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THE COOPERATION-AND-REMEDATION-CREDIT GAP IN FCPA JOINT VENTURES

Control for purposes of FCPA liability differs from control for purposes of cooperation and remediation. Companies entering into joint ventures face a potential “cooperation-and-remediation-credit gap” in which they may have sufficient ownership, control, or influence in a joint venture to incur liability under the FCPA as a factual and legal matter, yet lack adequate practical control to investigate, cooperate, and remediate to the degree necessary to maximize cooperation and remediation credit — or receive a declination in return for a voluntary self-disclosure — under DOJ policy criteria. The recent TIGO Guatemala resolution underscores that formal ownership rights do not always translate into practical access to documents, witnesses, communications, payment records, or controls and thus raises a second question to add to risk analysis: if misconduct occurs, does the joint venture structure give each partner enough practical control over the venture to pursue and maximize DOJ cooperation and remediation credit? This Article (1) identifies and explains the significance of the cooperation-and-remediation credit gap and (2) provides concrete recommendations for companies to overcome this gap, while recognizing the accompanying potential trade-offs, in the context of FCPA matters.

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I. INTRODUCTION

The Foreign Corrupt Practices Act (“FCPA”),¹ which prohibits the payment of bribes to foreign officials to obtain or retain business, has long caused companies engaged in joint ventures (“JVs”) to carefully analyze whether involvement in the JV exposes the company to potential FCPA liability. That analysis has grown increasingly sophisticated over the past two decades,

informed by landmark enforcement actions, DOJ guidance, and academic commentary. But a critical dimension has remained underexplored — what happens *after* misconduct surfaces, when the company must decide whether and how to investigate, self-report, cooperate with the government, and remediate effectively enough to capitalize upon incentives available under Department of Justice (“DOJ”) policies?

¹ 15 U.S.C. §§ 78dd-1–3 (2018) [hereinafter FCPA].

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