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When "Not Getting Caught" Is Not Enough: Preventing Foreign Corrupt Practices Act Violations and Liability in International Project Finance

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WHEN "NOT GETTING CAUGHT" IS NOT ENOUGH: PREVENTING FOREIGN CORRUPT PRACTICES ACT VIOLATIONS AND LIABILITY IN INTERNATIONAL PROJECT FINANCE

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I. INTRODUCTION

Reinhard Siekaczek, a skeptical former accountant of Siemens A.G., expressed little optimism that Siemens' violations of German law and the U.S. Foreign Corrupt Practices Act's ("FCPA")[1] prohibitions against bribing foreign officials would deter others in a world full of corruption. Siekaczek states, "[p]eople will only say about Siemens that they were unlucky and that they broke the 11th commandment. The 11th commandment is: 'Don't get caught.'"[2] At Siemens, Siekaczek participated in large-scale bribery by helping maintain a budget of tens of millions of dollars per year that was dedicated to bribing foreign officials, what one bureaucrat described as the "Siemens' business model" and "institutionalized corruption."[3] Eventually, Siemens and many of its subsidiaries paid a heavy price for getting caught: over $2.6 billion spent in fees, fines to the U.S. and Germany, and corporate reform measures to replace corruption with compliance.[4]

While many American businesspeople and companies who understand the realities of doing business in foreign countries would likely agree with Siekaczek's lamentation, the problem with the 11th commandment is that "not getting caught" for bribery is becoming increasingly difficult in the U.S. This is so not only because of the FCPA prevents the making of "corrupt payments" to foreign officials for the purpose of promoting business interests, but because the Department of Justice ("DOJ") is strictly enforcing the FCPA by investigating more

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[1] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2010); *see also* Brochure, U.S. Dep't of Justice & U.S. Dep't of Commerce, Foreign Corrupt Practices Act: Antibribery Provisions (Oct. 1999) [hereinafter Lay-Person's Guide to the FCPA]

[2] T. Christian Miller & Siri Schubert, *At Siemens, Bribery was Just a Line Item*, N.Y. TIMES, Dec. 20, 2008.

[3] *Id.*

[4] *Id.*

cases,[5] levying extremely high fines in plea bargains,[6] and even performing sting operations through the Federal Bureau of Investigation.[7]

Avoiding notice is likely hard enough in a situation where only one individual is paying bribes, but bribery naturally becomes harder to conceal when multiple parties are involved. Such is the case in the world of international project finance.[8] Because the FCPA's reach is not restricted to the people who physically pay the money or make an improper offer, liability can extend much further than U.S. companies and businesspeople might expect and hope. Consequently, complicated issues of liability exist for many project finance participants because any one project can include many people and entities—lenders, agents, project sponsors, project companies, constructors, operators, and so forth. Thus, rather than hoping to "not get caught," project finance participants should take active steps throughout the duration of a project to identify potential violations and prevent bribes. This strategy presents participants with the best opportunity for avoiding FCPA liability, possible jail time, and severe economic and other consequences to the project.[9]

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[5] Shearman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement*, *in* CTR. FOR CONTINUING LEGAL EDUC. ET AL., NATIONAL INSTITUTE ON THE FOREIGN CORRUPT PRACTICES ACT, at A-8 (2008).

[6] Steven A. Tyrrell, *DOJ Prosecution of BAE Heralds Continued Aggressive FCPA Enforcement Environment*, WEIL (Feb. 8, 2010), http://www.weil.com/news/pubdetail.aspx?pub=9725 (stating that Siemens paid a criminal penalty of $450 million).

[7] Press Release, Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010).

[8] Catherine Pedamon, *How is Convergence Best Achieved in International Project Finance?*, 24 FORDHAM INT'L L.J. 1272, 1273 (2001) (describing project finance as "a debt technique used for the development of a public infrastructure project . . . where lenders look primarily to the cash flow produced by the project to service their debt.").

[9] While much has been written about both the FCPA and international project finance, not much exists about the two together. This study attempts to fill that void. While FCPA has anti-bribery and accounting provisions, this work will only focus on the anti-bribery provisions. Finally, this paper will first expound upon the FCPA, then summarize key aspects of project finance, and conclude by looking at many FCPA problems and solutions in project finance.

II. FCPA STATUTE AND EXPLANATION

A. Liable Parties

The anti-bribery provisions of the FCPA apply to various parties that utilize project finance to carry out foreign endeavors and projects. First, the FCPA applies to any issuer of "securities that have been registered in the United States or who is required to file periodic reports with the SEC,"[10] as well as to "any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer."[11] Second, "domestic concerns" are subject to the FCPA.[12] A "domestic concern" is a U.S. citizen, resident, national, or "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship" that has the U.S. as its primary place of business or that is organized under any U.S. state or territory law.[13] Domestic concerns can also be liable where they worked or acted for foreign subsidiaries of U.S. corporations.[14] Third, "any person" who is not an issuer or a domestic concern, or "any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person" who takes a step toward violating the FCPA in the U.S., is liable.[15] Any "person" means "any natural person other than a [U.S.] national . . . or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship" not organized under any law of the U.S.[16]

The FCPA also applies to any of these parties that give or promise something of value to a person while knowing that some or all of the item will be used to violate the FCPA.[17] The giving party is deemed to have knowledge when the giving party is aware that the other party is "engaging in such conduct, that such circumstance exists, or that such result is substan-

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[10] Lay-Person's Guide to the FCPA, *supra* note 1, at 3.
[11] 15 U.S.C. § 78dd-1(a) (2010).
[12] § 78dd-2(a).
[13] § 78dd-2(h)(1)(b).
[14] Lay-Person's Guide to the FCPA, *supra* note 1, at 3.
[15] § 78dd-3(a).
[16] §§ 78dd-1a3, 2a3, 3a3.
[17] *Id.*

tially certain to occur."[18] Alternatively, knowledge exists when a party has "a firm belief that such circumstance exists or that such result is substantially certain to occur"[19] and there is a "high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."[20] This standard prevents directors from escaping liability when they did nothing in the face of red flags.[21] Actions of agents and consultants,[22] as well as subsidiaries,[23] can place liability on an issuer, domestic concern, or "any person" if these latter actors had knowledge.

B. Prohibited Actions

The FCPA's anti-bribery provisions prohibit these actors from using "the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, authorization of the payment of any money, offer, gift, promise to give, or authorization of the giving of anything of value" to any foreign official, political party, official of a political party, political party candidate, or anyone who the actor knows will commit one of these forbidden acts with the purpose of "obtaining or retaining business" with anyone.[24] A failed offer or promise is enough for liability.[25] Obtaining and retaining business is done by:

> influencing any act or decision of [the foreign person]; inducing such [official] to do or omit to do any act in violation of the lawful duty of [the person]; securing any improper advantage; or inducing [the person] to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of that person.[26]

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[18] §§ 78dd-1(f)(2)(A)(i), 78dd-2(h)(3)(A)(i), 78dd-3(f)(3)(A)(i).

[19] §§ 78dd-1(f)(2)(A)(ii), 78dd-2(h)(3)(A)(ii), 78dd-3(f)(3)(A)(ii).

[20] §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B), 78dd-3(f)(3)(B).

[21] *See, e.g.*, David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 682-83 (2009).

[22] ROBERT W. TARUN, BASICS OF THE FOREIGN CORRUPT PRACTICES ACT: WHAT EVERY GENERAL COUNSEL, TRANSACTIONAL LAWYER AND WHITE COLLAR CRIMINAL LAWYER SHOULD KNOW 26 (2006).

[23] Lay-Person's Guide to the FCPA, *supra* note 1, at 3.

[24] §§ 78dd-1(a), 2(a), 3(a).

[25] Lay-Person's Guide to the FCPA, *supra* note 1, at 3.

[26] §§ 78dd-1(a), 2(a), 3(a).

Various elements of these prohibited actions, when defined, show how far liability can reach. First, interstate commerce is defined as "trade, commerce, transportation, or communication among the several States; or between any foreign country and any State; or between any State and any place or ship outside thereof," which includes communicating between these places through a telephone or other medium.[27] Therefore, an airline flight between states, or between the U.S. and other countries,[28] as well as a wire transfer,[29] a fax,[30] an email,[31] or a letter,[32] could be enough to engage the FCPA. Furthermore, issuers and domestic concerns can be liable for FCPA violations anywhere in the world.[33] If issuers or domestic concerns use any means of interstate commerce to bring about a corrupt payment, the U.S. has territorial jurisdiction.[34] If, however, they take any action in the furtherance of a corrupt payment outside the U.S., no use of interstate commerce is necessary[35] because the U.S. can maintain jurisdiction based on nationality.[36] For persons that are not issuers or domestic concerns, jurisdiction and liability depend on whether any action took place within the U.S.[37]

Offering help on the meaning of "corruptly," the Eighth Circuit approved a jury instruction defining "corruptly" as prohibited action that is "intended to induce the recipient to misuse his official position or to influence someone else to do so," and is "done voluntarily and intentionally and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means."[38]

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[27] §§ 78dd-2(h)(5)(A), 3(f)(5)(A).

[28] Lay-Person's Guide to the FCPA, *supra* note 1, at 3.

[29] *Id.*

[30] *See, e.g.*, *Rotec Indus. v. Mitsubishi Corp.*, 163 F. Supp. 2d 1268, 1279 (D. Or. 2001), *aff'd*, 348 F.3d 1116 (9th Cir. 2003).

[31] *See*, *e.g.*, MAYER BROWN LLP, A POCKET GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 3 (2009).

[32] §§ 78dd-1(a), 2(a), 3(a).

[33] §§ 78dd-1(g)(1), 2(i)(1).

[34] Lay-Person's Guide to the FCPA, *supra* note 1, at 3.

[35] §§ 78dd-1(g)(1), 2(i)(1).

[36] Lay-Person's Guide to the FCPA, *supra* note 1, at 3.

[37] Peter W. Schroth, *The United States and International Bribery Conventions*, 50 AM. J. COMP. L. 593, 602 (2002).

[38] United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991).

Third, a foreign official is "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of" any of those listed parties.[39] This definition can become quite complicated in situations where joint private and public ownership exists and in certain industries, such as defense contracting, where a government's stake is not apparent on the surface.[40] An employee of a foreign firm might be a foreign official if the government appoints him or her, such as military personnel appointed to work for a defense contractor, or if the firm can be considered an "instrumentality" of the government.[41] It is clear that employees of an enterprise completely owned by a government can be a foreign official.[42] Additionally, the DOJ has emphasized that the official's position—whether high or low ranking—does not matter.[43]

Fourth, obtaining or retaining business means more than acquiring a contract or having one renewed.[44] For instance, in *United States v. Kay*, the Fifth Circuit broadly construed the FCPA's "obtaining or retaining business" requirement to include American businessmen who bribed to Haitian customs officials in order to receive discounted duties and sales taxes on their rice imports.[45] The Court of Appeals remanded the case to the district court to decide if the bribes were "designed to induce foreign officials unlawfully to perform their official duties in *administering* the laws and regulations of their country to produce a result intended to assist in obtaining or retaining business in that country."[46] Thus, it seems that many actions could fall under the statute as long as there is sufficient con-

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[39] §§ 78dd-1(f)(1)(A), 2(h)(2)(A), 3(f)(2)(A).

[40] *See* Sharie A. Brown & Brian S. Chilton, *Foreign Corrupt Practices Act*, 11 BRIEFLY, no. 5, 2007 at iii, 10-11.

[41] *Id.* at 11.

[42] *See, e.g.*, Press Release, Dep't of Justice, Two Former Executives of Itxc Corp Plead Guilty and Former Regional Director Sentenced in Foreign Bribery Scheme (July 27, 2007).

[43] Lay-Person's Guide to the FCPA, *supra* note 1, at 3 (stating that "[t]he FCPA applies to payments to any public official, regardless of rank or position").

[44] *Id.* at 4.

[45] United States v. Kay, 359 F.3d 738 (5th Cir. 2004).

[46] *Id.* at 761.

nection between the action and an intention to obtain or retain business. Further, the business sought need not be with the government; it can be with any person.[47]

C. Exceptions

The anti-bribery provisions do allow a few exceptions. One can pay a foreign official for "routine governmental actions."[48] Routine governmental actions are services "ordinarily and commonly performed" by foreign officials for: (1) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (2) processing governmental papers, such as visas and work orders; (3) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (4) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; and (5) similar actions.[49] Such activities do not entail "acquiring or retaining business," as used in the FCPA.[50] A party can also make "a reasonable and bona fide expenditure" to a foreign official, which includes "travel and lodging expenses . . . directly related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency thereof."[51] Metcalf & Eddy Inc. gave an Egyptian official 150 percent of his per diem in advance, paid the expenses that the per diem should have covered, paid for air travel for him and his family, and gave other gifts to sway his view, these payments did not meet the threshold.[52]

Furthermore, a party can use the affirmative defense that

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[47] *See* 15 U.S.C. §§ 78dd-1(a), 2(a), 3(a).

[48] §§ 78dd-1(b), 2(b), 3(b).

[49] §§ 78dd-1(f)(3)(A), (h)(4)(A), 3(f)(4)(A).

[50] Lay-Person's Guide to the FCPA, *supra* note 1, at 5.

[51] §§ 78dd-1(c)(2), 2(c)(2), 3(c)(2).

[52] Matthew S. Queler et. al., *Foreign Corrupt Practices Act*, *in* PROSKAUER ON INTERNATIONAL LITIGATION AND ARBITRATION: MANAGING, RESOLVING, AND AVOIDING CROSS-BORDER BUSINESS OR REGULATORY DISPUTES (2007), *available at* http://www.proskauerguide.com/law_topics/27/I (citing United States v. Metcalf & Eddy Inc., C.A. No. 99CV-12566-N6 (D. Mass. 1999).

the prohibited action is legal according to the "written laws and regulations" of the country targeted by the bribe.[53] In determining whether the action is legal in the foreign country, one should look at the "*payment*, not the payer."[54] Thus, the payer of a bribe in Azerbaijan who was exonerated based on his claim that he was extorted could not use this defense that his actions were legal; regardless of his exoneration, the *payment* was still illegal in Azerbaijan.[55] This defense is not often successful because "[t]here is . . . no country with laws or regulations that authorize or permit bribery of public officials."[56]

D. Enforcement and Penalties

The DOJ can enforce the anti-bribery provisions through criminal punishment for any party.[57] Criminal punishment can come in the form of a fine of up to $2 million for a domestic concern that is an organization or for "any person" when it refers to a foreign organization or entity,[58] or a fine of up to $100,000 for any individual.[59] Under the Alternative Fines Act, the DOJ can pursue a fine of up to double the benefit that was sought by the bribe.[60] Employers and principals cannot pay any fines levied against individuals.[61] Also, individuals can be subject to imprisonment of up to five years.[62] The DOJ and Securities Exchange Commission can also impose civil liability on any party for up to $10,000 and other fines of up to $500,000.[63] The Attorney General has injunctive authority to prevent a violation from happening.[64]

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[53] §§ 7dd-1 to -3.

[54] United States v. Kozeny, 582 F. Supp. 2d 535, 539 (S.D.N.Y. 2008).

[55] *Id.* at 539-41.

[56] Richard M. Strassberg & Kyle A. Wombolt, *Beware Foreign Corrupt Practices Act Traps*, N.Y. L.J., July 21, 2008, at n.2.

[57] *See, e.g.*, Lay-Person's Guide to the FCPA, *supra* note 1, at 5.

[58] §§ 78dd-2(g)(1)(A), dd-3(e)(1)(A).

[59] §§ 78dd-2(g)(2)(A), dd-3(e)(2)(A).

[60] *See, e.g.*, Lay-Person's Guide to the FCPA, *supra* note 1, at 5

[61] *Id.*

[62] §§ 78dd-2(g)(2)(A), dd-3(e)(2)(A).

[63] Lay-Person's Guide to the FCPA, *supra* note 1, at 5.

[64] §§ 78dd-2(d)(1), dd-3(d)(1).

III. INTERNATIONAL PROJECT FINANCE

Project finance, though defined in many ways, usually refers to

> a nonrecourse or limited recourse financing structure in which debt, equity, and credit enhancement are combined for the construction and operation, or the refinancing, of a particular facility in a capital-intensive industry, in which lenders based credit appraisals on the projected revenues from the operation of the facility, rather than the general assets or the credit of the sponsor of the facility, and rely on the assets of the facility, including any revenue-producing contracts and other cash flow generated by the facility, as collateral for the debt.[65]

Project finance in the cross-border context is very complex and involves a large amount of participants and planning. An essential party is the project sponsor, which comprises one or more companies or entities that will develop and seek the benefit from the project.[66] Before the project reaches its development stage, the project sponsor will carry out a number of measures, including an extensive feasibility study of the technical and financial potential of the project[67] and a development agreement with any other interested sponsors.[68] If the project sponsor wishes to continue with the project, it will decide on the business vehicle that will carry out the project.[69] The vehicle, often a special-purpose vehicle created for the project (the "project company"),[70] will participate in any required bidding processes in the host country.[71]

The project company will need to acquire the various forms of government approval required for the project such as permits and licenses,[72] and negotiate contracts with the host gov-

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[65] SCOTT L. HOFFMAN, THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE 4 (3d ed. 2008). Nonrecourse is where the project sponsor is completely free of debts or liabilities for the project, while the more frequently used limited recourse is where there are limited debts and obligations. *Id.* at 5.

[66] *Id.* at 71.

[67] *Id.* at 84.

[68] *Id.*

[69] *Id.* at 85.

[70] *Id.* at 71.

[71] *Id.* at 37.

[72] *See, e.g.*, ANDREW FIGHT, INTRODUCTION TO PROJECT FINANCE 11 (2006).

ernment.[73] These contracts include, among others, concession agreements that bestow the right to carry out the project, build-own-transfer agreements under which the completed project transfers to the host at some future time, arbitration agreements for resolving any dispute with the government, and an assurance that the government will not expropriate the project.[74] Many risks are present in all of these processes, which mean that parties must recognize and allocate risks to those who can best mitigate the risks' potential impact on the project.[75]

Each project will likely have some combination of debt (created by a loan between one or more private or government institutions), collateral security (which can come as assignments of revenue from the project or contractual rights), and equity.[76] To acquire a loan, the borrowing entity—usually the project company—will usually contract its debt with a variety of lenders.[77] Commercial lenders such as banks, international agencies such as the World Bank, bilateral agencies such as the U.S. Export-Import Bank, and bondholders who can buy debt in bond form are all lenders that can finance a project.[78] The lender will make the loan based on the debtor's credit ratings as reported by rating agencies.[79]

Once funding is available, the project will require a number contracts to construct,[80] supply,[81] insure,[82] or otherwise assist the development, completion, and operation of the project.[83] These extensive negotiations are complex, primarily because "[e]ach participant brings into the project what other participants are lacking: financing ability, political authority, technical know-how, procurement of supplies, human resources, etc.," and contracts are an effective method of allocating the

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[73] *See, e.g.*, HOFFMAN, *supra* note 65, at 37.
[74] *Id.* at 145–48.
[75] *Id.* at 27–28.
[76] *Id.* at 8.
[77] *Id.* at 71.
[78] *Id.* at 72–73.
[79] *Id.* at 73.
[80] FIGHT, *supra* note 72, at 11.
[81] *Id.*
[82] HOFFMAN, *supra* note 65, at 77.
[83] FIGHT, *supra* note 72, at 11.

expertise and comparative advantage of each party.[84] These contracts include many key agreements, including *force majeure* clauses with lenders and constructors for assurances in case of unforeseen disasters,[85] cost overrun agreements to identify who will pay for excess costs,[86] and covenants to ensure that the project is constructed and operated as planned.[87]

Following this development stage, suppliers, output purchasers, and contractors arrive, which necessitates more contracts and guarantees.[88] Risks increase during the construction phase because the project company is spending money while the project is not yet profitable.[89] These risks can be eased through construction contracts and performance promises.[90] Similarly, contracts are key to the operation of the project when construction is over; agreements with the operator[91] and others will handle unanticipated low revenues or political problems[92] and control the flow of inputs necessary to the project's operation, such as fuel.[93]

IV. IDENTIFYING FCPA PROBLEMS AND SOLUTIONS IN INTERNATIONAL PROJECT FINANCE

Project finance parties must understand the FCPA and its implications for projects. The host government is an absolutely necessary part of any project, which means that "project development is particularly susceptible to temptations of bribery."[94] Indeed, whenever a foreign official is involved with the project, the risk of a FCPA violation exists. Furthermore, the number of parties means that there are more people that could violate the FCPA. This liability can be deadly: "[i]n some instances,

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[84] Christophe Dugue, *Dispute Resolution in International Project Finance Transactions*, 24 FORDHAM INT'L L.J. 1064, 1064 (2001).
[85] HOFFMAN, *supra* note 65, at 184, 326.
[86] *Id.* at 350.
[87] *Id.* at 77.
[88] *Id.* at 73–74.
[89] FIGHT, *supra* note 72, at 11.
[90] *Id.*
[91] HOFFMAN, *supra* note 67, at 74. The operator operates, maintains, and makes any repairs on the project.
[92] FIGHT, *supra* note 72, at 11.
[93] HOFFMAN, *supra* note 65, at 188–89.
[94] *Id.* at 397.

the constraints imposed by the FCPA may cause a US business to delay or restructure a project, seek a different business partner, decline work, or, in very rare circumstances, exit a geography."[95] Thus, parties must take many monitoring steps through a project to prevent violations of the law.

A. Risk Assessment

Throughout the life of a project, the parties will often assess and attempt to mitigate whatever risks exist.[96] A project will inevitably face many risks, such as risk of expropriation by the government of the country where the project occurs,[97] risk of drop in demand of the finished project by the consumers in the project country,[98] and risk of cost overruns.[99] The risk structuring process is vital to a project, and is where "risks are identified, analyzed, quantified, mitigated, and allocated so that no individual risk threatens [any part of the project]."[100] This allocation can occur through contracts with those that are best able to prevent problems.[101]

One risk that parties in a project should not overlook is the risk of an FCPA violation, which is present whenever a participant must work with foreign officials. Any project requires a great deal of contact with the local government to acquire essential licenses, permits, and agreements, any of which could involve an improper payment to facilitate the approval.[102] A main problem for projects is that developing countries—precisely where many opportunities exist due to the lack of infrastructure and need for projects—often have cultures where bribery is necessary to do business.[103] Regardless of the host culture, any project that involves FCPA-liable parties is at risk of liability.

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95 MAYER BROWN LLP, *supra* note 31, at 7.

96 *Id.* at 28–29.

97 PETER K. NEVITT & FRANK J. FABOZZI, PROJECT FINANCING 20 (7th ed. 2000).

98 David Blumental, *Sources of Funds and Risk Management for International Energy Projects*, 16 BERKELEY J. INT'L L. 267, 272 (1998).

99 *Id.*

100 HOFFMAN, *supra* note 65, at 27.

101 *Id.* at 27–28.

102 *See infra* Part IV.E.

103 *See, e.g.*, NEVITT & FABOZZI, *supra* note 97, at 27.

Therefore, assessment of FCPA risk in the host country is vital. Using the risk structuring process,[104] project participants should identify, analyze, quantify, mitigate, and allocate the risk of FCPA violations by looking at data, indices, or other information about corruption in the country where the project will occur. Some suggest using Transparency International's Corruption Perceptions Index to perform this analysis.[105] The Corruption Perceptions Index for 2009 lists among the most corrupt countries in the world, for example, multiple oil-rich countries where projects could or do occur: Chad, Equatorial Guinea, Angola, and Venezuela.[106] This, or any other form of measurement, is an important aspect of assessing FCPA liability risk in a project. If a project sponsor knows that doing business in a country is impossible without bribing the officials, or if companies from countries where anti-bribery provisions do not exist will take advantage of the parties' FCPA compliance,[107] the sponsor might see the bribery risk as too great to take on the project. When the project begins, the risks of bribery still exist. As the risk structure analysis says, parties should allocate risks to those who are in the best position to handle it.[108] A number of project participants can endanger the project through FCPA violations, which means that parties should allocate the risk of breaking this law to everyone involved in order to protect the project.

Not only is the risk of FCPA violations its own risk that project parties should consider, FCPA violations play important roles in other aspects of the risk structure process. The stages of a project—development, design engineering and construction, start-up, and operation—all have individual risks[109] that FCPA problems can exacerbate. For example, in the development phase, there is the risk that the government will not give necessary approvals.[110] One might try to compensate for

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[104] HOFFMAN, *supra* note 65, at 27.

[105] *See, e.g.*, MAYER BROWN LLP, *supra* note 31, at 11.

[106] *Corruption Perceptions Index 2009,* TRANSPARENCY INT'L, http://www.transparency.org/policy_research/surveys_indices/cpi/2009 (last visited Feb. 20, 2012).

[107] *See, e.g.*, NEVITT & FABOZZI, *supra* note 97, at 27.

[108] *See* HOFFMAN, *supra* note 65, at 27.

[109] *Id.* at 28.

[110] *Id.*

the risk of failure with a bribe, which creates the risk of FCPA liability. Throughout the project, parties must consider the risk that FCPA violation or compliance plays.

B. Working with Local Agents, Partners, and Counsel

To maneuver the regulations and laws of the host country and find local labor, business, and other necessary aspects to complete the project, it is "essential, as a matter of operational necessity" that the project enlist local agents.[111] Local agents and consultants can provide vital help to projects because they can use expertise and contacts to connect with important government officials, push through paperwork for required government approvals, and help the project parties become familiar with local businesses.[112] Local attorneys are helpful because of their knowledge of the local law[113] and can be very useful if they know important government officials.[114] Sometimes host governments require that projects have at least one local ownership partner, which makes working with locals obligatory in those countries.[115]

While their role is vital to a project, these local parties' actions can create FCPA liability for themselves and other project parties. The FCPA has jurisdiction over non-U.S. nationals and corporations or other business entities organized in a foreign country[116] as long as at least some action made toward violating the FCPA using some form of interstate commerce takes place within U.S. territory.[117] If the person negotiated a contract with the U.S. project sponsor via email, phone conversations, or fax, the person is subject to the FCPA.[118] Also, agents of issuers and domestic concerns are specifically subject to the FCPA.[119] Furthermore, issuer or domestic concern project par-

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[111] *Id.* at 397.

[112] TARUN, *supra* note 22, at 28.

[113] HOFFMAN, *supra* note 65, at 74.

[114] RONALD F. SULLIVAN, INTERNATIONAL PROJECT FINANCING § 2.02 (3d ed. 2009).

[115] *See, e.g.*, HOFFMAN, *supra* note 65, at 397.

[116] 15 U.S.C. § 78dd-3(f) (1).

[117] *See, e.g.*, Schroth, *supra* note 37, at 602.

[118] § 78dd-2(h)(5).

[119] §§ 78dd-1(a), 78dd-2(a) (emphasis added).

ties cannot offer, pay, promise a payment, or authorize a payment to any person who the issuer or domestic concern knows will use all or part of the money or item to commit a prohibited action with a foreign official.[120] To establish corrupt intent for a third party's actions, the DOJ can show an issuer's or domestic concern's "willful blindness" of violation warning signs and purposeful avoidance of learning about violations.[121]

Liability for the actions of a third party agent is not a remote possibility. The large majority of FCPA enforcement comes from actions of foreign third parties.[122] This fact should put project sponsors and companies on guard to prevent prohibited actions by local agents, consultants, and counsel. While problems are difficult to foresee, a large amount of due diligence can help project parties make smart decisions on local help. A project sponsor will wisely select a local agent based on objective criteria such as the agent's competence to accomplish the designed purpose of the agreement.[123] The sponsor should perform an extensive verification on the local's reputation based on business references, information from government or private institutions in the host country, interviews with the local,[124] and even through reports a special investigator can find out.[125] One way to avoid liability is to not hire a local with a checkered past. The parties should document these due diligence efforts,[126] which can help them show that they tried to learn of FCPA problems.

The project sponsor can also take steps toward ensuring FCPA compliance through contractual representations, covenants, and termination clauses. The contract between the parties can include a representation that establishes the local's familiarity with the FCPA, which will teach the person about the importance of the FCPA and show that he or she knew about the law.[127] Also, the contract can include a representation stating that none of the employees of the agent, consult-

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[120] *Id.*
[121] Brown & Chilton, *supra* note 40, at 18.
[122] *Id.*
[123] TARUN, *supra* note 22, at 23.
[124] *Id.* at 24.
[125] HOFFMAN, *supra* note 65, at 397.
[126] Queler, *supra* note 52.
[127] HOFFMAN, *supra* note 65, at 397.

ant, or counsel is a government employee,[128] which can exclude liability that would arise from any payments to a foreign official.[129] The agreement can also include covenants through which the local agrees to not perform any of the actions prohibited by the FCPA.[130] Another covenant that will help ensure compliance with the FCPA is a requirement that the local make all payments through check or legitimate electronic transfer from a bank.[131] Specifically, the agreement can stipulate that the agreement is voided and terminated upon performance of any action prohibited by the FCPA and that the project sponsor does not have to pay.[132] Furthermore, a contract can provide the project sponsor with a right of action to recuperate the funds that the agent or other local used in committing a prohibited act.[133] Presenting these contractual obligations to a local can help measure the local's willingness to comply with the FCPA; if the local refuses to sign, it could be a warning sign of FCPA danger.[134] More importantly, these safeguards will help prevent FCPA liability based on actions of locals.

Contractual agreements alone, however, are not enough to prevent liability.[135] The project parties can seek additional protection through close monitoring and supervision of FCPA-related actions; telling the local actor once is not enough, and continuous inspection of the local's activities is essential.[136] Project sponsors should actively implement a compliance program that will prevent FCPA violations, such as regularly scheduled training programs in the local language for agents and other local actors.[137] When any of the project parties becomes aware of potential violations, it should conduct an extensive investigation to identify violations, improve the effective-

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[128] *Id.*

[129] *See supra* notes 39–43 and accompanying text.

[130] DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT 50 (2d ed. 1999).

[131] HOFFMAN, *supra* note 65, at 397.

[132] CRUVER, *supra* note 130, at 50.

[133] *Id.*

[134] TARUN, *supra* note 22, at 25.

[135] *See, e.g.*, HOFFMAN, *supra* note 65, at 397.

[136] *See, e.g.*, *id.*

[137] Queler, *supra* note 52.

ness of the compliance program,[138] and prepare for a DOJ investigation.[139] A sponsor must pay attention to the warning signs, which could be family relationships between the local and foreign officials, a local's insistence that he or she be paid in cash, requests by the local for false paperwork to be produced, or a general culture of bribery in the country.[140] By performing extensive due diligence on the potential agent's reputation and background, requiring contractual guarantees, and closely monitoring the agent's work, a project sponsor can protect itself from FCPA liability arising from the actions of local agents, consultants, and lawyers.

C. Choosing and Using a Project Vehicle

An important decision the project sponsor makes is what form the project company will take on to carry out the project.[141] This decision will depend on factors that are specific to each project, including the desired ratio of debt and equity, tax and other laws of the country where the project will occur, how much control any of the parties wishes to exert on the project company, what the lender prefers, and so forth.[142] Often, a parent company wants to be separated from the project in order to avoid liability and tax complications, which often results in a special-purpose vehicle ("SPV") created only for the project.[143] The project parties can thus remove risk unrelated to the project, but separateness in documentation and behavior should be visible in the contracting process for the SPV to remain its separate status.[144] While a "single-purpose corporate subsidiary" is common due to its limited liability, the SPV can be another entity, such as a general partnership, limited partnership, limited liability company, joint venture, or a combination of vehicles.[145] This project company is often incorporated

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[138] *See, e.g.*, MAYER BROWN LLP, *supra* note 31, at 5.
[139] *See, e.g.*, TARUN, *supra* note 22, at 30.
[140] *Id.* at 25–26.
[141] *See* HOFFMAN, *supra* note 65, at 83.
[142] *Id.* at 85–86.
[143] *Id.*
[144] *Id.*
[145] *Id.* at 87–92.

in the host country.[146]

Because project parties can be responsible for a surprising amount of FCPA liability for the actions of SPVs, it is important to analyze this liability when the project sponsor chooses a vehicle. After choosing a vehicle, project sponsors must understand how to use the SPV to minimize the possibility of liability. An issuer, domestic concern, or "any person" can be liable for using some form of interstate commerce to make, promise, authorize, or offer a bribe to "any person" who he or she knows will use the item of value in furtherance of a prohibited action.[147] More specifically, a parent (here the project sponsor) can be liable for a foreign-incorporated subsidiary's (here the SPV's) actions if it "in some way directs, authorizes, or knowingly acquiesces in the prohibited conduct."[148] The DOJ must only establish that the parent had knowledge of the wrongdoing.[149] A parent cannot use its subsidiary as an intermediary for making bribes.[150] The foreign-incorporated SPV itself is not subject to the FCPA,[151] even if the parent is,[152] unless it uses some form of interstate commerce to take a step toward breaking the FCPA.[153] The parent will not be subject to liability if the foreign subsidiary performs an FCPA-prohibited action without parent involvement or knowledge.[154]

The level of control that the parent exerts on the subsidiary can help establish knowledge because a controlling parent is more likely to know about violations.[155] Some common law agency factors that can establish control are common directors or officers, payment by the parent of the subsidiary's salaries, a high level of involvement in the subsidiary's daily activities, ef-

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146 *See, e.g.*, *id.* at 87.

147 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

148 STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 65 (2d ed. 2010); *see*, *e.g.*, Dworsky, *supra* note 21, at 46.

149 *See supra* notes 17–23 and accompanying text for more on knowledge.

150 Dep't of Justice, *BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine*, JUSTICE NEWS (Mar. 2, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-209.html.

151 *See, e.g.*, CRUVER, *supra* note 130, at 38.

152 *See, e.g.*, DEMING, *supra* note 148, at 65.

153 15 U.S.C. § 78dd-3(a).

154 *See, e.g.*, CRUVER, *supra* note 130, at 38.

155 DEMING, *supra* note 148, at 65.

fective control of the subsidiary, whether the subsidiary only does business with the parent, and so forth.[156] If the parent does not control the subsidiary, liability is not as likely but could be found if the parent has considerable influence in the subsidiary, representation on its board, or a significant financial stake and does not make efforts to prevent the actions.[157]

The level of control a partner exerts is also an important aspect in determining liability based on the actions of joint ventures, another type of vehicle that some projects use. Where the joint venture majority partner is subject to the FCPA, liability could exist when another partner commits a prohibited action because the majority partner will be presumed to have had control over the venture.[158] If the minority partner is an official in the host government or a government-owned entity, any payment could be considered improper, and liability exists depending on the majority partner's knowledge.[159] For any foreign partner that has already made an FCPA-prohibited action, a payment by the U.S. partner might be considered a reimbursement and liability could exist if the U.S. partner has the requisite knowledge.[160] Where the minority partner is subject to the FCPA, it still can be liable for prohibited payments even though it does not exercise the same control as a majority partner.[161]

As is usually the case with FCPA liability, however, careful and extensive due diligence can protect parties as they use special vehicles to complete a project.[162] Controlling parents can train their subsidiaries on the FCPA, have them sign statements of understanding that show the importance of compliance, and give guidelines on keeping the FCPA in mind when hiring employees and using agents.[163] A noncontrolling parent can also file a formal protest, make demands that the subsidiary stop the action, document its opposition, and consider end-

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[156] *Id.* at 66.
[157] *Id.* at 67.
[158] CRUVER, *supra* note 130, at 39.
[159] *See, e.g.*, DEMING, *supra* note 148, at 34.
[160] *Id.* at 65.
[161] CRUVER, *supra* note 130, at 41.
[162] *See* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 39 (1998).
[163] *Id.*

ing the relationship if the improper behavior does not cease.[164] For joint venture vehicles, the partners that are subject to the FCPA should review the contacts of the joint venture partner.[165] A wise joint venture partner will insert FCPA compliance into the agreement and perform due diligence on the reputation of the partner.[166] Asking how funds are spent, inquiring about FCPA violations, and demanding access to the financial records of the partnership are useful forms of due diligence to ensure that the partnership is complying and that there will be no liability.[167]

Project sponsors should consider the FCPA as they choose a vehicle and be aware of what liability could arise from this relationship. Subsidiaries and joint ventures can be particularly problematic. Regardless of what project vehicle is chosen, it is essential that vehicles know about the FCPA and comply with it to prevent liability for project sponsors.

D. Liability from Other Project Parties' Actions

Because of the extensive potential for vicarious liability under the FCPA, one might wonder whether a project party can be liable for the actions of project parties other than the project company. Can a commercial lender, for example, ever be liable for a local agent's improper payment or would a project sponsor be liable when the project operator pays a small bribe to have a government inspector look the other way? One of the problems with answering these questions, and a prevailing issue with FCPA compliance, is the lack of case law.[168] The majority of parties that come under DOJ investigation based on the anti-bribery provisions plead guilty or settle.[169] Thus, there is little case law, and even less in relation to project finance. Understanding how the DOJ enforces the FCPA, however, can help project participants understand how to avoid any problems that arise from the actions of others.

The statute specifically prohibits committing a prohibited

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[164] DEMING, *supra* note 148, at 67.
[165] TARUN, *supra* note 22, at 28.
[166] CRUVER, *supra* note 130, at 40–41.
[167] *Id.*
[168] *See, e.g.*, DEMING, *supra* note 148, at 4.
[169] *See, e.g.*, *id.*

action through a third party while knowing that the third party will perform the action.[170] Thus, obviously, if a lender is tired of delays and tells a contractor or operator to pay a bribe, the lender will be liable, however unlikely this situation seems. Furthermore, a lender is unlikely to be liable for a bribe that a debtor makes because seems far enough removed from the situation to be considered a principal or employer. A creditor can be considered a principal if there is enough control over the actions of the debtor,[171] and control can be a factor in determining vicarious liability.[172] It is nevertheless a stretch to hold the lender liable for FCPA violations without more control over the project.

As mentioned above, a project sponsor can be liable for the actions of a special-purpose subsidiary or joint venture.[173] Concerning the actions of the contractor or operator, a sponsor could be liable for actions where the sponsor had some control over these parties.[174] Similarly, a contractor can likely be held liable for the actions of the subcontractor.[175] For the project sponsor or any project party to be liable for the actions of a contractor, subcontractor, operator, or any other party will likely depend on the level of control and knowledge that the project sponsor had. These situations seem different from the relationship between the project sponsor and the project company because the contractor and operator are not subsidiaries or partners of the sponsor. Yet the project sponsor still might have some sort of control over these parties or knowledge as defined by the FCPA and enforced by the DOJ. Regardless of how probable or remote liability is for any of the project parties due to the actions of another party, the participants should protect themselves by making FCPA compliance a standard part of their contracts with each other.[176]

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[170] 15 U.S.C. §§ 78dd-1 to -3.
[171] *See, e.g.*, Jenson Farms v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981).
[172] *See supra* notes 157–159 and accompanying text.
[173] *See supra* Part IV.C.
[174] *See supra* notes 157–159 and accompanying text.
[175] TARUN, *supra* note 22, at 23.
[176] *See supra* notes 127–134 and accompanying text.

E. Working with the Host Government

Project finance requires a great deal of negotiation with and approvals from foreign governments. These requirements mean that parties to a project are often vulnerable to bribe solicitations, especially in countries where bribes are customary.[177] Throughout the course of a project, contact with the host government will come in many forms. A project will need to acquire licenses, authorizations, permits, and concessions.[178] These concessions include agreements that the government gives to the project company to "develop, construct, and operate the project,"[179] building permits,[180] and environmental permits for issues relating to waste water, electricity, oil, and air.[181] With environmental permits, and potentially with other areas, the regulations can come from the local, state or provincial, or federal government of the country.[182]

Often, host governments will sponsor a bidding process to determine which contractor should be able to carry out the project.[183] Also, the project sponsor or company will negotiate letters of intent,[184] memoranda of understanding,[185] concession agreements,[186] implementation agreements,[187] approval of political risk insurance,[188] preliminary agreements on important items that the government can provide such as enhanced infrastructure near the project,[189] waivers of sovereign immunities,[190] build-own-transfer agreements,[191] and arbitration agreements.[192] All of these negotiations that require collabora-

[177] *See, e.g.*, HOFFMAN, *supra* note 65, at 397.
[178] *See, e.g.*, *id.* at 74.
[179] *Id.* at 48.
[180] *See, e.g.*, SULLIVAN, *supra* note 114, § 4.03.
[181] *See, e.g.*, *id.*
[182] HOFFMAN, *supra* note 65, at 71.
[183] *See, e.g.*, *id.* at 140.
[184] *Id.* at 144.
[185] *Id.*
[186] *Id.* at 145.
[187] *Id.* at 147.
[188] HOFFMAN, *supra* note 65, at 157.
[189] *Id.* at 153.
[190] *Id.* at 158.
[191] *Id.* at 146.
[192] *Id.* at 162.

tion with government officials increase the susceptibility of a party to the project to make an improper payment.

Making payments to the government is unavoidable when acquiring approvals requires paying fees. The FCPA allows payments for routine governmental actions, which include services "ordinarily and commonly performed" by foreign officials.[193] It is often difficult to tell, however, whether a payment that a government official requires is a normal fee or a bribe. Project parties can protect themselves by focusing on the words and guidance of the statute to compare the fee and action with those the government ordinarily performs.[194] Furthermore, a party can protect itself by requiring that all payments to the government be approved by senior management or counsel before they happen.[195] Also, it is wise to require that payments be made to legitimate bank accounts in the host country, not banks in third countries unless in exceptional circumstances.[196] This was one source of trouble for Baker Hughes in its FCPA investigation; a wholly owned subsidiary paid over $4 million to "Consulting Firm A" located on the Isle of Man at the request of Kazakhstan's state oil company in return for no services from "Consulting Firm A."[197] Furthermore, payments should never be made in cash or to third parties.[198]

When a red flag arises here or in other FCPA-related project situations, any issuer or domestic concern can ask the DOJ for an opinion on whether the prospective behavior is legal.[199] The transaction must be real and not hypothetical, and the request usually comes before the requesting party accepts the deal.[200] The request must come from an issuer or domestic con-

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[193] 15 U.S.C. §§ 78dd-1(b), 78dd-1(f)(3)(A),78dd-2(b), 78dd-2(h)(4)(A), 78dd-3(b), 78dd-3(f)(4)(A).

[194] *See* § 78dd-1.

[195] Queler, *supra* note 52.

[196] TARUN, *supra* note 22, at 28.

[197] *See, e.g.*, *Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case*, DEP'T OF JUST. (Apr. 26, 2007), http://www.justice.gov/opa/pr/2007/April/07_crm_296.html.

[198] TARUN, *supra* note 22, at 28.

[199] Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80.1 (2010).

[200] § 80.3.

cern who is a party to the transaction,[201] and the opinion is not applicable to anyone who is not a party in the opinion request.[202] The request must be specific and include all of the information about the potential conduct that the DOJ needs to make an opinion, and the information must be accurate and truthful.[203] The DOJ will respond to a complete request within thirty days of receipt and can initiate an investigation if it wants to.[204] The written opinion signed by the Attorney General or a designee is a statement that the requesting party can rely on.[205] Thirty days might seem like a long time when a deal is pending, but protection against liability is worth the wait.

V. CONCLUSION

As Stuart Deming says, "the purpose and language of the FCPA appear to be straightforward in nature . . . [yet] [i]ts scope and means of application can be complex and lead to dramatically unexpected results."[206] This reality is especially true in the project finance setting because of the number of parties and variety of relationships between themselves and with the host government. While only a few of the risks are discussed here, the parties can use the same measures to protect themselves in any situation where FCPA liability is a possibility. Contractual guarantees, due diligence, proper training, and closely monitoring activities are necessary activities that can help a project avoid FCPA violations and liability. Most importantly, taking these active steps helps create a "culture of compliance"[207] within a project where a commandment that better avoids FCPA problems than "don't get caught" exists: don't make bribes.

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[201] § 80.4.
[202] § 80.5.
[203] § 80.6.
[204] § 80.7.
[205] § 80.9.
[206] DEMING, *supra* note 148, at 3.
[207] Brown, *supra* note 162, at 39.