list.
- Exercising contractual rights, such as contract termination, indemnification for commercial damages, and claw backs of funds paid.

If the company has limited commercial leverage to persuade a third-party business partner to cooperate with its investigation, counsel should:

- Communicate to the third party the steps the company is willing to take if the third party does not assist.
- Document all efforts counsel took to secure the requested assistance, such as memorializing telephone calls and meetings and retaining emails.

Counsel should add a record of these communications to the company's due diligence file on the third-party business partner and consider the record in future contracting decisions. Documenting these efforts also allows the company to describe its internal investigation process to any regulators that later inquire.

The third party's location also can affect the company's internal investigation. Visiting third parties in distant places can cause logistical difficulties for counsel. Additionally, third parties in

unsafe locations may be too dangerous for counsel to visit or require the company to provide security for counsel. The local culture, political situation, and local privacy and data protection laws also can prevent counsel from accessing relevant information.

VOLUNTARY SELF-DISCLOSURE

The DOJ and the SEC encourage companies to self-disclose FCPA violations. They also require companies that self-disclose to identify all of the perpetrators both "inside and outside the company." (FCPA Resource Guide, at 54.)

A company that is the first to report the conduct to the government and provide information about the third parties involved in the misconduct typically receives a more favorable outcome than the third parties.



Search [Trends in Federal White Collar Prosecutions](#) for information on the government's tactics and strategies in enforcing federal criminal law, including more on self-reporting FCPA violations to the DOJ.

RESOLVING THE INVESTIGATION

In advocating for leniency, a company may leverage information it has regarding third-party business partners to obtain a favorable settlement.

For example, the DOJ's deferred prosecution agreement with BizJet International Sales and Support Inc. credited BizJet for extraordinary cooperation and agreeing to continue to cooperate in any FCPA investigation of BizJet's conduct or the conduct of its officers, directors, employees, agents, and consultants (Deferred Prosecution Agreement ¶ 4, *United States v. BizJet Int'l Sales & Support, Inc.*, No. 12-cr-61 (Mar. 14, 2012)).

MINIMIZING THIRD-PARTY RISK

To minimize potential FCPA liability when working with third-party business partners, companies should prioritize the following three compliance objectives:

- Establishing robust and well-documented anti-corruption compliance policies and programs.
- Researching and monitoring potential third-party business partners.
- Managing contractual risk in agreements with third parties.

COMPLIANCE POLICIES AND PROGRAMS

To guard against FCPA liability risk based on third-party misconduct, a company should first:

- Adopt a policy to set clear guidelines when engaging third-party agents and consultants to conduct business outside of the US on its behalf. This policy should be tailored to the company's specific business and risks. (For more information, search [Policy for the Use of Third-Party Agents Outside of the United States](#) on Practical Law.)
- Obtain an annual compliance certificate from third parties to certify their compliance with the FCPA and to confirm anti-bribery representations and warranties (for more information, search [Anti-Bribery Compliance Certificate \(Third-Party Intermediaries\)](#) on Practical Law).

- Educate third parties about the company's compliance expectations by, for example, providing comprehensive trainings or periodically reviewing the third party's observance of the company's compliance requirements (FCPA Resource Guide, at 60) (for more information and sample training materials, search [FCPA Training for Employees: Presentation Materials](#) and [FCPA Training Hypotheticals for Employees: Presentation Materials](#) on Practical Law).
- Document the company's adherence to compliance controls designed to prevent and, as necessary, detect improper payments by third-party business partners.

If a company is investigated for third-party misconduct, the company should be prepared to detail the diligent steps it has taken to address and mitigate the risk that improper third-party payments will be made on the company's behalf. Indeed, companies that, in the government's view, fail to adhere to their own third-party compliance controls are likely to face more severe penalties if a third-party business partner engages in improper conduct.

A company should be prepared to respond to all the applicable questions in the DOJ's 2017 guidance on compliance programs and provide documentary evidence detailing its own compliance program, including:

- The structure and staffing of the compliance function.
- Compliance policies, procedures, and related guidance.
- Due diligence files.
- Compliance certifications.
- Compliance communications.
- Training programs.

A company also should be prepared to provide quantitative data regarding the compliance program as it applies to third parties, including the number of:

- Third parties on which the company has performed due diligence.
- Third parties that have participated in anti-corruption compliance training.
- Third-party audits the company conducted.
- Internal investigations or audits relating to third parties.

Without proper documentation and tracking, it is difficult to prove that even the most robust compliance program is operating as it should be.



Search [Bribery and Corruption Toolkit](#) for a collection of resources counsel can use when designing anti-bribery and corruption compliance programs.

RESEARCH ON POTENTIAL BUSINESS PARTNERS

Before contracting with a third party, a company should gather information about potential third-party business partners through a risk-based due diligence process. This type of process focuses on:

- The reason the third party's services are needed.
- The third party's:

- qualifications;
 - associations (including connections to persons with poor business reputations in the market);
 - business reputation;
 - banking and credit status; and
 - relationship, if any, with foreign officials.
- The proposed payment terms and how they compare to similar arrangements within the particular industry and country.
 - The company's identification and resolution (if possible) of any corruption red flags.

(FCPA Resource Guide, at 60.)

The SEC has brought enforcement actions where companies have allegedly failed to follow their own internal third-party diligence protocols. Companies should therefore monitor and regularly audit third-party management processes to verify employee compliance and ensure that the protocols effectively identify and resolve anti-corruption red flags.



Search [Risk-Based Due Diligence of Third Parties in Commercial Transactions](#) for more on conducting risk-based due diligence and managing due diligence findings.

CONTRACT MANAGEMENT

Companies should attempt to secure contractual protections, such as audit rights and anti-corruption compliance warranties and commitments, to facilitate their access to relevant information (FCPA Resource Guide, at 60-61). After securing these rights, a company also should examine third parties' activities through, for example, regular transaction monitoring or exercising the company's audit rights.

Additionally, companies should negotiate for contractual remedies for potential breach of the contractual provisions, including:

- Termination.
- Indemnification.
- Claw back of previous payments made under the contract.



Search [General Contract Clauses: Anti-Bribery Representations and Warranties](#) and [General Contract Clauses: Anti-Bribery Covenants](#) for sample clauses counsel can use to guard against third-party FCPA liability risk, with explanatory notes and drafting tips.

Search [Developing a Legal Compliance Program](#) for more on due diligence and oversight of third-party relationships.