THE FOREIGN CORRUPT PRACTICES ACT IN MERGER AND ACQUISITION TRANSACTIONS: SUCCESSOR LIABILITY AND ITS CONSEQUENCES

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This Article traces the development of successor liability under the Foreign Corrupt Practices Act ("FCPA") by outlining the transition from corporate self-regulation to a harsher brand of private enforcement that poses significant challenges for transnational mergers and acquisitions ("M&A"). By holding innocent acquirers liable for the pre-acquisition FCPA violations of target entities, the U.S. Department of Justice and the Securities and Exchange Commission have created a regulatory environment that is dangerous to efficient corporate transactions. Successor liability for FCPA violations also risks undercutting public and private responses to corporate corruption. Firm transactional due diligence guidelines coupled with a regulatory safe harbor will restore efficiency to the cross-border M&A market while enhancing FCPA compliance.

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I.
Introduction

The Foreign Corrupt Practices Act ("FCPA")—a statute that prohibits the bribery of foreign government officials and establishes accounting requirements for covered entities[1]—

1. The FCPA contains an anti-bribery provision, as well as two accounting provisions: a books and records requirement, and an internal controls requirement. *See* Don Zarin, Doing Business Under the Foreign Corrupt Practices Act §§ 2:1–2:3 (2009). In brief, the anti-bribery provision makes it illegal for an issuer or a domestic concern "to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" a payment or offer to pay anything of value to a foreign official "for purposes of" influencing the official to obtain or retain business, or to direct business to any person. 15 U.S.C. §§ 78dd-1(a), -2(a) (2010). United States persons, including issuers organized under the laws of the U.S. and their officers and directors, are subject to the anti-bribery provision "irrespective of whether" any means and instrumentality of interstate commerce is used in furtherance of the bribe or offer. *Id.* § 78dd-2(i). The anti-bribery provision also applies to foreign entities and persons while present within the U.S. *Id.* § 78dd-3(a). The FCPA does not apply to facilitating payments, which are used to expedite routine government action. *Id.* § 78dd-1(b).
Under the FCPA, the "definition of foreign official is . . . quite broad and covers not only those holding public office but also local citizens affiliated with state-run or owned organizations (e.g., doctors at a state-run hospital or employees at a state-owned oil company)." Obiamaka P. Madubuko, *What You Don't Know Can Hurt You: FCPA Risks in Cross-Border M&A Deals*, 42 Sec. Reg. & L. Rep. 589, 589 (2010).

An "issuer" includes any company that registers securities under Section 12 of the Securities Exchange Act of 1934, or that files reports under Section 15(d). *See* F. Joseph Warin et al., *Nine Lessons of 2009: The Year-in-Review of Foreign Corrupt Practices Act Enforcement*, 38 Sec. Reg. L.J. 19, 20 (2010). A "domestic concern" includes a U.S. citizen, national, or resident, or a business entity with its principal place of business in the U.S., or which is organized under the laws of a U.S. state or territory. 15 U.S.C. § 78dd-2(h)(1).

has, by any metric, "come of age" in the last several years.[2] After spending more than two decades at the periphery of enforcement agencies' attention, the U.S. Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") have in recent years breathed new life into the FCPA, transforming it from a seldom-used relic of the Watergate-era into "a main focus of concern for U.S. businesses."[3] The upturn in FCPA enforcement actions during the last several years has been massive, with the DOJ revealing in 2009 that it had "brought more FCPA prosecutions in the last five years than in all of the previous 26 years dating back to passage of the FCPA statute in 1977."[4] According to the DOJ, FCPA enforcement

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The books and records requirement mandates that issuers shall "[m]ake and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." *Id.* § 78m(b)(2)(A). The internal accounting controls provision requires issuers to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that transactions are authorized, are recorded as necessary to allow preparation of financial statements in accordance with generally accepted accounting standards, and that assets are accounted for accurately. *Id.* § 78m(b)(2)(B).

The FCPA was amended in 1988 and 1998. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001–5003, 102 Stat. 1107, 1415–1425 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to 78dd-3, 78ff (1988)); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff (1998)). Among other changes, the 1988 amendments added affirmative defenses for (1) reasonable and *bona fide* expenses for the promotion of products or services, or for the execution or performance of a contract and (2) conduct that is legal under the written laws of a foreign jurisdiction. *See* David E. Dworsky, *Foreign Corrupt Practices Act*, 46 AM. CRIM. L. REV. 671, 672, 684-85 (2009). For more information on the affirmative defenses provided by the 1988 amendments, see H. Lowell Brown, *The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act*, 12 INT'L TAX & BUS. L. 260, 280–81 (1994).

2. Justin F. Marceau, *A Little Less Conversation, a Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 309 (2007).

3. Laurence A. Urgenson et al., *New Bumps and Tolls Along the Road to FCPA Settlements*, BUS. CRIMES BULL. (Phila., Pa.), Nov. 2009, at 1.

4. U.S. DEP'T OF JUSTICE, THE ACCOMPLISHMENTS OF THE U.S. DEPARTMENT OF JUSTICE 2001-2009 31 (2009), *available at* http://www.fas.org/irp/agency/doj/2001-2009.pdf. FCPA enforcement was also a key SEC agenda in 2009. *See* Marc Dorfman et al., *Top Ten SEC Enforcement Developments of 2009*, 42 SEC. REG. & L. REP. 469, 479 (2010) (discussing 2009 FCPA enforcement trends at the SEC).

has become "second only to fighting terrorism in terms of priority,"[5] a sentiment underscored by the existence of 150 ongoing criminal investigations as of mid-2010.[6] Other commentators have claimed that U.S. law enforcement officials view FCPA compliance as "a national-security imperative."[7]

For its part, the SEC in 2009 introduced five new, specialized enforcement units, one of which is devoted solely to FCPA matters.[8] The Chief of the FCPA Unit remarked that the SEC "continues to be at the vanguard in its enforcement" of the statute, and that "[c]onsistent and aggressive enforcement by the SEC" will create incentives for the global regulation of corrupt practices.[9] By early 2010, the SEC and the DOJ had already resolved several high-profile FCPA cases against business entities.[10] As recent activity suggests, enforcement agencies'

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5. Urgenson et al., *supra* note 3, at 1.

6. Susan Kavanagh, *DOJ Official Discusses Federal Enforcement and Corporate Compliance*, SEC TODAY (CCH Wash. Serv. Bureau, Chi., Ill.), June 16, 2010, at 1 (discussing the remarks of Marc Litt, Assistant U.S. Attorney for the Southern District of New York, at a presentation to the Practising Law Institute 2010 Corporate Compliance and Ethics Institute, New York); *see also* Jacquelyn Lumb, *D.C. Bar Panelists Discuss Trends in FCPA Cases*, SEC TODAY (CCH Wash. Serv. Bureau, Chi., Ill.), Apr. 2, 2009, at 1 (reporting that the SEC "has several FCPA investigations in the pipeline.").

7. Michael Zeldin & Miriam Ratkovicova, *Money Laundering: A Changing Paradigm*, BUS. CRIMES BULL. (Phila., Pa.), Feb. 2010, at 3, 4 (discussing compliance with the FCPA and anti-money laundering laws).

8. Robert Khuzami, soon after assuming the role of Director of the SEC's Enforcement Division in 2009, announced that FCPA enforcement would be the focus of one of five specialized units to be launched by the SEC. *See* Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), *available at* http://www.sec.gov/news/speech/2009/spch0805 09rk.htm. He said, "[W]hile we have been active in this area, more needs to be done." *Id.*

9. Cheryl J. Scarboro, Chief of the Foreign Corrupt Practices Act Unit, U.S. Sec. & Exch. Comm'n, Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), *available at* http://www. sec.gov/news/speech/2010/spch 011 310newsconf.htm.

10. In March of 2010, BAE Systems plc ("BAE") pleaded guilty to conspiring to make false statements to the U.S. government regarding its FCPA compliance. *See* United States v. BAE Systems plc, No. 1:10-cr-00035-JBD, 2010 WL 2293412, at *1 (D.D.C. 2010). BAE was sentenced to pay a $400 million criminal fine. *See* Press Release, Dep't of Justice, BAE Systems plc Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), *available at* http://washingtondc.fbi.gov/dojpressrel/pressrel10/wfo030110. htm. Alcatel-Lucent, a telecommunications company based in Paris, an-

nounced in early 2010 that it had reached prospective settlement agreements with the DOJ and the SEC to resolve outstanding FCPA investigations. Alcatel-Lucent, Annual Report (Form 10-K), at 114 n.35 (Feb. 11, 2010). If finalized, Alcatel-Lucent would pay over $135 million in criminal fines and disgorgement to the DOJ and the SEC. *Id.* In March of 2010, it was revealed that German car company Daimler AG had agreed to pay $93.6 million in fines to the DOJ and $91.4 million in disgorgement to the SEC to resolve investigations into FCPA violations in numerous countries. *See* United States' Sent. Mem. at 14-15, United States v. Daimler AG, No. 1:10-cr-00063-RJL (D.D.C. 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/daimlerag-sent-memo.pdf; Press Release, Sec. & Exch. Comm'n, SEC Charges Daimler AG with Global Bribery (Apr. 1, 2010), *available at* http://www.sec.gov/news/press/2010/2010-51.htm. In late March 2010, Delaware-based Innospec Inc. pleaded guilty to FCPA violations related to kickbacks paid through the U.N. Oil for Food Program, as well as the bribery of other Iraqi officials. *See* Press Release, Dep't of Justice, Innospec Inc. Pleads Guilty to FCPA Charges and Defrauding the United Nations; Admits to Violating the U.S. Embargo Against Cuba (Mar. 18, 2010), *available at* http:// www.justice.gov/opa/pr/2010/March/10-crm-278.html. The plea agreement requires Innospec to pay a $14.1 million criminal fine and to retain an independent compliance monitor for at least three years. United States' Sent. Mem., United States v. Innospec Inc., No. 1:10-cr-00061-ESH (D.D.C. 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/innsopec-sentencing-memo.pdf. Innospec settled the SEC's civil claims based on the FCPA's anti-bribery, books and records, and internal control provisions by disgorging $11.2 million in profits. Final Judgment of Defendant Innospec Inc., at 15, SEC v. Innospec Inc., No. 1:10-cv-00448-RMC (D.D.C. 2010). On June 28, 2009, French company Technip S.A. agreed to pay a $240 million criminal penalty to resolve charges that it had employed agents to bribe Nigerian officials to secure liquefied natural gas contracts on Bonny Island, Nigeria, as part of what was called the TSKJ-Nigeria joint venture. Press Release, Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Fine (June 28, 2010), at 1, *available at* http://www.justice.gov/opa/pr/2010/June/10-crm-751.html. The SEC brought a complaint against Technip for the same conduct, alleging violations of all three prongs of the FCPA, resulting in a settlement of $98 million in disgorgement and prejudgment interest. SEC Charges Technip with Foreign Bribery and Related Accounting Violations, Litigation Release No. 21578, 2010 SEC LEXIS 2120; *see also* Complaint, SEC v. Technip, No. 4:10-cv-02289 (S.D. Tex. 2010), *available at* http://www.sec.gov/litigation/complaints/2010/comp-pr2010-110.pdf. Soon after, on July 7, 2010, ENI S.p.A. and its former subsidiary, Snamprogetti Netherlands B.V. ("Snamprogetti"), entered into a $125 million settlement with the SEC for FCPA allegations relating to Snamprogetti's participation in the TSKJ-Nigeria joint venture. SEC v. ENI, S.p.A. & Snamprogetti Netherlands, Litigation. Release No. 21588, 2010 SEC LEXIS 2204 (July 7, 2010). Snamprogetti also entered into a deferred prosecution agreement with the DOJ, requiring it to pay a $240 million fine. Deferred Prosecution Agreement ¶ 10, United States v. Snamprogetti Netherlands B.V., No. 4:10-

increased focus on FCPA enforcement will become even sharper in the years to come.[11]

One area of FCPA enforcement that began to draw considerable attention from the DOJ and the SEC in the years leading up to the 2008 credit crisis[12] is that of corporate

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cr-00460, (S.D. Tex. 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/07-07-10snamprogetti-dpa.pdf

11. *See* Gibson, Dunn & Crutcher LLP, *2010 Mid-Year FCPA Update* (Gibson, Dunn & Crutcher LLP Publications, Wash., D.C.), July 8, 2010, at 2, *available at* http://www.gibsondunn.com/publications/pages/2010Mid-YearFCP AUpdate.aspx (providing several reasons why "it is clear that 2010 will go down as yet another landmark year for FCPA enforcement."); *see also* Warin et al., *supra* note 1, at 40-41 ("With the creation of a unit dedicated exclusively to FCPA inquiries, streamlined investigative processes, and new tools designed to foster cooperation and fashion creative resolutions, the pace of FCPA enforcement at the SEC is unlikely to slow in 2010."); Hughes Hubbard & Reed LLP, *FCPA/Anti-Bribery Mid-Year Alert 2010* (Hughes Hubbard & Reed LLP, Wash., D.C.), 2010, at 1, *available at* http://www.hugheshubbard.com/files/upload/2010%20mid-year%20fcpa%20alert.pdf ("Despite the change in Administrations, and perhaps the expectations of some, FCPA enforcement remains a high priority for the United States government under President Obama."); Shearman & Sterling LLP, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES OF FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, (Shearman & Sterling LLP, Wash., D.C.), Mar. 4, 2010, at i, *available at* http://shearman.symplicity.com/files/03f/03f164bc0bd3d772e53eff9d9cbba048.pdf [hereinafter Shearman & Sterling LLP, FCPA DIGEST 2010] ("Senior DOJ and SEC officials at the Obama Administration have repeatedly promised a robust program of [FCPA] enforcement").

12. The fallout from the credit crunch did not constrain FCPA enforcement, and it has been argued that "[t]he current economic crisis will spawn more crimes under the Foreign Corrupt Practices Act in the years ahead as governments across the world pump huge amounts of money into their economies to keep industries alive." Yin Wilczek, *Government Actions in Economic Turmoil Will Create FCPA Issues, DOJ Official Says*, 41 SEC. REG. & L. REP. 1667, 1667 (2009). At a recent American Bar Association panel, Mark Mendelsohn, deputy chief of the DOJ's Criminal Division, was paraphrased as claiming that "in many countries, government spending is not subject to stringent controls, and the kind of projects created by stimulus programs often are fraught with corruption." *Id. See also* Nicholas Rummell, *Cash Crunch Could Result in More Corruption Cases,* FIN. WEEK (Oct. 7, 2008), http://www.financialweek.com/apps/pbcs.dll/article?AID=/20081007/REG/810079983/1036 ("Although the market troubles have put a drag on corporate dealmaking, don't expect federal authorities to slow down in their pursuit of bribery cases."); Thomas O. Gorman, *Trends in SEC Enforcement 2009*, 41 SEC. REG. & L. REP. 1255, 1255 (2009) (At the SEC, FCPA enforcement was a "[p]rimary area of emphasis in 2008 which can be expected to give direction to future enforcement efforts.").

merger and acquisition ("M&A") transactions. In 2009, "more than one-third of the corporate FCPA enforcement actions . . . implicate[d] successor liability issues" arising from M&A deals.[13] This focus remained steady throughout 2010, with the Chief of the SEC's newly-founded FCPA Unit announcing in a civil case against General Electric Company ("GE") that, '"corporate acquisitions do not provide GE immunity from FCPA enforcement"' for the conduct of subsidiaries it acquired years after the alleged violations.[14]

Despite these developments in enforcement, the more interesting effect of successor liability under the FCPA may lie not in the actions of regulatory agencies, but rather the responses of the private sector. Responding to the enhanced risk of inadvertently purchasing enforcement actions, would-be acquirers and parties to mergers[15] often invest significant time and resources into FCPA due diligence,[16] which often precedes disclosures of violations to enforcement agencies.

The DOJ and the SEC have encouraged business entities to engage in FCPA due diligence and voluntary disclosure, which provide enforcement agencies with a valuable enhancement to the self-regulatory corporate governance traditionally advanced through the FCPA.[17] Effective M&A due diligence is

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13. Warin et al., *supra* note 1, at 41.

14. Press Release, Cheryl J. Scarboro & Tracy L. Price, Sec. & Exch. Comm'n, SEC Charges Gen. Elec. and Two Subsidiaries with FCPA Violations (July 27, 2010), *available at* http://www.sec.gov/news/press/2010/2010-133.htm. *See also* SEC v. Gen. Elec. Co., et al., No. 1:10-cv-01258 (D.D.C. 2010) discussed *infra* Section V.D.

15. This Article often uses the term "acquirer" to describe a business entity that purchases or takes control of other entities or assets. However, it should be stressed that the topics discussed in this Article, including successor liability under the FCPA and pre-transactional FCPA due diligence, apply with equal force to merger counterparties as to "acquirers." *See* SCOTT MOELLER & CHRIS BRADY, INTELLIGENT M&A 142 (2007) ("In a merger situation where the parties are 'equals,' both companies should do [full due] diligence on each other.").

16. *See, e.g.*, Rebekah J. Poston et al., *FCPA Due Diligence in Acquisitions*, 43 REV. OF SEC. & COMMODITIES REG. 13, 13 (2010) ("FCPA due diligence has taken on added importance in the mergers and acquisitions area as a result of the increased enforcement and prosecutions of FCPA violators.").

17. *See* Harold M. Williams, Chairman, U.S. Sec. & Exch. Comm'n, Implementation of the Foreign Corrupt Practices Act: An Intersection of Law and Management, Address Before the American Bar Association Section of Business, Banking and Corporation Law (Aug. 14, 1979), at 19, *available at*

an arms-length process intended to uncover risks and remove uncertainty from a transaction.[18] This dynamic is beneficial in M&A transactions, as it allows parties to make rational strategic and pricing decisions.[19] But in the FCPA context, the DOJ and the SEC have taken the position that an acquirer's failure to uncover a target's pre-acquisition FCPA violations may subject the acquirer to civil or even criminal liability for those violations.[20] While the FCPA may have been designed to encourage *self-regulation*, enforcement agencies' newfound emphasis on successor liability in M&A transactions represents a distinct form of *private enforcement* infused with new costs and complexities.

This Article examines successor liability within the general framework of corporate self-regulation under the FCPA. Business entities possess unparalleled knowledge of and access to their own compliance and management systems, and are optimally situated to uncover and respond to FCPA risks within their own organizations—which is a key factor driving the traditional internal investigation and voluntary disclosure regime that for years has characterized self-regulation under the FCPA. Successor liability for FCPA violations clashes with this history, as M&A transactions introduce new entities with oppositional interests and dissimilar knowledge—thus fracturing the cohesive self-regulation often present within a single company or a group of commonly-owned or related companies.

For entities facing FCPA risks, successor liability has replaced traditional self-regulation with a far harsher brand of private enforcement that transfers, under risk of penalty, the costs of detection and disclosure onto innocent, would-be ac-

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http://www.sec.gov/news/speech/1979/081479williams.pdf ("[I]n my view, the objective of the [FCPA] is to *reduce* the need to invoke the processes of the federal bureaucracy by making clear that primary responsibility for the integrity of corporate controls rests on management and the board of directors.").

18. *See* ALEXANDRA REED LAJOUX & CHARLES M. ELSON, THE ART OF M&A DUE DILIGENCE 5 (2000) ("The basic function of M&A due diligence . . . is to assess the benefits and the liabilities of a proposed acquisition by inquiring into all relevant aspects of the past, present, and predictable future of the business to be purchased. Those making this assessment should focus on risk.").

19. *See id.*

20. *See* discussion *infra* Section VI.

quirers and merger counterparties. This Article discusses several potential consequences resulting from this arrangement, including increased transaction costs for M&A deals (particularly cross-border), the possibility that wealth-maximizing or reformative transactions will be chilled by successor liability concerns, the risk of premature or unhelpful disclosures to enforcement agencies, and a potential reduction in the quality of information such agencies may receive.

II.
Historical Origins

A. *The SEC's Voluntary Disclosure Program*

Enforcement of the FCPA by the DOJ and the SEC[21] has always been tempered by resource-management concerns.[22] As a result, transferring detection costs to the private sector has been necessary because enforcement officials "cannot hope to ferret out every instance of wrongdoing," and, "even if [they] could, the government lacks the necessary resources to prosecute every such case."[23] A key result of these limitations is that enforcement costs have been shifted to the private sector through incentives designed to encourage behavior that is desirable to enforcement agencies. This approach to cost-shifting in the context of FCPA enforcement predates the stat-

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21. The DOJ "is responsible for all criminal enforcement [of the FCPA] and for civil enforcement of the antibribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the antibribery provisions with respect to issuers." U.S. Dep't of Justice & U.S. Dep't of Commerce, Lay-Person's Guide to FCPA, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf. The FCPA's accounting provisions are generally enforced by the SEC. David E. Dworsky, *supra* note 1, at 678. For more discussion of the agencies' enforcement duties, see Andrea Dahms & Nicolas Mitchell, *Foreign Corrupt Practices Act*, 44 Am. Crim. L. Rev. 605, 619 (2007); *see also* Mary Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 Colum. L. Rev. 1084, 1087 n.15 (1979).

22. *See* Ethan S. Burger & Mary S. Holland, *Why the Private Sector is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 Fordham Int'l L.J. 45, 52-53 (2006) ("The low number of formal proceedings in the United States is not an entirely accurate indicator of the practical impact of the FCPA. Both the DOJ and the SEC have limited resources and thus are selective in their investigations and prosecutions.").

23. Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 Yale J. on Reg. 149, 171 (1990).

ute itself and first took hold through its predecessor initiative, the SEC's Voluntary Disclosure Program for questionable foreign payments (the "Program").

As a regulatory device forged directly by the Watergate scandal,[24] the origins of the SEC's Voluntary Disclosure Program have been discussed elsewhere at great length.[25] In short, the Program encouraged U.S. corporations that may have provided "questionable" payments to foreign officials to conduct internal investigations and make disclosures to the SEC. If a company voluntarily disclosed payments to the SEC, it "would not have to disclose the names of countries or officials, but could instead make a generic report on Form 8-K."[26] If a company failed to disclose and was later found to have made a questionable payment, it "would be required to make

24. As described in the SEC's 1976 Report to the Senate Banking, Housing and Urban Affairs Committee:

> In 1973, as a result of the work of the Office of the Special Prosecutor, several corporations and executive officers were charged with using corporate funds for illegal domestic political contributions. The Commission recognized that these activities involved matters of possible significance to public investors, the nondisclosure of which might entail violations of the federal securities laws . . . . The Commission's inquiry into the circumstances surrounding alleged illegal political campaign contributions revealed that violations of the federal securities laws had indeed occurred. The staff discovered falsifications of corporate financial records, designed to disguise or conceal the source and application of corporate funds misused for illegal purposes, as well as the existence of secret "slush funds" disbursed outside the normal financial accountability system. These secret funds were used for a number of purposes, including in some instances, questionable or illegal foreign payments.

U.S. SEC. & EXCH. COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 2, Submitted to the Senate Banking, Housing and Urban Affairs Committee (May 12, 1976) [hereinafter SEC, Report No. 353]. *See also* Charles R. McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 YALE L.J. 215, 215 (1976) ("Among the most far-reaching consequences of the Watergate inquiry have been the continuing disclosures of questionable domestic and foreign corporate payments.").

25. *See, e.g.*, Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 348-352 (1999).

26. John Sweeny, *The SEC Interpretive and Enforcement Program Under the FCPA*, 9 SYRACUSE J. INT'L L. & COM. 273, 275 (1982).

public disclosures, and complaints would be filed in court."[27] Companies considering voluntarily disclosing information prior to the conclusion of an internal investigation could request SEC guidance regarding such disclosures.[28] Further, boards of directors of companies participating in the Program were tasked with creating policy statements regarding illegal or questionable payments.[29]

In all, over 400 companies participated in the Voluntary Disclosure Program, and the SEC eventually brought enforcement actions against a "substantial number of firms" for "especially egregious" conduct or the failure to voluntarily disclose.[30] As the then-Director of the SEC Enforcement Division wrote years later, "[t]o put it mildly, the program was a huge success."[31]

The SEC's concern with questionable foreign payments was not primarily motivated by bribery as an independent matter, but rather the extent to which bribe payments poisoned corporate disclosures and, more broadly, U.S. capital markets.[32] The "questionable payments" that bothered the SEC were often disguised in corporate books and records, a practice which—while portending the FCPA's accounting provisions—was considered by the SEC as inconsistent with the disclosure requirements of the federal securities laws.[33] Growing

27. *Id.*

28. SEC, Report No. 353, *supra* note 24, at 4.

29. *Id.*

30. Russell B. Stevenson, Jr., *The SEC and Foreign Bribery*, 32 BUS. L. 53, 63 (1976).

31. Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 273 (1997).

32. *See* Sweeny, *supra* note 26, at 274 ("The SEC did not actively support the bribery provisions of the Foreign Corrupt Practices Act. Indeed, it's not entirely clear that they have any interest in prohibiting bribery per se. Their interest is making sure that disclosures are made to public investors . . . . ").

33. While the Securities Act, the Securities Exchange Act and related laws and regulations revealed a strong legislative commitment to "financial transparency for the benefit of investors . . . no provision had been made in any of this legislation for payments to foreign officials, much to the consternation of SEC officials called in to investigate potential violations of federal securities law during the Watergate crisis." During the Watergate-era, "[t]he SEC recognized that the general acceptance accorded by the US business community to the practice of overseas bribery challenged long accepted principles of ethical securities trading in the United States." William Woof &

awareness of foreign bribery as a separate point of interest had not yet solidified.

A central reason for creating the Voluntary Disclosure Program was the recognition that the resources of enforcement agencies alone were insufficient to provide the type of securities law compliance environment that the SEC desired. The SEC's 1976 Report to the Senate Banking, Housing and Urban Affairs Committee commented that "[t]he Commission, with its limited resources, must maximize its own effectiveness by constantly seeking to prompt the private sector's increased assumption of initiative and responsibility in dealing with problem areas we identify."[34] The resulting Voluntary Disclosure Program was intended to "encourage voluntary corporate disclosure of questionable or illegal foreign payments,"[35] as "the SEC staff could not, under its own steam, press all the necessary investigations to prompt conclusions."[36] Indeed, the Voluntary Disclosure Program was intended to manage the "severe burden" placed on the SEC's enforcement resources, and resulted in "a positive incentive policy almost by inadvertence."[37] The account of Stanley Sporkin, former federal judge and Director of the SEC Enforcement Division, is particularly helpful in explaining the development of the Voluntary Disclosure Program:

> The caseload mounted. We uncovered enough evidence to initiate formal actions against some of the nation's most prestigious corporations. The SEC was literally overrun with these cases, and its meager resources were tapped to the utmost. A creative solution became absolutely necessary. . . .

Wesley Cragg, *The U.S. Foreign Corrupt Practices Act: Ethics, Law and Self-Regulation*, *in* ETHICS CODES, CORPORATIONS AND THE CHALLENGE OF GLOBALIZATION 112, 119 (Wesley Cragg ed., 2005).

34. SEC, Report No. 353, *supra* note 24, at 10.

35. *Id.* at 3.

36. Lewis D. Lowenfels, *Questionable Corporate Payments and the Federal Securities Law*, 51 N.Y.U. L. REV. 1, 22 (1976).

37. John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1117 (1977) (explaining that the Voluntary Disclosure Program offered a carrot to the stick of "increasingly negative incentives, in the form of novel consent decrees.").

The solution that we developed was inspired by the spirit of the federal securities laws. The securities laws have long been a model for appropriate government regulation. They are largely statutes that mandate transparency. Full and fair disclosure is the general concept underpinning these laws. As part of its administration of the federal securities laws, the SEC relies heavily on voluntary private sector compliance. Thus, instead of requiring government auditors to examine the financial reports of public corporations, that responsibility has been delegated to the nation's Certified Public Accountants. With these concepts in mind, [Director of the Division of Corporation Finance] Mr. [Alan] Levenson, with some input from me and Commissioner Pollack, came up with the idea of a voluntary disclosure program.[38]

It was against this background that Congress passed the Foreign Corrupt Practices Act in 1977.

B. *Enactment of the FCPA*

The corporate corruption exposed during the Watergate-era investigations and through the Voluntary Disclosure Program provided fertile ground for a congressional response to foreign bribery.[39] Enacted in 1977,[40] the FCPA amended the

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38. Sporkin, *supra* note 31, at 272-73.

39. Homer Kripke, *The SEC, Corporate Governance, and the Real Issues*, 36 Bus. L. 173, 191 (1980) (arguing that the SEC "used the occasion of Congressional concern with the 'questionable payments' episodes to propose the accounting and internal control provisions" of the FCPA); Gary M. Elden & Mark S. Sableman, *Negligence Is Not Corruption: The Scienter Requirement of the Foreign Corrupt Practices Act*, 49 Geo. Wash. L. Rev. 819, 819 (1980) ("In response to Watergate era revelations that United States businesses were engaging in bribery abroad, Congress enacted the Foreign Corrupt Practices Act of 1977."); *see also The International and Anti-Bribery and Fair Competition Act of 1998: Hearing on H.R. 4353 Before the Subcomm. on Fin. and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 11-14 (1998) (statement of Paul V. Gerlach, Div. of Enforcement, U.S. Sec. & Exch. Comm'n) ("Under the [Voluntary Disclosure Program], over 400 United States companies, including 117 of the top Fortune 500 companies, admitted making questionable or illegal payments in excess of $300 million to foreign government officials . . . In response to these events, Congress enacted the Foreign Corrupt Practices Act of 1977."); *see also* Marceau, *supra* note 2, at 286 (explaining that following the SEC's Watergate-era investigations of questionable payments, "Congress held hearings to assess the severity of the bribery problem. . . Congress, perceiving this to be an epidemic, responded by passing the FCPA.").

Securities and Exchange Act of 1934 by adding books and records and internal control requirements to Section 13(b), and by adding Section 30A to proscribe covered persons or entities from "corruptly"[41] paying or offering to pay "anything of value" to foreign government officials for the purpose of obtaining or retaining business.[42]

Legislators were initially torn between mandatory disclosure or criminalization as the ideal response to foreign bribery.[43] The disclosure approach would have required companies to publicly disclose corrupt foreign payments under threat of criminal penalty.[44] It would have included "a systematic program of disclosure to the SEC of all overseas consultant payments."[45] There was legislative support for a broad disclosure regime that did not turn on materiality.[46] The theory behind disclosure was that "corporate management w[ould] be reluctant to engage in illegal or improper activities if it must inform the government or shareholders about those activities."[47]

The criminalization approach prevailed during congressional debates and came to define the anti-bribery prong of

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40. Congress amended the FCPA in 1988 and 1998. *See supra* note 1.

41. Congress intended the term "corruptly" to mean that the offer or payment springs from "an evil motive or purpose, an intent to wrongfully influence the recipient." H.R. REP. NO. 95-640, at 8 (1977); S. REP. NO. 95-114, at 10 (1977).

42. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 697 PLI/CORP 319, 351 (1990); *see also* LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 193 (5th ed. 2004) (discussing the FCPA's addition of Section 13(b)(2) to the Securities Exchange Act.).

43. *See, e.g.*, E.C. Lashbrooke, Jr., *The Foreign Corrupt Practices Act of 1977: A Unilateral Solution to an International Problem*, 12 CORNELL INT'L L.J. 227, 232 (1979); *see also* Timothy Atkeson, *The Foreign Corrupt Practices Act of 1977: An International Application of SEC's Corporate Governance Reforms*, 12 INT'L L. 703, 714-15 (1978).

44. *See* H.R. REP. NO. 95-640, at 6 (1977).

45. 122 CONG. REC. 12,099 (1976) (statement of William Proxmire).

46. *Id.*

47. McManis, *supra* note 24, at 226 (discussing corporate disclosure generally). *See also* Sporkin, *supra* note 31, at 274 ("Bribery needs secrecy in order to flourish. Thus, I theorized that requiring the disclosure of all bribes paid would, in effect, foreclose the activity.").

the FCPA.[48] While rendering corrupt payments or offers of payment to foreign officials illegal, the FCPA did not require that violations be disclosed to enforcement agencies.[49] Criminalization of foreign bribery prevailed "for pragmatic reasons," as it did not mandate reporting by covered entities, "would impose 'less of an enforcement burden on the government,' and would 'to a significant extent act as a self-enforcing, preventative mechanism.'"[50]

C. *Early FCPA Enforcement*

Enforcement of the FCPA by both the DOJ and the SEC began relatively slowly.[51] Despite the success of the Voluntary Disclosure Program,[52] "[t]he FCPA languished in obscurity for

48. *See, e.g.*, Atkeson, *supra* note 43, at 714 ("The argument that a criminalization approach was the most direct and effective way to declare U.S. public policy in this area and would involve less administrative effort and expense for both government and business than a reporting and disclosure system was ultimately decisive."). It should be noted, however, that a disclosure theme is not entirely absent from the FCPA, at least with respect to the accounting and internal controls provisions. *See, e.g.*, Linda Chatman Thomsen, Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks Before the Minority Corporate Counsel 2008 CLE Expo (Mar. 27, 2008), *available at* http://www.sec.gov/news/speech/2008/spch032708lct.htm ("The genius of the FCPA, if you will indulge the hyperbole, is that it is, like all of the federal securities laws, disclosure-based," and that "simply requiring companies to clearly and candidly describe what they are doing will cause them to decide to avoid certain problematic behavior.").

49. *See, e.g.*, ZARIN, *supra* note 1, at 10-11 ("There is no mandatory obligation to report a violation of the FCPA to the Department of Justice."); Lucinda A. Low et al., *The Uncertain Calculus of FCPA Voluntary Disclosures*, at 1-2 (Mar. 27, 2007), *available at* http://www.abanet.org/intlaw/spring07/World%20Bank%20Anticorruption%20Programs/Low%20-%20The%20Uncertain%20Calculus%20of%20FCPA%20Voluntary%20Disclosures.pdf [hereinafter Low et al., *Uncertain Calculus*] ("Nothing in the FCPA mandates disclosure of violations.").

50. Judith L. Roberts, *Revision of the Foreign Corrupt Practices Act by the 1988 Omnibus Trade Bill: Will It Reduce the Compliance Burdens and Anticompetitive Impact?*, 1989 BYU L. REV. 491, 493-94 (1989) (quoting S. REP. NO. 114, at 10 (1988)).

51. Samuel Porteous, *Foreign Corrupt Practices Act Issues in China*, *in* BUSINESS GUIDE TO BEIJING AND NORTH-EAST CHINA 2006-2007 274 (2006) (explaining that the SEC brought more enforcement actions under the Sarbanes-Oxley Act during its first three years than FCPA actions during that statute's first twenty-five years).

52. *See* Sporkin, *supra* note 31, at 273.

nearly 30 years."[53] One commenter noted that ten years after passage of the FCPA, the DOJ and the SEC had "brought comparatively few actions" to enforce the anti-bribery provision, largely because of "the heavy burden of detection placed on these government agencies."[54] Indeed, enforcing the provision requires rooting out conduct "inherently cloaked in secrecy and subterfuge."[55] Further, FCPA violations often occur overseas, which complicates enforcement by U.S. authorities.[56] Initial enforcement was slowed by the difficulty of obtaining evidence located abroad[57] and the need to overcome local barriers[58] to enforcing an anti-bribery statute outside of the U.S.

53. Ron Johnstone, *The Top 10 Compliance Tips for the Foreign Corrupt Practices Act*, 71 TEX. B.J. 642, 643 (2008); *see also* Soren Lindstrom & Curtis Riddle, *The Foreign Corrupt Practices Act: A Pickle in M&A Transactions*, 12 M&A LAW. 6, 6 (2008) (writing that the FCPA "lived in near-hibernation" during its first 25 years).

54. Laura E. Longobardi, *Reviewing the Situation: What Is To Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 476 (1987); *see also* Daniel Pines, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 192 (1994) ("Despite several prominent cases, enforcement of the FCPA's antibribery provision has been extremely limited. From 1977 to 1988, the DOJ initiated only twenty anti-bribery cases under the FCPA, and the SEC only three.").

55. Posadas, *supra* note 25, at 350 (discussing questionable foreign payments within the context of the initial Watergate-era congressional investigations).

56. *See* Longobardi, *supra* note 54, at 476-77 (arguing that difficulties related to overseas enforcement "severely limited the number of actions brought under the antibribery provisions" during the FCPA's first decade); *see also* Thomas W. Hill, Jr., *Foreign Representatives: Saudi Law and the Foreign Corrupt Practices Act (FCPA)*, 4 ARAB L.Q. 291, 309 (1989) ("Criminal prosecutions [for FCPA violations] have been rare. Those that have been instituted could probably have been brought under a variety of other federal statutes," such as those criminalizing conspiracy and mail fraud.).

57. *See, e.g.*, Lashbrooke, *supra* note 43, at 236 ("The difficulty of obtaining evidence compounds the problem of establishing the elements of the crime in an FCPA prosecution. The foreign situs of the act of bribery will generally be the location of some, if not most, of the necessary evidence.").

58. *See* Christopher F. Dugan & Vladimir Lechtman, *The FCPA in Russia and Other Former Communist Countries*, 91 AM. J. INT'L L. 378, 378-79 (1997) (discussing economic and political factors that have stymied local anti-corruption measures in post-Soviet Russia); *see also* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 262 (1997) (describing the difficulties of pushing other countries, including U.S. allies, toward adopting anti-corruption legislation, and arguing that "[b]ribery is an intransigent global reality that is unlikely to

By 1997, there was still a perceived "disinclination of the U.S. government to pursue actual charges and convictions" under the FCPA.[59]

When the DOJ and the SEC did turn their attention to the FCPA, they remained true to the statute's early roots in corporate self-regulation. The SEC was "only too happy to enthusiastically promote corporate principles of 'new governance' requiring high standards of accountability," often self-

disappear any time soon."). This situation has changed in recent years, particularly as a result of the Organisation for Economic Co-Operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD") and other non-U.S. anti-bribery laws. *See, e.g.*, Scott W. Muller & Chiawen C. Kiew, *Responding to Multi-Jurisdictional Investigations: Issues and Considerations*, 42 REV. SEC. & COMMODITIES REG. 47, 49 (2009) (discussing the development of anti-corruption laws outside the U.S. and stating that such laws "have spawned a surge of anti-bribery enforcement actions by foreign authorities."); *see also* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 307 (2d ed. 2010) (As a result of international agreements to combat corruption, "[t]he enhanced ability to obtain evidence and secure cooperation means, over time, a much broader net for investigators in the United States and elsewhere. Yet another result of these international agreements is the upsurge in prosecutions under the anti-bribery provisions of the FCPA."); Woof & Cragg, *supra* note 33, at 143 ("The efforts of the OECD and other international organizations to join the war on corruption, through establishment of multilateral conventions and guidelines, suggests that a more optimistic view of the future effectiveness of the FCPA may now be warranted."); Jacqueline C. Wolff & Jessica A. Clarke, *Liability Under the Foreign Corrupt Practices Act*, 40 REV. SEC. & COMMODITIES REG. 13, 14 (noting that "[e]ven countries where bribery may have been considered business as usual are starting to enforce anticorruption rules."). The trend of additional focus on anti-bribery outside of the U.S. is likely to continue, as seen by the U.K. Bribery Act 2010, which is in some ways more expansive than the FCPA and is scheduled to take effect in April, 2011. *See* Bribery Act 2010, c. 23 (U.K.); *see also* Akin Gump Strauss Hauer & Feld LLP, *UK Bribery Act Raises the Bar on FCPA Standards for Antibribery Compliance*, FCPA/ANTIBRIBERY ALERT (Akin Gump Strauss Hauer & Feld LLP, Wash., D.C.), Aug. 2, 2010, *available at* http:// www.akingump.com/communicationcenter/newsalertdetail.aspx?pub=2531.

59. James W. Williams & Margaret E. Beare, *The Business of Bribery: Globalization, Economic Liberalization, and the 'Problem' of Corruption*, *in* CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, AND CORRUPTION 88, 112 (Margaret E. Beare ed., 2003); *see also* ABDULHAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 207 (2004) ("Since the enactment of the FCPA, very few prosecutions were initiated . . . . "); Salbu, *supra* note 58, at 231 ("Historically, authorities have been lax in enforcing the FCPA.").

enforced by independent audit committees rather than government agencies.[60] In particular, the FCPA's accounting and internal control provisions, violations of which are often alleged in tandem with corrupt payments, "put the burden of compliance squarely on the shoulders of the companies falling under its authority."[61] As SEC Commissioner John R. Evans stated two years after passage of the FCPA, by "emphasizing self-regulation . . . the Commission has been able to enhance the effectiveness of our relatively small staff and budget resources."[62] As a result of these resource concerns, "the degree to which a company self-polices" its compliance with the federal securities laws—including the FCPA—is of significant concern to the SEC.[63] The SEC's emphasis on self-regulation further intensified over time as compliance standards tightened across the regulatory landscape, most notably through generalized regulatory changes flowing from the Sarbanes-Oxley Act of 2002.[64]

Similar to the SEC, the DOJ has promoted self-regulation under the FCPA's corrupt payments provision by emphasizing cooperation with authorities and the voluntary disclosure of violations. One former Assistant U.S. Attorney has publicly stated that voluntary compliance with the FCPA and the self-reporting of violations are activities that business entities and their counsel "should be doing."[65] Similarly, the DOJ's "Filip

60. Woof & Cragg, *supra* note 33, at 123.

61. *Id.* at 127. *See also* Hill, *supra* note 56, at 324 (following the FCPA, "[m]anagements' auditors have assumed responsibilities in policing compliance.").

62. John R. Evans, Comm'r, Sec. & Exch. Comm'n, The SEC, The Accounting Profession, and Self-Regulation, Speech Before the Department of Accounting, University of Kentucky (Feb. 28, 1979), at 20, *available at* http://www.sec.gov/news/speech/1979/022879evans.pdf.

63. HECTOR GONZALEZ & CLAUDIUS O. SOKENU, WASH. LEGAL FOUND., FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT AFTER U.S. v. KAY 29 (2006), *available at* http://www.mayerbrown.com/london/article.asp?id=3047&nid=369.

64. Dick Thornburgh, *Foreword* to GONZALEZ & SOKENU, *supra* note 63, at ii. *See also* ANTHONY G. TARANTINO, GOVERNANCE, RISK, AND COMPLIANCE HANDBOOK: TECHNOLOGY, FINANCE, ENVIRONMENTAL, AND INTERNATIONAL GUIDANCE AND BEST PRACTICES 651 (Anthony Tarantino ed., 2008) (noting that "[s]everal [Sarbanes-Oxley] provisions have contributed to the increase in self-reported FCPA cases.").

65. Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Prepared Remarks to the American Bar Association National Institute on the Foreign

Memorandum," while not speaking directly to the FCPA, discusses corporate compliance programs generally, affirming that "[t]he Department encourages such corporate self-policing, including voluntary disclosures to the government of any problem that a corporation discovers on its own."[66] On the enforcement front, both "the SEC and the DOJ have enthusiastically embraced the role that self-monitoring and cooperation play in assisting their investigations."[67]

Business entities have responded to this self-regulatory environment by assuming the costs of FCPA compliance in two primary ways: developing compliance programs,[68] and con-

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Corrupt Practices Act (Oct. 16, 2006), at 6, *available at* http://www.justice.gov/ criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf ("The fact is, if you are doing the things you should be doing— whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation before it starts — you *will* get a benefit. It may not mean that you or your client will get a complete pass, but you will get a real, tangible benefit.").

66. Principles of Federal Prosecution of Business Organizations, U.S. ATTORNEY'S MANUAL 9-28.800(A), *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf [hereinafter Filip Memorandum]. The SEC also encourages corporate cooperation and disclosure in its official guidelines. *See* Framework for Evaluating Cooperation by Companies, Div. of Enforcement, Sec. & Exch. Comm'n, ENFORCEMENT MANUAL § 6.1.2. at 127, *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf (discussing "[s]elf-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top," and "[s]elf-reporting of misconduct when it is discovered.").

67. Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008).

68. One author has defined "FCPA compliance program" to mean "a single, documented, corporate plan designed to reduce the likelihood that the company will engage in violations of the anti-bribery provisions of the FCPA, and to detect such violations and bring them to the attention of senior management, if they occur." Daniel L. Goelzer, *Designing an FCPA Compliance Program: Minimizing the Risks of Improper Foreign Payments*, 18 NW. J. INT'L L. & BUS. 282, 282 (1997). Goelzer later notes that a statement of corporate policy within such a program should "describe the accounting provisions of the FCPA and set forth the company's expectation that all employees will adhere to the requirement that corporate books and records be accurate." *Id.* at 297. Today, companies often use a general anti-corruption compliance program that includes the FCPA as well as applicable non-U.S. laws. This reflects the increasing globalization of anti-corruption laws and regulations. *See, e.g.*, Richard N. Dean, *The Necessity of an Effective Anti-Corruption Compliance Policy*, *in* FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHT-

ducting internal investigations.[69] Such investigations often precede voluntary disclosures of wrongdoing to, and subsequent cooperation with, enforcement agencies.[70]

III.
THE EMERGENCE OF SELF-REGULATORY DEVICES

A. *FCPA Compliance Programs*

Corporate FCPA and anti-corruption compliance programs took root soon after the foreign bribery scandal of the 1970's and are now commonplace.[71] Viewed as an essential component of corporate governance for many companies,[72] such programs traverse a wide range of topics, including the activities of foreign subsidiaries[73] and the retention of agents

ENED ENFORCEMENT RISKS 263 (2008) (noting that while U.S. corporations have long used FCPA compliance programs, "the enactment of anti-corruption legislation in virtually all of the world's developed economies and recent high profile prosecutions in Germany and France are turning the attention of law enforcement regulators in many countries on to the importance of compliance policies.").

69. Internal investigations have become a central practice for uncovering and resolving FPCA problems. *See, e.g.*, Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 NW. J. INT'L L. & BUS. 303, 445 (1998) [hereinafter Mathews, *Defending FCPA Investigations*] ("Virtually no serious corporate FCPA problem in the 1990s gets resolved in the absence of an internal corporate investigation.").

70. *See* Homer E. Moyer, Jr., THE CHANGING DYNAMICS OF INTERNAL FCPA INVESTIGATIONS, SEC. LITIG. REPORT 14 (Thomson/West LegalWorks) [hereinafter Moyer, CHANGING DYNAMICS].

71. *See, e.g.*, Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 RUTGERS L. REV. 605, 653 (1994) ("The foreign bribery scandal, and the underlying corporate dysfunctions it revealed, accelerated the widespread development of corporate ethical conduct codes.").

72. *See, e.g.*, Johnstone, *supra* note 53, at 643 (explaining that increased enforcement has made "an FCPA prevention plan a virtual prerequisite for U.S. companies doing business overseas."); *see also* Dean, *supra* note 68, at 263 ("No U.S. company involved in international business and no non-U.S. company that accesses U.S. public capital markets can afford not to have an anti-corruption compliance policy.").

73. *See, e.g.*, WilmerHale, *SEC Settlement Announced for Violations of FCPA Accounting Provisions by a Subsidiary of Oil States International, Inc.*, WILMERHALE BRIEFING SERIES (WilmerHale, N.Y.C.), June 2006, at 3, *available at* http://www.wilmerhale.com/files/Publication/2959c36b-0e2d-4f50-8096-3883d5b20c23/Presentation/PublicationAttachment/160b4245-9e7b-4a97-

and other third parties.[74] Companies use FCPA compliance programs both to prevent violations of the statute[75] and as a mitigating factor when violations do occur.[76] In assessing the FCPA's impact on corporate conduct, Stanley Sporkin noted, "[s]elf-regulatory and internal compliance programs have become commonplace," and, as a result, "[t]he government's costs of policing have been modest."[77]

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b731-3dd68048e28a/FCPA_06_2006.pdf (stating that the *Oil States International, Inc.* settlement "highlights the SEC's emphasis on the need for companies to implement effective controls that are applicable to their controlled subsidiaries, both domestic and overseas, to prevent improper payments in violation of the FCPA.").

74. FCPA compliance programs frequently contain provisions for the retention of third parties. *See, e.g.*, Rebecca Walker, *Am I My Brother's Keeper? The Advantages and Potential Pitfalls of Extending Compliance Requirements to Suppliers and Other Third Parties*, *in* ADVANCED CORPORATE COMPLIANCE AND ETHICS WORKSHOP 2008 625, 629 (2008) ("To help decrease the risk that payments to a third party will give rise to liability under the FCPA, many companies have implemented extensive compliance policies and procedures to govern consultants who assist in their relationships with foreign officials.").

75. *See* ZARIN, *supra* note 1, § 10-1, at 10-1 ("An effective compliance program has, as its ultimate objective, to deter violations of the FCPA . . . and to detect possible violations before they occur."); *see also* Wolff & Clarke, *supra* note 58, at 17 ("Compliance efforts now can avoid the high costs of an enforcement action later."); Richard M. Strassberg & Kyle A. Wombolt, *Beware Foreign Corrupt Practices Act Traps*, 240 N.Y. L.J. 9 (2008) (stating, in the context of travel and entertainment expenses for foreign officials under the FCPA, that "[h]aving [an FCPA compliance] program in place will significantly reduce the likelihood that promotional expenditures will run afoul of the FCPA.").

76. *See, e.g.*, U.S. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON GOVERNMENTAL AFFAIRS, 108TH CONG., MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT; CASE STUDY INVOLVING RIGGS BANK 112 (2004) ("Based on guidelines issued by the U.S. Sentencing Commission, federal courts are required to take into account the existence or absence of effective corporate compliance programs when handing down criminal sanctions with respect to violations of the FCPA. The presence of an effective compliance program can significantly reduce a corporation's sentence."); *see also* ZARIN, *supra* note 1, § 10-2, at 10-4 (An effective FCPA compliance program "will carry some weight with prosecutors in any determination whether to prosecute the corporation. If the corporation is prosecuted and convicted, the compliance program will be a significant factor in reducing fines and other penalties."); Burger & Holland, *supra* note 22, at 53 ("Where management has a strong compliance program, the government may prefer not to prosecute and may negotiate ways to strengthen internal corporate controls.").

77. Sporkin, *supra* note 31, at 281.

The key components of an effective FCPA compliance program are laid out in *United States v. Metcalf & Eddy, Inc.*, a 1999 civil case in which the DOJ alleged that U.S. environmental engineering firm Metcalf & Eddy, Inc. ("Metcalf") violated the FCPA by providing *per diems*, cash payments, and first-class travel to an Egyptian official and his family to secure wastewater contracts under a United States Agency for International Development program.[78] To settle the matter, Metcalf agreed to pay a $400,000 fine,[79] $50,000 in investigation costs,[80] and to implement an extensive FCPA compliance program that included "[a] clearly articulated corporate policy against violations of the Foreign Corrupt Practices Act and the establishment of compliance standards and procedures"[81] for employees, consultants and agents "that are reasonably capable of reducing the prospect of violative conduct."[82] Metcalf also agreed to establish a committee to review agents and consultants hired by the company,[83] to develop an upward reporting system for suspected criminal conduct,[84] and to implement internal accounting controls.[85] The settlement is instructive because the "DOJ spelled out its view of the minimum components of an effective FCPA compliance regime."[86]

More recently, enforcement authorities have expressed the concern that a company's failure to effectively implement and enforce an FCPA compliance program can allow systemic cracks to form in corporate compliance systems. In 2008, Siemens AG and several of its subsidiaries (collectively, "Sie-

78. *Metcalf & Eddy, Inc.*, No. 99-cv-12566 (D. Mass. 1999).

79. Consent and Undertaking of Metcalf & Eddy, Inc. ¶ 12, United States v. Metcalf & Eddy, Inc., C.A. No. 99CV-12566-N6 (D. Mass. 1999).

80. *Id.*

81. *Id.* ¶ 4(a).

82. *Id.*

83. *Id.* ¶ 4(c).

84. *See id.* ¶ 4(h).

85. *See id.* ¶¶ 5-6.

86. Wilmer, Cutler & Pickering, *DOJ Obtains Injunction for FCPA Violations Based on Payment of Travel and Entertainment Expenses*, FOREIGN CORRUPT PRACTICES ACT UPDATES (Wilmer, Cutler & Pickering, Wash., D.C.), Mar. 2, 2000, at 1, *available at* http://www.wilmerhale.com/files/Publication/c78790b0-c3ab-42ae-bab1-24babde63438/Presentation/PublicationAttachment/9fbc4551-f56f-4ab3-9014-e3234cc50a0c/FCpa0302.pdf.

mens"),[87] were the subjects of a group of landmark cases[88] involving the failure to implement and enforce an effective FCPA compliance program across global business lines.[89] Corrupt payments and their concealment were effected through a complex web of transactions that "included using off-the-books slush fund accounts and shell companies to facilitate bribes," and falsely recording improper payments as consulting fees.[90] Siemens was alleged to have used the payments to secure contracts in numerous countries, including China, Israel, Russia, Vietnam, Mexico and Iraq.[91]

Following an extensive government investigation,[92] Siemens shattered all prior records by resolving internal control

87. *See* Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines: Coordinated Enforcement Actions by DOJ, SEC, and German Authorities Result in Penalties of $1.6 Billion (Dec. 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html [hereinafter Press Release, Dep't of Justice, Siemens AG and Subsidiaries Agree to Pay $450 Million]. The criminal cases filed by the DOJ are as follows: United States v. Siemens Aktiengesellschaft, No. 08-CR-367 (D.D.C. 2008); United States v. Siemens S.A. (Arg.), No. 08-CR-368 (D.D.C 2008); United States v. Siemens Bangl. Ltd., No. 08-CR-369 (D.D.C 2008); United States. v. Siemens S.A. (Venez.), No. 08-CR-370 (D.D.C 2008). The related SEC civil action is Sec. & Exch. Comm'n. v. Siemens Aktiengesellschaft, No. 1:08-cv-02167-RJL (D.D.C. 2008).

88. *United States. v. Siemens Aktiengesellschaft* is the first time that the DOJ has brought criminal charges for violations of the FCPA's internal controls provision. *See* Roger M. Witten et al., *Siemens Agrees to Record-Setting $800 Million in FCPA Penalties* (WilmerHale, Wash., D.C.), Dec. 22, 2008, at 1, *available at* http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=8704.

89. *See, e.g.*, Information ¶¶ 38, 53, 64, 79, United States v. Siemens Aktiengesellschaft, No. 1:08-CR-367 (D.D.C. Dec. 12, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/siemensakt-info.pdf.

90. Press Release, Dep't of Justice, Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/December/08-opa-1112.html [hereinafter Press Release, Dep't of Justice, Siemens AG and Subsidiaries Plead Guilty].

91. Complaint ¶ 2, SEC v. Siemens Aktiengesellschaft, No. 1:08-cv-02167 (D.D.C. Nov. 25, 2008), *available at* http:// www.sec.gov/litigation/complaints/2008/comp20829.pdf; Information, *supra* note 89, ¶¶ 101-03.

92. Siemens, which was also investigated by German officials, launched an internal investigation in 2006 after its offices were raided by the Munich Public Prosecutor's Office. Sent. Mem. at 18-19, *Siemens Aktiengesellschaft*, No. 1:08-CR-00367 (D.D.C. Dec. 12, 2008).

and books and records violations for $800 million (composed of a $450 million fine and $350 million in disgorgement) paid to the DOJ and the SEC following allegations of "a systemic and widespread effort to make and to hide hundreds of millions of dollars in bribe payments across the globe."[93] If the fines imposed by the Munich Public Prosecutor's Office are included, the total global fines, penalties and disgorgement to be paid by Siemens amounts to $1.6 billion.[94]

Siemens clearly demonstrates the significant value enforcement agencies place on effective FCPA compliance programs. The charging document implies a sharp distinction between merely implementing an FCPA compliance program and ensuring that the program is enforced, alleging, "[w]hile foreign anti-corruption circulars and policies were promulgated, that 'paper program' was largely ineffective at changing Siemens' historical, pervasive corrupt business practices."[95] The DOJ also alleged that Siemens "issued principles and recommendations, but not mandatory policies, regarding business-related internal controls and agreements with business consultants," and that "[t]hese non-binding recommendations were largely ineffective" at preventing corrupt payments.[96] Senior management was criticized on the basis that "notwithstanding the promulgation of some written policies," there was "little corresponding guidance on how to conduct business lawfully in countries where Siemens had been paying bribes historically."[97] As FCPA violations "frequently stem from problems in the 'middle' or even 'edges' of a company," an effective compliance program "can rely less on conveying good intentions and, instead, requires genuine *operational strength.*"[98]

An earlier case demonstrates the need for anti-corruption compliance programs to thoroughly address FCPA risks.[99] In

93. Press Release, Dep't of Justice, Siemens AG and Subsidiaries Plead Guilty, *supra* note 90, at 1, 3.

94. Press Release, Dep't of Justice, Siemens AG and Subsidiaries Agree to Pay $450 Million, *supra* note 87, at 3.

95. Information, *supra* note 89, ¶ 39.

96. *Id.* ¶ 53.

97. *Id.* ¶ 64.

98. Jeffrey M. Kaplan, *Effective FCPA Compliance Programs (Part One)*, 22 ETHIKOS & CORP. CONDUCT Q. 9 (Sept./Oct. 2008).

99. Westinghouse Air Brake Tech. Corp., Exchange Act Release No. 57333, 92 SEC Docket 1868 ¶ 15 (2008); Complaint ¶¶ 7-21, SEC v. Westing-

1998, the SEC brought a civil action and a related administrative proceeding against Westinghouse Air Brake Technologies Corp. ("Wabtec"), alleging that Wabtec had violated the FCPA's anti-bribery and accounting provisions when its subsidiary tendered payments to state-owned companies in India to secure business, avoid audits and acquire product delivery certificates.[100] Wabtec internally investigated the subsidiary, voluntarily disclosed the results of its investigation,[101] and settled the SEC case through a $377,000 combined disgorgement and penalty, plus the retention of an independent compliance monitor.[102] The related DOJ criminal action was resolved through a non-prosecution agreement calling for a $300,000 penalty.[103] The non-prosecution agreement also required Wabtec and its subsidiaries to review and improve their FCPA controls and policies.[104]

While Wabtec had a corporate policy on the payment of bribes, this policy did not specifically address the FCPA or provide employee training or education.[105] These components were lacking despite a general policy that "prohibited giving anything of value to improperly influence any person in a business relationship" with Wabtec or its subsidiaries.[106] This language is noteworthy, as Wabtec's policy closely approximated

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house Air Brake Tech. Corp., No. 08-CV-706 (E.D. Pa. Feb. 14, 2008), *available at* http://www.fcpaenforcement.com/FILES/tbl_s31Publications/FileUpload137/4786/Wabtec%28SECComplaint%29.pdf; Letter from Steven Tyrrell, Chief, Fraud Division, Dep't of Justice, to Eric A. Dubelier, Partner, Reed Smith LLP (Feb. 8, 2008), at Appendix A ¶¶ 4-16, *available at* http://www.foley.com/files/WestinghouseNonPros.pdf (discussing Westinghouse Non-Prosecution Agreement).

100. Exchange Act Release No. 57333, *supra* note 99, ¶¶ 1, 4-15; Complaint, *supra* note 99, ¶¶ 7-21.

101. Complaint, *supra* note 99, ¶ 23.

102. *Id.*; Exchange Act Release No. 57333, *supra* note 99, ¶ 15; Press Release, Dep't of Justice, Westinghouse Air Brake Technologies Corporation Agrees to Pay $300,000 Penalty to Resolve Foreign Bribery Violations in India (Feb. 14, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/February/08_crm_116.html.

103. Letter from Tyrrell to Dubelier, *supra* note 99, at Appendix A ¶¶ 4-16.

104. *Id.* at Appendix B.

105. Exchange Act Release No. 57333, *supra* note 99, ¶ 14; Complaint, *supra* note 99, ¶ 22.

106. Exchange Act Release No. 57333, *supra* note 99, ¶ 14; Complaint, *supra* note 99, ¶ 22.

the language of the anti-bribery provision of the FCPA,[107] yet the SEC still concluded that Wabtec "did not have a FCPA policy."[108] The SEC case against Wabtec thus underscores the need for compliance programs to include specific, well-drafted FCPA policies, as well as adequate training and education for employees, agents and subsidiaries.

B. *Internal Investigations and Voluntary Disclosures*

The second major development in corporate self-regulation that would have significant implications for FCPA compliance was the rise of the internal investigation, which developed in tandem with the SEC's efforts to strengthen its nationwide enforcement program during the 1960's.[109] A decade later, passage of the FCPA "guaranteed that internal corporate investigations would become an accepted part of American corporate life in the 1980s."[110] The increased use of internal investigations throughout the 1990's prompted one author to claim in 1997 that "[v]irtually no serious corporate FCPA problem in the 1990s gets resolved in the absence of an internal corporate investigation."[111]

This does not mean, however, that internal investigations automatically lead to voluntary disclosures to enforcement agencies. As Lucinda A. Low explains, "[i]n the first 25 years of the FCPA, an era of sparser enforcement activity, voluntary disclosures of FCPA violations, while not unheard of, were not the norm."[112] This is because "[i]nternal investigations traditionally have been, almost by definition, responses to potential issues or problems about which a company has learned," rather than "diagnostic or preventative measures."[113] In such

107. *See supra* note 1 (describing the anti-bribery language in the FCPA).
108. Exchange Act Release No. 57333, *supra* note 99, ¶ 14; Complaint, *supra* note 99, ¶ 22.
109. *See* Arthur F. Mathews, *Internal Corporate Investigations*, 45 OHIO ST. L.J. 655, 656-58 (1984).
110. *Id.* at 670.
111. Mathews, *Defending FCPA Investigations*, *supra* note 69, at 445.
112. Low et al., *Uncertain Calculus*, *supra* note 49, at 2.
113. Moyer, CHANGING DYNAMICS, *supra* note 70, at 1; *see also* DAN H. WEBB ET AL., CORPORATE INTERNAL INVESTIGATIONS § 4.02[1], at 4-4 (2008) (explaining, "[t]he goals of [internal] investigations may differ. Commonly, the goal is to ascertain what happened and, when appropriate, to discipline or terminate wrongdoers and implement remedial measures to avoid recurrence of the misconduct.").

cases, an internal investigation may result in the implementation of remedial measures,[114] but not necessarily voluntary disclosures to the government.

The role of the internal investigation has changed over the last several years. The fact that fifty of eighty-five FCPA investigations made publicly available between 2005 and the fall of 2008 "were voluntarily disclosed to the SEC or the DOJ following internal investigations by the companies"[115] reveals the evolution of the device from an internal risk-management tool to a precursor to voluntary disclosures. Today, "new laws and enforcement policies have substantially increased the likelihood that the results of investigations will ultimately be disclosed to government enforcement officials."[116] Often, a business entity will disclose to enforcement agencies that an internal investigation is being conducted, and will then provide them with the results of the investigation.[117]

The increase in voluntary disclosures of FCPA violations and the use of internal investigations to supply information to the government has developed in response to incentives created by enforcement agencies. The DOJ and the SEC have encouraged companies to voluntarily disclose FCPA violations,[118] and companies have acted on the expectation that

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114. *See, e.g.*, Douglas R. Young & Jessica K. Nall, *Considerations When Conducting an Internal Investigation*, 1665 PLI/CORP 317, 325 (2008) (explaining that one reason to conduct an internal investigation of FCPA violations stems from "the need to adopt remedial measures, including a compliance program and disciplinary actions to minimize the risk of recurrence or future prosecution."); *see also* William M. Hannay & Patricia Brown Holmes, The Nuts and Bolts of Conducting an FCPA Internal Investigation, Presentation at the Practising Law Institute (May 8, 2008), at 6, *available at* http://www.schiffhardin.com/binary/hannay_holmes_pli_050808.pdf (explaining that companies may undertake internal investigations "as a company-initiated effort to investigate potential problems, rectify any that are discovered, and take steps to prevent a repetition of the conduct in the future.").

115. Shearman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement* (Shearman & Sterling LLP, N.Y.C.), Oct. 21, 2008, *available at* http://www.shearman.com/files/upload/LIT_FCPA_Trends_121208.pdf.

116. Moyer, CHANGING DYNAMICS, *supra* note 70, at 1.

117. *See infra* Section III.B. (discussing United States v. SSI Int'l Far E. Ltd., No. 3:06-cr-00398-KI (D. Ore. 2006).).

118. *See, e.g.*, Susan F. Friedman, *Mission Possible: Developing in-House Counsel's Role in the Fight Against Global Corruption*, 239 N.Y. L.J. 24 (2008) ("In addition to robust FCPA compliance programs, due diligence and consulting with counsel, the DOJ and SEC consistently highlight that self-reporting

such disclosures may avert heavy-handed enforcement and prosecution.[119] In 2006, a former Assistant U.S. Attorney sent the private sector a clear signal of the value the DOJ places on voluntary disclosures, stating, "[w]hen serious FCPA issues do arise, we strongly encourage you and your clients to voluntarily disclose those issues."[120] She further remarked that while "a voluntary disclosure might result in a guilty plea," "[t]here have been cases where companies have come in and voluntarily disclosed real FCPA violations that we have not prosecuted at all."[121]

During a 2008 panel discussion on the FCPA, the then-Deputy Director of the SEC's Enforcement Division addressed cooperation between the SEC and the DOJ, saying, "[t]he most important thing you want to take away from this presentation is: self-report [violations of the FCPA]. If some lawyers are telling you what you want to hear, which is, 'Let's bury this and not self-report it,' you are making a very big mistake."[122]

is a vital protective measure for in-house counsel in their efforts to minimize legal exposure to the corporations they serve."); Marsha Z. Gerber et al., *Voluntary Disclosure of FCPA Violations*, 43 REV. SEC. & COMMODITIES REG. 55, 55 (2010) ("Officials from the DOJ and the SEC have urged companies to cooperate with the government by self-reporting FCPA violations and assisting in the prosecuting the individuals responsible for the conduct."); *see also* Lorraine McCarthy, *SEC Official, Practitioners Encourage Compliance Measures, Self-Reporting*, 41 SEC. REG. & L. REP. 1934, 1934 (2009) (discussing comments by an SEC official suggesting that "[a] company with an effective FCPA compliance program that voluntarily reports violations of the Foreign Corrupt Practices Act to the Securities and Exchange Commission when they occur will face less severe consequences than a firm whose infractions are discovered by a government investigator."); Low et al., *Uncertain Calculus*, *supra* note 49, at 5 (noting that enforcement agencies have "sought to encourage voluntary disclosures" of FCPA violations).

119. Low et al., *Uncertain Calculus*, *supra* note 49, at 1 (explaining that "most companies make disclosures in the expectation that any penalties will be substantially mitigated, and that such disclosure may even prevent enforcement action.").

120. Fisher, *supra* note 65, at 5. *See also* Filip Memorandum, *supra* note 66, at 9-28.800, at 14.

121. Fisher, *supra* note 65, at 6.

122. Walter Ricciardi, Deputy Dir., Div. of Enforcement, U.S. Sec. & Exch. Comm'n, Remarks at the PricewaterhouseCoopers Roundtable Discussion: Navigating Dangerous Waters: FCPA: Managing International Business and Acquisition Compliance Risk (2008), *available at* http://www.pwc.com/us/en/forensic-services/publications/acquisition-compliance-risk.jhtml (click on download button to access the PDF document).

He later added, "[p]eople who don't self-report get hammered."[123]

Numerous FCPA cases support the notion that voluntarily disclosing violations is beneficial to the disclosing entity.In *United States v. SSI International Far East Ltd.*, Schnitzer Steel Industries Inc. ("Schnitzer") and SSI International Far East Ltd. ("SSI"), its wholly-owned South Korean subsidiary, were alleged to have provided corrupt payments to executives at government-owned steel companies to gain scrap metal supply contracts.[124] The conclusion of the criminal investigation in *SSI* "resulted, in large part, from the actions of Schnitzer Steel and its Audit Committee in [among other things] voluntarily disclosing the matter to the Justice Department" following an internal investigation, as well as "cooperating extensively and authentically with the Department in its ongoing investigation."[125]

To resolve the criminal case, SSI pleaded guilty to violating all three prongs of the FCPA[126] and agreed to pay a $7.5 million penalty,[127] while Schnitzer entered into a deferred prosecution agreement providing that it would retain an independent compliance monitor for three years.[128] The SEC proceeding concluded with a cease-and-desist order calling for more than $7.7 million in disgorgement and interest.[129]

In the case of *In re of BJ Services Co.*, cooperating with the SEC proved helpful in securing an atypical FCPA settlement that did not include a fine.[130] Delaware-based BJ Services Company, through a wholly-owned foreign subsidiary, made improper payments to a customs official to secure the release

123. *Id.* at 8.

124. Information ¶¶ 10-11, United States v. SSI Int'l Far E. Ltd., No. 3:06-cr-00398-KI (D. Ore. 2006).

125. Press Release, Dep't of Justice, Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a $7.5 Million Criminal Fine (Oct. 16, 2006), at 2.

126. Deferred Prosecution Agreement ¶ 1, United States v. SSI Int'l Far E. Ltd., No. 3:06-cr-00398-KI (D. Ore. 2006).

127. *Id.* ¶ 18.

128. *Id.* ¶ 8.

129. Schnitzer Steel Indus., Inc., Exchange Act Release No. 54606, at 8, 2006 SEC LEXIS 2332 (Oct. 16, 2006).

130. BJ Services Co., Exchange Act Release No. 49390, 2004 SEC LEXIS 557 (Mar. 10, 2004).

of equipment that was being imported into Argentina.[131] Company officials became aware of the payments while investigating other issues in Argentina, and soon launched an internal investigation.[132] Following its investigation, the company "voluntarily and promptly approached the [SEC]'s staff, notified the staff of the results of the investigation, and cooperated with the staff's investigation."[133] It also engaged in remedial compliance measures, which included replacing certain management and retaining an independent auditor to perform a forensic examination of the books and records in Argentina.[134]

Still, "[w]hether to voluntarily disclose an FCPA violation is a complex decision, dependent upon the facts of each situation, with no guaranteed outcome."[135] Any benefit derived from a voluntary disclosure "will be impossible to know at the time the disclosure is made,"[136] in part because enforcement agencies "do not have clear, formal guidelines on FCPA voluntary disclosures, including the weight they are given in the agency decision-making process."[137] The situation is compounded by the "limited transparency in the government's enforcement settlement calculus in individual cases and the lack of public information regarding the agencies' overall FCPA dockets more broadly."[138]

C. *Enforcement Efficiency*

As reflected in the cases, the DOJ and the SEC have suggested that the ideal behavior from a company that suspects the existence of FCPA violations is to conduct an internal investigation, voluntarily disclose the results to enforcement agencies, cooperate fully with any ensuing government investigation and implement remedial compliance measures.[139]

131. *Id.* ¶¶ 3-9.
132. *Id.* ¶ 11.
133. *Id.* ¶ 12.
134. *Id.* ¶ 13.
135. Gerber et al., *supra* note 118, at 55.
136. *Id.* at 56.
137. Low et al., *Uncertain Calculus*, *supra* note 49, at 8.
138. *Id.* at 2.
139. *See, e.g.*, Press Release, Dep't of Justice, Paradigm B.V. Agrees to Pay $1 Million Penalty to Resolve Foreign Bribery Issues in Multiple Countries (Sept. 24, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/Septem-

Such efforts by the private sector can produce considerable cost savings for enforcement agencies, as white-collar investigations "can be painstakingly complex, terribly time-consuming, and a tremendous drain on resources."[140] As one white collar defense attorney explains, resource constraints require the government to "triage the [FCPA] cases it sees and try to leverage its resources to accomplish as much as it can."[141] This leverage is generated from the private sector, which has realized that cooperation with enforcement agencies "is far preferable to a criminal prosecution, the likelihood of which is greatly reduced if the company *can essentially fill the role traditionally played by government investigators.*"[142]

The transformation of private sector entities into surrogate enforcement agencies bound by the "higher standards of self-regulation"[143] has been shaped through positive incentives underwritten by hard-edged enforcement. At a 2008 FCPA roundtable, a former Deputy Director of the SEC's Enforcement Division stated, "we need to send a message to encourage companies to make the necessary investments in training and controls to prevent [violations of the FCPA] from happening."[144] That message has been effectively transmitted to the private sector, as "within the past several years, the government made an enforcement policy decision to 'ramp up publicly the way that they enforce the [FCPA]. Before that, the

ber/07_crm_751.html (describing the resolution of FCPA charges against Paradigm B.V. as follows: "[T]he [non-prosecution] agreement acknowledges Paradigm's voluntary disclosure and thorough self-investigation of the underlying conduct, the full cooperation provided by the company to the Department and the extensive remedial efforts undertaken by the company"); *see also* Muller & Kiew, *supra* note 58, at 51 ("One of the hallmarks of the U.S. criminal system is the significant amount of credit given to a corporation that cooperates with prosecutors and other regulatory authorities through self-investigation, self-reporting, and self-remediation.").

140. Deming, *supra* note 58, at 645.

141. Lee Stein, *Maintaining Credibility in FCPA Investigations*, 16 A.B.A. Crim. Just. Sec. Newsl. 7 (Winter 2008), *available at* http://www.abanet.org/crimjust/ newsletterwinter08.pdf.

142. *Id.* at 7 (emphasis added). *See also* Hannay & Holmes, *supra* note 114, at 7 ("One of the purposes of a properly conducted internal investigation is to demonstrate to the government that its involvement is unnecessary because the company will proceed expeditiously to investigate and extirpate any wrongdoing.").

143. Woof & Cragg, *supra* note 33, at 123.

144. Ricciardi, *supra* note 122, at 7.

enforcement program was managed quietly . . . [T]he way it's being enforced now is much more public . . . . the business community is listening.' "[145]

The "new model" of FCPA regulation resulting from ramped-up, public enforcement "has enabled the government to put pressure on companies to self-evaluate and to spend company resources in gathering evidence overseas and turning that information over to the government," allowing enforcement agencies to more effectively pursue FCPA cases.[146] Indeed, by 2004, "[t]he number of internal investigations, compliance enhancements, disciplinary actions, and remedial steps voluntarily taken by the private sector dwarf[ed] the number of FCPA enforcement actions."[147] Now, companies that reduce enforcement agencies' cost burdens by conducting internal investigations—which can cost between two and twenty million dollars[148]—and voluntarily disclosing violations to the government can often avoid prosecution as well as the reputational damage likely to be incurred in litigating an FCPA case.[149] FCPA cases rarely see the inside of a court-

145. Phyllis Diamond, *Attorney Sees More Individuals Named in Ramped up FCPA Enforcement Effort*, 41 SEC. REG. & L. REP. 1495, 1496 (2009) (quoting James Parkinson of Mayer Brown LLP).

146. Colleen Mahoney, Head of Sec. Enforcement & Compliance at Skadden, Arps, Slate, Meagher & Flom LLP, Remarks at the PricewaterhouseCoopers Roundtable Discussion: Navigating Dangerous Waters: FCPA: Managing International Business and Acquisition Compliance Risk (2008), *available at* http://www.pwc.com/us/en/forensic-services/publications/acquisition-compliance-risk.jhtml (click on download button to access the PDF document).

147. Homer Moyer, *DOJ Turns up Heat on Foreign Corrupt Practices*, INFLUENCE (July 2005), *available at* http://www.millerchevalier.com/portalresource/lookup/poid/Z1tOl9NPl0LTYnMQZ56TfzcRVPMQiLsSwSZCu0!/document.name=/DOJ%20Turns%20Up%20Heat%20on%20Foreign%20Corrupt%20Practices%20%5BInfluence%206-05%20Moyer%5D.pdf.

148. Friedman, *supra* note 118, at 23.

149. *See In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (discussing voluntary cooperation with the SEC as a general matter and arguing that "a corporation has substantial incentives to cooperate with SEC requests for assistance. Voluntary cooperation offers a corporation an opportunity to avoid extended formal investigation and enforcement litigation by the SEC, the possibility of leniency for prior misdeeds, and an opportunity to narrow the issues in any resulting litigation."); *see also* John Gibeaut, *Battling Bribery Abroad*, 93 A.B.A. J. 48, 50 (2007) ("The [SEC and the DOJ] operate largely unconstrained by judicial precedent. Staying in business is more important than setting precedent to most companies, so they typically plead guilty or

room,[150] and the overwhelming trend is to resolve FCPA mat-

settle with the government rather than risk the ruinous consequences of going to trial" in an FCPA case."); Joel M. Cohen et al., *Under the FCPA, Who Is a Foreign Official Anyway?*, 63 BUS. L. 1243, 1248 (2008) ("There are also reputational concerns in becoming the subject of an FCPA investigation, including the embarrassment of being publicly identified as a participant in unfair business practices, which can impact a company's share price and employee morale."); Marceau, *supra* note 2, at 310 (arguing that the FCPA poses a "tragedy of the commons problem" in that "although virtually all corporations stand to benefit from an aggressive litigation of these cases and the favorable case law that will likely result, no single corporate defendant has been willing to risk its reputation and the costs of litigating").

150. *See, e.g.*, Jacquelyn Lumb, *SEC Historical Society Panel Discusses Developments in FCPA*, SEC TODAY (Wash. Servs. Bureau, Chi., Ill.), Apr. 21, 2010, at 1 (discussing comments made by George Washington University School of Law professor Jeffrey Mann at SEC Historical Society panel on the FCPA, relating, "Mann mentioned criticisms of the SEC's enforcement strategy which forces settlements and leaves little judicial accountability. There are very few precedents for dealing with the FCPA so there is little judicial guidance to follow."); *see also* United States v. Kozeny, 439 F. Supp. 2d 693, 697 (S.D.N.Y. 2007) (providing that "there [have] been surprisingly few decisions throughout the country on the FCPA over the course of the last thirty years."); Mike Koehler, *Compliance Lessons From an Active Year in FCPA Enforcement*, 3 WHITE COLLAR CRIME REP. 4, Feb. 15, 2008, at 1 [hereinafter Koehler, *Compliance Lessons*] (remarking, "[i]n an era of negotiated settlements resulting in deferred-prosecution or nonprosecution agreements, it is rare for an FCPA enforcement action to result in substantive caselaw."); David Glovin, *Kozeny to Spend Investor's Oil Bribery Trial at Bahamas Estate*, BLOOMBERG, May 30, 2009 (quoting Danforth Newcomb of Shearman & Sterling LLP on the FCPA trial of Frederic Bourke, calling it '"a legal rarity,'" as "'[t]here aren't that many cases that go to trial in the FCPA area.'"); Philip Urofsky & Danforth Newcomb, *Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES OF FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 (Shearman & Sterling LLP, Wash., D.C.), Mar. 1, 2009, at 1, 10, *available at* http:// www.shearman.com/files/upload/LT-030509-FCPA-Digest-Cases-And-Review-Relating-to%20Bribes-to-Foreign-Officials-under-the-Foreign-Corrupt-Practices-Act.pdf [hereinafter Shearman & Sterling LLP, FCPA DIGEST 2009] (discussing United States v. Kay, 359 F.3d 738 (5th Cir. 2004), a litigated FCPA case where the Fifth Circuit found that paying bribes to obtain tax benefits is a violation of the FCPA despite the statute's language that improper payments are those intended to secure "business," and noting that "[a]lthough technically binding only in the 5th Circuit, the *Kay* decision is likely to be persuasive precedent throughout the United States, particularly because so few FCPA matters result in appellate rulings."). As for cases brought under the accounting provisions of the FCPA, "most have been in the context of civil proceedings and, even in that context, the vast majority of cases have resulted in settlements." DEMING, *supra* note 58, at 6.

ters through civil settlements with the SEC and deferred or non-prosecution agreements with the DOJ.[151]

The role of the private sector in undertaking activities traditionally performed by enforcement agencies is not an aberrant or temporal event, but instead represents an evolution that began prior to congressional passage of the FCPA and which continues today. Recent FCPA cases and investigations involving M&A transactions reflect a new development in the corporate self-regulatory scheme that predates the FCPA—rather than limiting themselves to the company under investigation, enforcement agencies can now rely on the threat of successor liability to secure enforcement assistance from entities that may transact with the company of interest.

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151. Of the cases brought under the FCPA's anti-bribery provision, "most have resulted in the entry of a guilty plea or some sort of civil settlement." DEMING, *supra* note 58, at 6. *See also* Friedman, *supra* note 118, at 23 ("At present, the DOJ more commonly offers companies deferred prosecution agreements, as alternatives to criminal prosecution, in exchange for monetary penalties and continued cooperation with the government."); Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 96-97 (2007) ("In the past three years, there appears to have been a shift away from prosecution with the aim of punishment for [FCPA] violations to use of deferred prosecution agreements.").

The DOJ has prosecuted companies that violate the terms of deferred or non-prosecution agreements entered into to resolve FCPA charges. In November 2008, Aibel Group Ltd. ("Aibel"), a former subsidiary of Vetco International Ltd. of the ABB Ltd. case (*see infra* Section V.B.), pleaded guilty to a superseding information charging it with FCPA violations related to conduct in Nigeria. Aibel agreed to pay a $4.2 million penalty and submit to two years of additional compliance monitoring for breaching the earlier deferred prosecution agreement. *See* Plea Agreement at 9, United States v. Aibel Group Ltd., No. 4:07-cr-00005 (S.D. Tex. 2008); *see also* Press Release, Dep't of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines (Nov. 21, 2008), *available at* http://www.justice.gov/opa/pr/2008/November/08-crm-1041.html. Aibel's 2008 plea agreement "illustrates the government's willingness to prosecute companies that fail to live up to obligations imposed pursuant to deferred prosecution or non-prosecution agreements even when . . . the company has devoted significant time, personnel, and resources" to compliance. Willkie Farr & Gallagher LLP, *Former Vetco International Subsidiary Aibel Group Ltd. Admits to Failing to Meet Obligations Under Deferred Prosecution Agreement and Agrees to Pay $4.2 Million Fine for Violating the Foreign Corrupt Practices Act*, CLIENT MEMORANDUM (Willkie Farr & Gallagher LLP, N.Y.C.), Dec. 1, 2008, *available at* http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C2806%5CFormer_Vetco_International_Subsidiary_Aibel_Group.pdf.

IV.
Successor Liability: A Short Background

The M&A boom prior to the 2008 credit crisis led to a significant rise in FCPA cases resulting from information uncovered during M&A deals.[152] The M&A cases are significant because they illustrate the expanded reach of enforcement proceedings beyond related corporate entities, or entities that have mutually participated in wrongful conduct—now, an entity can be subjected to an enforcement action not only for its own FCPA violations, but also for the violations of unrelated entities it transacts with. Through successor liability,[153] the M&A cases have made the conduct of previously non-controlled entities a critical concern for transacting parties.

The M&A cases have been a boon for the DOJ and the SEC, as the push for private sector enforcement assistance can now be advanced in several directions and against multiple transacting entities, which often have opposing interests and respond to different incentives. While "[s]uccessor liability has not been squarely addressed in enforcement actions over the last few years . . . avoiding such liability . . . has been a key driver of corporate behavior."[154] Indeed, the DOJ and the SEC have contributed to private sector anxiety through public statements that have "echoed a theme of successor liability through enforcement actions."[155] The result is that M&A deals quickly became more complex, time-consuming and expensive, as business entities responded to the emerging doc-

152. *See* Shearman & Sterling LLP, FCPA Digest of Cases and Review Releases Relating to Bribes of Foreign Officials Under the Foreign Corrupt Practices Act of 1977 (Shearman & Sterling LLP, Wash., D.C.), Oct. 21, 2008, *available at* http://www.shearman.com/files/upload/LIT_FCPA_Digest_121208.pdf [hereinafter Shearman & Sterling LLP, FCPA Digest 2008] (stating, "it is important to recognize that the dramatic swell in the overall number of mergers and acquisitions in 2005 increased the overall likelihood that violations discovered in the course of due diligence will be specifically FCPA-related.").

153. Successor liability is imposed "[w]hen a court decides that an asset acquirer should be treated as a 'successor' to the transferor, [and is therefore] liable for the transferor's debts as though it were the transferor." Marie T. Reilly, *Making Sense of Successor Liability*, 31 Hofstra L. Rev. 745, 746 (2002).

154. Lucinda A. Low & John E. Davis, *The FCPA in Investment Transactions*, 1 Foreign Corrupt Practices Act Rep., §5:23, at 5-21 (West 2d ed. 2010).

155. *Id.* §5:20, at 5-19.

trine that "[i]ssues of successor liability mean that the past improper practices of a target company may lead to problems for the acquiring company."[156]

Importantly, successor liability is distinct from the imposition of liability on the surviving entity of a corporate merger, in which separate corporate identities are combined into one,[157] which "result[s] in the surviving entity succeeding to all of the rights and obligations of the acquired entity."[158] Successor liability in asset purchase transactions has generated controversy because the asset seller usually remains a separate legal entity capable of paying the costs of its misconduct, unlike in a merger transaction.[159]

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156. Linda Braude & Jonathan Nelms, *FCPA Compliance in Russia*, 41 REV. SEC. & COMMODITIES REG. 169, 176 (2008). *See also* Marceau, *supra* note 2, at 302 (explaining that "[i]n certain circumstances, the actions of a foreign company prior to acquisition by a domestic corporation may raise FCPA issues for the acquiring company," as the DOJ "does not want to create incentives for foreign companies to bribe public officials by allowing U.S. companies to acquire them at such a price and in such a manner so as to effectively reimburse the foreign company for its corrupt payments.").

157. *See* Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp., 523 F.2d 543, 548 (7th Cir. 1975) ("The proposition that separate corporations lose their separate identity after merger is too evident for much discussion."); Knapp v. N. Am. Rockwell Corp., 506 F.2d 361, 365 (3rd Cir. 1974) ("In a merger a corporation absorbs one or more other corporations, which thereby lose their corporate identity."); Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817, 821 (D. Colo. 1968) ("The two corporate entities were completely separate and distinct before and after the sale. We hold therefore that the criteria applicable to merger or consolidation were not satisfied.").

158. AMERICAN BAR ASSOCIATION COMMITTEE ON NEGOTIATED ACQUISITIONS, THE M&A PROCESS: A PRACTICAL GUIDE FOR THE BUSINESS LAWYER 162 (American Bar Association 2005). *See also* Cargo Partner AG v. Albatrans Inc., 207 F. Supp. 2d 86, 95 (S.D.N.Y. 2002) ("In a merger or corporate reorganization, the corporate identity of the predecessor is absorbed by the surviving corporation; the predecessor's shareholders maintain their interest in the seller's assets through their ownership of the surviving corporation's stock, and the survivor becomes liable for the predecessor's liabilities."). Virgil W. Duffie, III & Frederick J. Ufkes, *Avoiding a Quagmire,* 7 M&A J. 4 (2007) (explaining, "in a merger, or hostile takeover, the acquiring or resulting corporation typically assumes all the liabilities of the former entity.").

159. *See, e.g.*, Joachim Zekoll, *Liability for Defective Products and Services*, 50 AM. J. COMP. L. 121, 126 (2002):

> A distinct question arises in the context of increasing corporate acquisitions: Should the corporation that acquired another be liable for the damages caused by the defective product sold by the predecessor? Although, in principle, this question has been answered in

A. *Legal Standards*

Several variations of successor liability have emerged over time, all of which represent an exception to the traditional rule that "a firm that buys assets from another firm does not assume the liabilities of the seller merely by buying its assets."[160] Instead, an asset purchaser traditionally assumes only those liabilities of the seller that are provided for in the purchase agreement.[161] The non-liability rule for asset transfers was designed "to facilitate commercial transactions" by preventing buyers from unknowingly purchasing liabilities.[162] As the distinction between a stock transfer (which carries ownership implications) and an asset purchase "often has legal effects . . . [s]uccessor liability in the context of the FCPA thus may depend in part upon the structure of the transaction."[163] "In fact, one of the most important reasons for structuring an acquisition as an asset purchase transaction is the desire of the buyer to limit or avoid responsibility for liabilities of the seller."[164] As a result, business entities "will often choose to structure the deal as an asset purchase rather than a stock purchase in order to avoid successor liability; however, such structuring is not always successful."[165]

The successor liability doctrine is understood to include four exceptions to the common law rule of non-liability in asset purchase transactions:[166] (1) the buyer assumes the seller's

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> the affirmative, the standards for imposing successor liability remain controversial. The [American Law Institute] takes the view that successor liability constitutes an exception.

160. Berg Chilling Sys., Inc. v. Hull Corp., 435 F.3d 455, 464 (3d Cir. 2006).

161. American Bar Association Committee on Negotiated Acquisitions, *supra* note 158, at 163 ("Asset purchases do not, as a general proposition, result in the buyer assuming any of the obligations of the target outside of those expressly assumed by contract in the acquisition agreement.").

162. Wendy B. Davis, *De Facto Merger, Federal Common Law, and Erie: Constitutional Issues in Successor Liability*, 2008 Colum. Bus. L. Rev. 529, 533 (2008).

163. Low & Davis, *supra* note 154, §5:23, at 5-20, 5-21.

164. Minn. Dep't of Emp't and Econ. Dev. & Lindquist & Vennum PLLP, A Guide to Biotechnology Finance 102 (1st ed. 2005), http:// www.lindquist.com/files/Uploads/Documents/Guide_Biotechnology_Finance.pdf.

165. Carolyn Lindsey, *More Than You Bargained for: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 Ohio N.U. L. Rev. 959, 966 (2009).

166. *See* George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 Fla. St. U. Bus. L. Rev. 9, 57 (2007) ("Successor liability began as a narrow

liability, either expressly or impliedly; (2) the sale is construed as a *de facto* merger; (3) the purchaser is found to be a "mere continuation" of the seller; or (4) the transaction is a fraudulent device used to avoid liabilities.[167]

The first exception, based on the assumption of liability, "is usually straightforward in application" and, as a creature of contract law, is determined by the parties' agreement.[168] The *de facto* merger and mere continuation exceptions "are generally treated identically" and respond to a "continuity of identity between the buyer and seller."[169] The Third Circuit case of *Berg Chilling Systems, Inc. v. Hull Corp.* offers nuance to the *de facto* merger and mere continuation exceptions, in that the former "inquires whether a transaction—though structured as an asset purchase—factually amounts to a consolidation or merger," while the latter in most cases "focuses on whether the new corporation is merely a restructured form of the old."[170] Related to mere continuation is the "substantial continuity" exception, a broadened form of the mere continuation theory[171]

set of exceptions to the corporate rule of no-liability-in-asset-sale-transactions."); *see also* Aaron Xavier Fellmeth, *Cure Without a Disease: The Emerging Doctrine of Successor Liability in International Trade Regulation*, 31 YALE J. INT'L. L. 127, 139 (2006) ("The law of successor liability has evolved exceptions to cope with complex and increasingly canny transaction structures used by corporate and tax lawyers.").

167. *See* Kelly v. Kercher Mach. Works, Inc., 910 F. Supp. 30, 34 (D.N.H. 1995); *see also* Lindsey, *supra* note 165, at 966.

168. Berg Chilling Sys. v. Hull Corp., 435 F.3d 455 at 464.

169. *Id.* at 464-65.

170. *Id.* at 465. *See also* Hargrove & Costanzo v. United States, No. CV-F-06-046 LJO DLB, 2007 WL 2409590, at *4-5 (E.D. Cal. 2007) (denying a motion to dismiss on grounds that the elements of "mere continuation" were present where a partnership reconstituted itself as a corporation, as "[t]he basic premise underlying the theory [of successor liability] is that a business should not be allowed to defraud its creditors by simply changing its form."); United States v. Ataka America, Inc., 826 F. Supp. 495, 499 (Ct. Int'l Trade 1993) ("Whereas a merger involves the combination of two entities, a continuation entails the transformation of only one. In a continuation, a new corporation, which purchases all the assets of the old, proceeds exactly as if it were the old corporation.").

171. Some courts have applied a broad variation of the "mere continuation" theory, called the "substantial continuity" test, which has often appeared in the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA") context. However, the "mere continuation" test is usually based on "the common law 'identity' test (which requires the existence of a single corporation after the transfer of assets, with an identity of

that will be discussed below in the context of the *Sigma-Aldrich* administrative decision.[172] The fourth exception, involving fraud, is trigged when a transaction dispossesses the seller of certain assets as a means to evade liability.[173]

More broadly, most successor liability cases have been in the context of civil litigation, which is unsurprising given that a central reason for creating exceptions to the traditional non-liability rule was to protect creditors by preventing debtors from altering the corporate form to escape obligations.[174] Equitable considerations run strong in such situations, as creditors would be left without recourse if an entity saddled with obligations could wipe its balance sheet clean by merging with another entity.[175] Successor liability permits the creditor to

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stock, stockholders, and directors between the successor and predecessor corporations)." New York v. Westwood-Squibb Pharm. Co., No. 90-CV-1324C, 2004 U.S. Dist. LEXIS 13841, at *60 (W.D.N.Y. 2004). *See also* United States v. Davis, No. 90-0484T, 1998 WL 166222, at *6 (D.R.I. 1998) ("The state common law test as to whether a buyer corporation is the 'mere continuation' of the seller corporation requires the existence of a single corporation after the sale of assets, with a commonality of stock, stockholders and directors."). As one commenter explains, "[t]he key difference is that under the substantial continuity exception, unlike mere continuation, there need not be identity of shareholders between the buyer and seller corporations." Kenneth K. Kilbert, *Successor Liability Under CERCLA: Wither Substantial Continuity?*, 14 PENN. ST. ENVTL. L. REV. 1, 7 (2005).

172. *Sigma-Aldrich Bus. Holdings, Inc.*, 01-BXA-06 (U.S. Dep't of Commerce Bureau of Indus. & Sec. 2002), http://www.bis.doc.gov/enforcement/case summaries/sigma_aldrich_alj_decision_02. pdf [hereinafter Sigma-Aldrich Order]. The *Sigma-Aldrich* decision arose from three separate complaints filed by the Bureau of Industry and Security. *See* discussion *infra* Section IV.B.

173. *See, e.g.*, Moore v. Pyrotech Corp., No. 92-3404, 1993 WL 513834, at *6 (10th Cir. 1993).

174. *See* United States v. Mexico Feed & Seed Co., 980 F.2d 478, 487 (8th Cir. 1992) ("Exceptions to the traditional rule that mere asset purchasers are not liable as successors developed to prevent corporate evasions of debt through transactional technicalities.").

175. *See id.* at 487 ("The purpose of corporate successor liability . . . is to prevent corporations from evading their liabilities through changes of ownership when there is a buy out or merger."); *see also Davis*, 1998 WL 166222, at *4 (explaining that "[t]he successor corporation liability doctrine is equitable in origin and nature" and was designed to remedy the potential for abuse of the traditional non-liability rule for asset sales).

collect from the purchaser, thus preserving incentives to lend.[176]

Successor liability in the criminal context is murkier.[177] Cases imposing successor liability for criminal violations often involve related or commonly-owned corporate entities, as in the U.S. Supreme Court opinion of *Melrose Distillers, Inc. v. United States*, an early successor liability case[178] involving criminal antitrust violations.[179] In *Melrose Distillers*, one Delaware and two Maryland corporations, all wholly-owned subsidiaries of the same parent, were indicted for violations of the Sherman Act.[180] After being indicted, the three corporations were dissolved and became divisions of a new corporation "under

176. *See, e.g.*, Kelley v. Thomas Solvent Co., 725 F. Supp. 1446, 1459 (W.D. Mich. 1988) ("The historical basis for imposing successor liability is founded upon principles of equity that seek to prevent creditors of the original corporation from being left without a remedy while the corporation escapes responsibility by transferring its assets into a new form."); *see also* Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252, 266 (1st Cir. 1997) (noting that "the successor liability doctrine was devised to safeguard disadvantaged creditors of a divesting corporation" when one of the four exceptions to non-liability in asset sales is present); Canadyne–Georgia Corp. v. Cleveland, 72 F. Supp. 2d 1373, 1381 (M.D. Ga. 1989) ("The purpose of successor liability is to protect third parties, either creditors or tort claimants, from being left without recourse when a corporation or partnership either sells all its assets or changes the form in which it does business."); Nat'l Architectural Prods. Co. v. Atlas-Telecom Servs.-USA, Inc., No. 3:06-CV-0751-G ECF, 2007 U.S. Dist. LEXIS 51182, at *37 (N.D. Tex. 2007) ("If a debtor corporation were able to circumvent the repayment of its debts merely by transferring its assets to a corporation located in or formulated under the laws of a state which provide greater protection against successor liability, why would creditors continue to loan money to corporations within the state of North Carolina?"); Kuney, *supra* note 166, at 60 (explaining that successor liability is intended "to provide contract and tort creditors with an avenue of recovery against a successor entity" when a predecessor "had sold substantially all of its assets and was no longer a viable source of recovery.").

177. *See* F. Joseph Warin & Andrew S. Boutros, *Response: Deferred Prosecution Agreements: A View from the Trenches and a Proposal for Reform*, 93 VA. L. REV. 121, 133 n.34 (2007) ("To be sure, whether successor liability includes criminal liability is a matter of some dispute."); *see also* Fellmeth, *supra* note 166 (discussing problems with using successor liability as a vehicle for criminal or regulatory sanctions in the international trade context).

178. *Melrose Distillers* has been described as the "foundation for successor corporate criminal liability." WEBB ET AL., *supra* note 113, § 1.03[4], at 1-17.

179. Melrose Distillers v. United States, 359 U.S. 217, 271 (1959).

180. *Id.*

the same ultimate ownership."[181] The three entities then moved to dismiss the indictments on the basis of their dissolution.[182] Justice Douglass, writing for a unanimous Court, determined that it would constitute bad policy to allow business entities to evade criminal liability by dissolving and then reorganizing the corporate family under the same owner.[183] He wrote, "[i]n this situation there is no more reason for allowing [the three entities] to escape criminal penalties than damages in civil suits."[184]

Unlike later cases, *Melrose Distillers* did not involve an "innocent" party—all criminal violations were performed by the same corporate family, which simply reconfigured itself in an effort to evade punishment.[185] Where ownership is unchanged despite a morphing corporate structure, imposing criminal successor liability may be necessary to prevent business entities from escaping "their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities."[186]

B. *The Sigma-Aldrich Administrative Decision*

While *Melrose Distillers* may rest on sound foundations, other criminal successor liability cases are more vulnerable to criticism. One such case is the seminal *Sigma-Aldrich* administrative decision,[187] widely viewed as providing a key successor liability opinion and heavily discussed in the FCPA context.[188]

181. *Id.* at 271-72.
182. *Id.* at 272.
183. *Id.* at 274.
184. *Id.*
185. *Id.*
186. United States v. Mexico Feed & Seed Co., 980 F.2d 478 at 487 (8th Cir. 1992) (discussing congressional intent under CERCLA). *See also* United States v. Ashland Oil, Inc., 537 F. Supp. 427, 432 (M.D. Tenn. 1982) (in denying a corporation's motion to dismiss an antitrust indictment on the grounds that a construction division held by its wholly-owned subsidiary was the same entity as the moving corporation, the Court explained, "the acceptance of defendant's argument would run afoul of the basic principle that a corporation cannot disable itself from liability for its acts simply by effecting some type of corporate transformation.").
187. *See* Sigma-Aldrich Order, *supra* note 172.
188. Gary DiBianco & Wendy E. Pearson, *Anti-Corruption Due Diligence in Corporation Transactions: How Much Is Enough?*, 11 Rev. of Sec. & Commodities Reg. 125, 127 (2008) ("Although [successor liability] has not been liti-

In *Sigma-Aldrich*, the Bureau of Industry and Security ("BIS") brought three separate complaints alleging violations of the export control laws against a parent holding company, its subsidiary and a newly-acquired entity owned by both the parent and the subsidiary.[189] The holding company and its subsidiary were charged "as successors in interest" to the new acquisition's alleged violation of export control regulations "occurring before the transfer of interest."[190] The parent company, Sigma Aldrich Corporation, was fined $1.7 million for the target's pre-acquisition violations of the export regulations.[191]

Determining that the export control regulations "strongly suggest that 'successors' should not be excluded from liability," the administrative judge applied the substantial continuity exception to non-liability in asset purchases to hold the acquirers liable for the seller's pre-acquisition export control violations.[192] The judge determined that while liability could attach only if the acquirers had possessed knowledge of their new subsidiary's export control violations, such knowledge could be "inferred from the facts, taken in totality of the circumstances."[193]

The administrative judge also rejected the argument that the continuing existence of the seller, which had spun off the

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gated in the FCPA context, the government may argue that it is supported by" the *Sigma-Aldrich* decision); *see also* Wilson Sonsini Goodrich & Rosati P.C., *Commerce Has a Tight Grip on Mergers and Acquisitions While State Department Loosens Its Hold on Transfers to Foreign Nationals of Certain Countries*, CLIENT ALERT (Wilson Sonsini Goodrich & Rosati, P.C., Palo Alto, Ca.), Feb. 2008, at 1, *available at* http://www.wsgr.com/publications/pdfsearch/client alert_northrop.pdf (positing that *Sigma-Aldrich* "provides additional precedent for regulators in other areas [beyond trade], e.g., the Foreign Corrupt Practices Act"); *see also* Peter D. Trooboff, *Successor Liability*, NAT'L L.J. 14 (2005), *available at* http://www.cov.com/files/Publication/5f993909-1415-4c62-b91e-8a2b435706b9/Presentation/PublicationAttachment/b161566a-7219-412b-be11-8c49e627878c/oid29837.pdf (discussing *Sigma-Aldrich* as a background for successor liability under the FCPA and noting that "[t]he recent emphasis on [successor liability in the foreign trade controls and FCPA contexts] traces its origins to the settlement by the U.S. Department of Commerce's Office of Export Enforcement with Sigma Aldrich Corp. in November 2002.").

189. Sigma-Aldrich Order, *supra* note 172, at 1-2.

190. *Id.*

191. Wilson Sonsini Goodrich & Rosati P.C., *supra* note 188, at 1.

192. Sigma-Aldrich Order, *supra* note 172, at 12-13.

193. *Id.* at 9.

business unit purchased by the Sigma-Aldrich companies, precluded the purchasers from being found liable.[194] The opinion proposed that "the more important question is whether the predecessor is merely a hollow shell or an entity with assets answerable to judgments."[195] It then argued that "a successor business organization cannot avoid liability simply because its predecessor is a proper defendant," and that "the successor corporation may be sued, as well as the original proprietorship."[196] This position veers away from earlier and more common applications of the successor liability doctrine, which required a seller to have lost its separate corporate existence for a purchaser to be held accountable for the seller's liabilities.[197]

The *Sigma-Aldrich* opinion applied "a broadened 'mere continuation' theory commonly know as the 'substantial continuity' exception, which eliminates the requirement for a continuity of shareholders," thus painting an expanded picture of liability, such that "a literal 'purchase' of assets is not required to establish successor liability as long as there is some form of a 'transfer' of assets."[198] Based on this liability structure, the acquirers could be held liable despite the fact that "[g]iven the absent continuity of shareholder interest, the two corporations remain strangers, both before and after the sale."[199]

If a "transfer of assets" alone is sufficient to hold an acquirer of assets liable for a seller's misconduct, then *Sigma-Aldrich* is indeed a troubling opinion, even if the outcome appears rooted in the relatively disfavored "substantial continuity" exception.[200] The administrative judge's treatment of

194. *Id.* at 10-11.

195. *Id.*

196. *Id.* at 11.

197. *See, e.g.*, Berg Chilling Sys. Inc. v. Hull Corp., 435 F.3d 455, 470 (declining to apply successor liability in a transaction involving the acquisition of a business unit in part because the seller "continued to exist as a corporate entity, and continued to operate its other divisions, for years after the [asset purchase transaction] closed.").

198. Sigma-Aldrich Order, *supra* note 172, at 9.

199. *Id.*

200. *Id.* at 10-11. *See also* John Barker et al., *Buyer Beware: Successor Liability for Export Violations and Due Diligence Measures to Identify and Mitigate Deal Risks*, 11 M&A LAW. 1, 2 (Mar. 2007) (explaining that "[t]he principle [from *Sigma-Aldrich*] applies regardless of the form of the transaction, whether an asset or a stock sale, the liability attaches to the acquirer if there is a substantial continuity between the predecessor and successor.").

the knowledge requirement provided that "it is easy to infer knowledge or notice when the successor holds itself out as the continuation of the previous enterprise" by retaining the seller's employees and personnel, producing the same product from the same production facilities and "maintain[ing] a continuity of assets and the general business operations."[201]

This characterization of the knowledge requirement for successor liability broadens the test, as merely *being* a "substantial continuation" can lead to an inference of the acquirer's knowledge of the seller's wrongdoing, such that liability moves with the assets, even if *actual* knowledge is absent. This position is especially dangerous for asset purchasers who conduct due diligence that, as in *Sigma-Aldrich*, fails to identify the seller's wrongdoing.[202] The danger is heightened in cases where even the most thorough due diligence may not reveal wrongdoing cloaked in secrecy—such as violations of the export control laws or the FCPA.[203]

Sigma-Aldrich has not escaped criticism and remains untested in federal court.[204] Further, the opinion comes with at least one additional built-in limitation, apart from courts' general disfavor of the "substantial continuation" theory upon

201. Sigma-Aldrich Order, *supra* note 172, at 10.

202. *See* Fellmeth, *supra* note 166, at 150 (claiming, "Sigma-Aldrich's due diligence, conducted in the course of the acquisition, had not uncovered the fact that [the asset seller] had committed numerous violations of the [Export Administration Regulations] by failing to obtain export licenses from the BIS."). Fellmeth was one of the attorneys representing Sigma-Aldrich Corp. and its subsidiaries in the matter. *Id.* at 128 n.2.

203. *See, e.g.*, Posadas, *supra* note 25, at 350.

204. *See, e.g.*, Fellmeth, *supra* note 166, at 151:

> BIS apparently believes that the [Administrative Law Judge ("ALJ")] should interpret the law to convert asset purchasers into a proxy for BIS, discovering violations of the seller or suffering in their stead for not doing so. In October 2002, the ALJ signaled his agreement with BIS by publishing the first order stating that an innocent asset purchaser may be penalized for export violations committed by an unrelated seller.

See also Low & Davis, *supra* note 154, §5:23, at 5-21 n.2:

> [W]hile Commerce Department officials trumpeted the expansive reading given to potential successor liability, the case went untested by the federal courts. While DOJ officials have cited this case in presentations on due diligence, in our view it does not represent settled law on the question of successor liability in asset sales in the FCPA context.

which the decision relied. The seller in *Sigma-Aldrich* "sold all its assets and business," despite the fact that the purchase agreement "clearly indicates that only partnership units were transferred," leading the opinion to concede that "[o]rdinarily . . . [the purchasers] would not be considered successors."[205] In denying summary judgment, the opinion maintained that the transfer of the business plus the purchase agreement's silence as to the exchange of "assets, obligations or liabilities" created lingering issues of fact as to "whether [the seller] gratuitously transferred its assets and business" during the sale.[206] Hence, the opinion was impacted by the extent of assets transferred and the administrative judge's sense that the case may have involved a situation where the Court needed to "prevent a corporation from escaping its liabilities merely by changing hats."[207]

Despite its flaws and limitations, *Sigma-Aldrich* remains an important opinion with implications extending far beyond the export control context.[208] Both the DOJ and the SEC have applied the themes advanced in *Sigma-Aldrich* to inject FCPA compliance into the M&A arena.[209] Business entities have responded to the resulting enforcement risk by making FCPA due diligence and post-closing compliance measures far more important to cross-border deals.[210] The next section is de-

205. Sigma-Aldrich Order, *supra* note 172 at 13.

206. *Id.* at 13-14.

207. *Id.* at 8. *See also* Trooboff, *supra* note 188, at 1 (claiming that the ALJ in *Sigma-Aldrich* "seemed to believe that the terms of the acquisition involved more than an assets transfer and possibly an effort to avoid the assumption by the acquirer of preclosing liabilities.").

208. *See supra* note 188 and accompanying text.

209. *Id.*

210. *See, e.g.*, Mark J. Rochon & James G. Tillen, *When Buying Overseas, Companies Need To Expand Their M&A Due Diligence To Include FCPA Compliance or Risk an Enforcement Action,* DEAL, Aug. 6, 2007, at 29, *available at* http://www.millerchevalier.com/portalresource/lookup/poid/Z1tOl9NPl0LTYnMQZ56TfzcRVPMQiLsSwGpDm0!/document.name=/Rochon%20and%20Tillen%202007-08-06%20The%20Deal.pdf (explaining that in recent years "many companies have expanded M&A due diligence to include reviews of compliance with international regulatory regimes, including the FCPA"); *see also* Eli Richardson et al., *Is That a Crime? Understanding Risks and Obligations in the Foreign Corrupt Practices Act,* 45 TENN. B.J. 14, 16 (Apr. 2009), *available at* http://www.tba2.org/journal_new/index.php/component/content/article/208 (explaining, "many FCPA problems come to light during mergers and acquisitions. Because an acquirer may be liable for violations com-

voted to the specifics of how the risk of successor liability has impacted M&A transactions, with emphasis on the most significant transactions and cases of the last several years.

V.
FCPA Applications to M&A Transactions

The expanded risk of successor liability for regulatory and criminal violations laid out in *Sigma-Aldrich* has permeated the FCPA context[211] and can be credited with the significant corporate attention now devoted to detecting and resolving FCPA issues prior to closing M&A transactions.[212] This has been true even though *Sigma-Aldrich* focused on asset purchases while most serious FCPA problems in the M&A context have involved mergers. More important, however, are the "extreme steps" business entities have taken to avoid successor liability for FCPA violations in a wide array of transactions.[213]

A. *The Role of Private Enforcement*

Business entities subject to the FCPA have responded to the threat of successor liability by making increasingly thorough FCPA due diligence a standard component of interna-

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mitted by its target, corporate counsel are increasingly insisting on FCPA due diligence."); Gary DiBianco & Charles F. Smith, *The Foreign Corrupt Practices Act in Transactions: Plan Ahead or Pay Later*, G 100 Insights (Skadden, Arps, Meagher & Flom LLP, N.Y.C.), Summer 2007, *available at* http://skaddenpractices.skadden.com/fcpa/attach.php?documentID=106 ("FCPA due diligence has become a critical component of many corporate control transactions."); Trooboff, *supra* note 188 ("Corporate counsel have become increasingly aware of the significant liability that can arise from acquisitions of businesses that have violated . . . the Foreign Corrupt Practices Act.").

211. *See supra* note 188 and accompanying text.

212. *See supra* note 210 and accompanying text.

213. Lucinda A. Low, *The New Dynamics of FCPA Internal Investigations: Often Not a Private Affair, in* 1 Foreign Corrupt Practices Act Rep., § 12:1, at 12-2 (2nd ed. 2010). *See also* Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 Cap. Markets L.J. 400 (2007) ("Just because US enforcement authorities have thus far exercised their discretion not to bring successor liability prosecutions does not mean that the prospect alone does not have significant M&A implications."). Since 2007, however, the DOJ and the SEC have brought several large-scale FCPA successor liability cases. *See* SEC v. El Paso Corp., Civ. Action No. 07-CV-899 (S.D.N.Y. 2007); *see also* United States v. Latin Node, Inc., Case 1:09-cr-20239-PCH (S.D. Fla. 2009); SEC v. Gen. Elec. Co., et al., No. 1:10-cv-01258 (D.D.C. 2010), all discussed *infra* Section V.D.

tional transactions,[214] particularly those involving entities in high-risk locations.[215] In recent years, "increased merger and acquisition activity has led to [the] discovery of more FCPA infractions, as anti-bribery due diligence has become standard practice."[216] Fuelled by the 2005-2007 global M&A boom[217] and enforcement agencies' emphasis on successor liability for violations of the FCPA, "due diligence has emerged as the most fundamental FCPA safeguard to be taken by covered entities and persons in preparation for all transactions."[218] Uncovering the FCPA problems of a target entity prior to closing a transaction is now viewed as key to avoiding a "parade of horribles," including costly government investigations and the potential for a "dramatic downward swing in the market value or stock price of the asset(s) recently purchased."[219]

The DOJ and the SEC have driven this result, as private sector M&A due diligence can defray the costs of government investigations and can result in what are effectively "involun-

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214. *See, e.g.*, Joan Harrison, *Does Your Foreign Target Have Clean Hands?*, 42 Mergers & Acquisitions 51 (July 2007) ("FCPA issues had not historically been at the top of acquirers' due diligence checklist, but in the wake of several FCPA actions that stalled or even shattered deals, buyers are paying more attention to potential violations and the risk of successor liability.").

215. For a widely-used list of such countries, see Transparency International, Corruption Perceptions Index, *available at* http ://www.transparency.org/policy_research/surveys_indices/cpi. The Index "ranks 180 countries by their perceived levels of corruption, as determined by expert assessments and opinion surveys." *Id. Cf.* Koehler, *Compliance Lessons, supra* note 150, at 2 (noting that FCPA problems have emerged in countries qualifying as "low risk" based on the Transparency International Corruption Perceptions Index).

216. Paul R. Berger & Erin W. Sheehy, *The Globalization of SEC Enforcement Activities*, 41 Rev. Sec. & Commodities Reg. 243, 244 (2008).

217. *See* Shearman & Sterling LLP, FCPA Digest 2008, *supra* note 152, at vii (suggesting a new trend of FCPA cases arising out of due diligence related to M&A transactions).

218. Low & Davis, *supra* note 154, §5:23(1), at 5-24. *See also* Gibson, Dunn & Crutcher LLP, *2007 Year-End FCPA Update* (Gibson, Dunn & Crutcher LLP Publications, Wash., D.C.), Jan. 4, 2008, at 10 [hereinafter Gibson, Dunn & Crutcher LLP, *2007 Update*] ("With the recent upsurge in global M&A activity coinciding with that of FCPA enforcement, the FCPA has become a central issue in transactional due diligence.").

219. Madubuko, *supra* note 1, at 590. *See also* Lindsey, *supra* note 165, at 982 ("the value of the target's contracts could be wiped out if those contracts were found to be obtained through corrupt payments.").

tary" disclosures of FCPA problems.[220] Indeed, a 2008 FCPA Opinion Procedure Release stated clearly "the interests of the [DOJ] in enforcing the FCPA and promoting FCPA due diligence in connection with corporate transactions."[221] The risk for business entities is that the failure to conduct due diligence at a level that enforcement agencies consider adequate may give rise to allegations of willful blindness to the FCPA violations of a target entity or merger counterparty.[222]

Enforcement agencies have effectively conscripted business entities into informant roles, as prospective acquirers or merger counterparties that discover other entities' FCPA issues now frequently ensure that disclosures are made to the government, often as a condition of closing a transaction.[223] Unlike traditional self-regulation through FCPA compliance programs and internal investigations, "involuntary" disclosures arising from FCPA due diligence in M&A transactions are more accurately understood to result from *private enforcement*, as companies shoulder the burden of detecting corruption risks at entities that are not subject to their ownership or control.

The de facto private enforcement injected into M&A transactions by the threat of successor liability is much less controlled and stable than earlier corporate self-regulatory initiatives. Rather than investigating its own personnel, facilities and accounting records, a potential acquirer conducing FCPA due diligence of a non-related entity investigates a company beyond its control and informational expertise. Applying regulatory or criminal sanction to an acquirer in this situation is

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220. Muller & Kiew, *supra* note 58, at 55 & n.55 (citing the Lockheed Martin/ Titan transaction (*see infra* Section V.C.) as an example of when "'[i]nvoluntary disclosure' may . . . arise during due diligence or other negotiations in a merger.").

221. DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 08-02 (June 13, 2008), at 4, *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

222. Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies,* 62 BUS. L. 691, 721 (2009) [hereinafter Witten et al., *Prescriptions*].

223. *See* Moyer, CHANGING DYNAMICS, *supra* note 70, at 3 ("In some recent, well-publicized FCPA cases, acquiring companies that discovered possible FCPA violations during pre-merger due diligence insisted that the target company disclose and resolve any issues prior to closing.").

problematic because business entities, while possessing optimal information about their own inner workings, personnel and history, often lack such expertise with respect to a potential target, a fact that is recognized by the need to conduct transactional due diligence in the first place. Inherent limitations on an acquirer's access to information from a target entity may also raise doubts about the quality of disclosures enforcement agencies are likely to receive.[224]

The uncertain risk environment created by successor liability is magnified by the lack of regulatory guidance concerning *how much* FCPA due diligence is required to prevent liability for a target's pre-acquisition conduct.[225] As one author claims, "[v]agueness and ambiguity are the DNA of the FCPA."[226] Not enough has been done to resolve this problem, leaving the private sector with little guidance for mitigating liability when engaging in transactions that carry FCPA risks.[227]

As a consequence of the FCPA's vagueness and the dearth of case law on the statute,[228] business entities face "genuine confusion as to what is permissible and what is not, as to what is required as a satisfactory demonstration of due diligence in making an acquisition, and as to what conduct the government considers benign."[229] Unclear and arguably unmanage-

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224. *See infra* Section VI.B.

225. *See, e.g.*, Koehler, *Compliance Lessons*, *supra* note 150, at 3 ("Understanding the facts and circumstances of each enforcement action, and assessing the issues raised in them, is key to ensuring FCPA compliance, particularly given the lack of substantive caselaw and meaningful substantive guidance from the enforcement agencies.").

226. James R. Doty, *Toward a Reg. FCPA: A Modest Proposal for Change in Administering the Foreign Corrupt Practices Act*, 62 Bus. Law. 1233, 1239 (2007).

227. *See, e.g.*, Frederick B. Wade, *An Examination of the Provisions and Standards of the FCPA*, 9 Syracuse J. Int'l L. & Com. 255, 261 (1982) ("most critics state that their problem lies not with the policy of the Act, but with a lack of clarity and ambiguity in the terms used to express that policy."); *see also* Sweeny, *supra* note 26, at 273 ("The Foreign Corrupt Practices Act suffers because lawyers are unable to decide precisely where lines are going to be drawn.").

228. Issuers and domestic concerns may seek Opinion Procedure Releases from the DOJ, but these are highly situational and do not bind other entities or transactions. *See* Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. § 80.5 (1992) ("An FCPA Opinion shall have no application to any party which does not join in the request for the opinion.").

229. Doty, *supra* note 226, at 1255.

able[230] due diligence expectations result in higher transaction costs for all cross-border deals.[231] Transactions may even collapse under the weight of uncertainty, as seen in the failed merger of Lockheed Martin Corporation and The Titan Corporation.[232] Higher transaction costs and chilling effects in the M&A market are inevitable without further guidance from enforcement agencies regarding the sufficiency of FCPA due diligence programs, particularly because *no amount of due diligence can guarantee* that all potential misconduct of a target entity has been uncovered.[233]

While unable to guarantee that every stone potentially hiding an FCPA risk has been overturned, parties to M&A transactions are keenly aware that under the FCPA, "liability may be imposed not only when a person actually knows of an illegal transaction or offer, but also when the person is willfully blind to—or ignores—indicators suggesting that violations may occur."[234] Business entities are likely to respond to this uncertainty with an over-abundance of caution, resulting in universally higher transaction costs and the occasional abandoned deal.[235]

When the costs of managing this uncertainty subsume the expected value of a transaction, a company is likely to aban-

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230. *See* DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 04-02 (July 12, 2004), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf; *see also infra* text accompanying notes 260-61.

231. *See* Valli Baldassano, Partner, Fox Rothschild LLP, Roundtable: The Foreign Corrupt Practices Act – Its Many Lives, *in* METRO. CORP. COUNS. (July 2005), at 51 (transcript available on LexisNexis) ("Pre-merger due diligence of FCPA matters is the responsible thing to do, but it requires negotiation with all parties. It is expensive, takes a lot of time and will inevitably delay the transaction.").

232. *See infra* Section V.C.

233. *See* Baldassano, *supra* note 231, at 51 (discussing FCPA due diligence in M&A transactions and stating, "[y]ou may think you have uncovered everything there is to know about an event or series of events, but you don't have the subpoena power and the same leverage as the government in doing investigations.").

234. Witten et al., *Prescriptions, supra* note 222, at 721.

235. *See* Gibeaut, *supra* note 149, at 54 (arguing "the prosecutors, not the courts, assume the leading role in determining what violates the FCPA and what doesn't. With that kind of uncertainty, compliance planners constantly have to ask themselves when prevention becomes overkill.").

don the deal.[236] In discussing the impact of vague criminal statutes on individual behavior, Isaac Ehrlich and Richard A. Posner argue:

> The 'chilling' of socially valuable behavior by an uncertain law is a potentially serious problem whenever criminal penalties are involved. This may explain why the Constitution has been interpreted to require greater specificity in criminal than in civil statutes. . . . The average individual can avoid the risk of being subjected to a criminal penalty only by avoiding criminal activity. But if what constitutes criminal activity is uncertain, this is not enough: he can eliminate the risk only by avoiding, in addition to clearly criminal behavior, all other behavior that is within the penumbra of the vague standard . . . Thus the social costs of vague criminal standards might be high.[237]

Business entities, too, are unable to ensure compliance with vague laws or regulations unless all potentially violative conduct is ceased. In the M&A arena, the risk that due diligence may fail to protect an acquirer from successor liability for FCPA violations may require deciding whether to pour more resources into the due diligence effort or to simply abandon the transaction. In some cases, the escalating costs of mitigating uncertain risks may have the undesirable effect of deterring a wealth-maximizing transaction, thus creating generalized economic losses.[238]

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236. *See, e.g.*, Daniel J. Plaine & Judith A. Lee, *Making the Way for International Business Integrity and Compliance Due Diligence in Cross-Border Acquisitions*, METRO. CORP. COUNS. (May 2007), at 9 (explaining, "[i]f the identified risks of successor liability or future non-compliance cannot be reasonably avoided, shared or mitigated, the U.S. acquirer might be required to step away from the deal."); *see also* Davis, *supra* note 162, at 537 (arguing, "[i]f acquiring corporations cannot determine with certainty the liabilities and obligations of the target for which they will become responsible, the transaction is less likely to be consummated. The costs of aborting a merger are significant.").

237. Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 263 (1974).

238. *See* Fellmeth, *supra* note 166, at 178:

> The incentive for asset transfers would necessarily be chilled by [successor liability-driven] uncertainty, which creates a deadweight loss to society. Asset transfers promote the efficient allocation of capital. By creating the potential for an unforeseeable loss, there is a greatly increased risk that small asset purchases and some large asset purchases involving moderate efficiency gains will be discour-

In addition, buyers with sophisticated FCPA compliance systems may be deterred from acquiring targets with weaker systems. As one article has claimed, prosecuting acquirers for their targets' pre-acquisition FCPA violations "can have a perverse effect: discouraging the 'race to the top' created where companies with superior FCPA compliance programs acquire those with less thorough programs, inculcating the latter into the former's culture of compliance."[239] As the article suggests, the chilling effect of successor liability on what may be deemed reformative transactions compromises the government's overall compliance goals.[240] Acquirers are already concerned that they "will be unable to reform any wayward business practices of the target in time to prevent unlawful payments post-acquisition."[241]

Lack of control over the business entity being examined and the absence of an optimal information position are not the only factors that complicate the successor liability picture. Unlike a truly internal investigation, in which control and a knowledge advantage can be utilized to efficiently uncover and correct problems, private enforcement through M&A due diligence is conducted by an outside entity that is primarily concerned with limiting its own liability and maximizing the value it will receive from the transaction. These instincts of the acquirer are likely to collide with the target's own, conflicting motivations. As entities on opposite sides of a transaction, "[a] target's incentives during due diligence may not always – and frequently do not – coincide with the goals of the buyer."[242]

Yet, it is precisely within the clash between a buyer and seller's conflicting objectives that the goal of private FCPA en-

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> aged by the risk of undiscovered violations . . . Such impediments reduce total societal wealth by impeding capital from being moved from less productive to more productive uses.

239. Gibson, Dunn & Crutcher LLP, *2008 Mid-Year FCPA Update* (Gibson, Dunn & Crutcher LLP Publications, Wash., D.C.), July 7, 2008, *available at* http://www.gibsondunn.com/publications/pages/2008mid-yearfcpaupdate.aspx [hereinafter Gibson, Dunn & Crutcher LLP, *2008 Update*].

240. *Id.* (arguing that the government benefits when a company with a strong FCPA compliance program acquires an entity that has a weaker program).

241. Erbstoesser et al., *supra* note 213, at 399.

242. DiBianco & Pearson, *supra* note 188, at 127.

forcement is most effectively realized. Several significant FCPA disclosures to the DOJ and the SEC have involved violations uncovered during M&A due diligence.[243] Enforcement agencies' efforts to broadcast the risk of successor liability have taken the past model of self-regulation and tightened it, through the use of external parties that have every incentive to discover FCPA violations and bring them to the government's attention. The risk in this environment is that the drive for disclosure will be ratcheted upward, *even where an internal resolution may be most efficient*.[244]

As one commenter has claimed, the "spike in self-reporting of FCPA problems discovered as part of merger or acquisition activity . . . may be somewhat of a self-fulfilling prophecy as more parties are worried about successor liability arising from prior corrupt conduct by the acquired company."[245] Such an environment may foster an over-abundance of caution that is detrimental to the efficient resolution of FCPA problems, as resources are consumed by minor issues that balloon into larger and more costly issues than is warranted.[246]

Solutions to the problems outlined above are not radical, and would rely on the creation of firm due diligence guidelines to aid the market in fashioning effective and cost-efficient programs. Further, the development of a safe harbor from successor liability for business entities performing FCPA due diligence that satisfies the guidelines would calm market

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243. *See, e.g.*, the Lockheed Martin / Titan transaction, the Cardinal Health / Syncor transaction, the GE / InVision transaction, and the Monsanto / Delta Pine transaction, all discussed *infra*, Section V.C.; *see also* Low et al., *Uncertain Calculus*, *supra* note 49, at 8 (explaining, "planned mergers between high-profile companies [have been] significantly affected when evidence of FCPA violations emerged in the due diligence process, and were only consummated after the violations were disclosed to the DOJ and/or SEC."); *see also* Gibson, Dunn & Crutcher LLP, *2007 Update*, *supra* note 218, at 7 ("Nearly half of the corporate FCPA enforcement actions in 2007 implicated some aspect of M&A activity.").

244. *See* Low et al., *Uncertain Calculus*, *supra* note 49, at 9 ("FCPA violations often are not a matter of black and white. If there are persuasive arguments that the company did not violate the FCPA, that may counsel in favor of not disclosing and instead taking robust corrective internal action.").

245. Shearman & Sterling LLP, FCPA DIGEST 2008, *supra* note 152, at 1.

246. *See* Mahoney, *supra* note 146, at 8 (raising the question of whether it is preferable for companies to internally resolve minor FCPA risks rather than disclose them to the government).

nerves and facilitate compliance without jeopardizing beneficial M&A transactions.[247] Sharpened standards for post-closing FCPA compliance would also be a welcome development.

B. *Due Diligence and Uncertainty*

Several prominent cases indicate that the effectiveness of FCPA due diligence is increasingly important when enforcement authorities assess an acquirer's FCPA liability. Due diligence can serve as a proxy for knowledge of an FCPA violation—while effective due diligence may act to disprove knowledge of misconduct, faulty or incomplete due diligence can satisfy the knowledge element of a violation.[248] Enforcement actions have solidified the link between FCPA due diligence and the imposition of successor liability, with at least one case "suggest[ing] that the failure to perform due diligence prior to a payment *was itself a partial basis for liability*" under the FCPA.[249]

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247. When the 1988 amendments to the FCPA were being developed, Congress considered including a corporate safe harbor for companies that performed "reasonable" due diligence on employees and agents. *See* Mathews, *Defending FCPA Investigations*, *supra* note 69, at 339-40 (discussing H.R. REP. NO. 100-576, at 922-923 (1988) (Conf. Rep.)).

248. *See* ZARIN, *supra* note 1, § 1-8 ("An appropriate due diligence inquiry to resolve potential red flags and additional representations from and monitoring of the third party may negate any inference that the U.S. company had knowledge of possible illicit conduct."). *See also* Jason E. Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, ADVOCATE, Mar./Apr. 2009, at 21 (explaining, "under the scienter element of the FCPA's anti-bribery provisions . . . a company need not have actual knowledge of illegal bribes paid by its third-party representatives or merger targets—the mere failure to recognize and investigate the third party's or merger target's suspicious activities may suffice").

249. Low & Davis, *supra* note 154, §5:23(1), at 5-23 (emphasis added). In the case, Baker Hughes Inc. ("Baker Hughes") consented to an SEC cease-and-desist order based on allegations that it had violated the FCPA's books and records and internal control provisions in connection with a subsidiary's payments to foreign officials in Indonesia, India and Brazil. *See In re* Baker Hughes Inc., Exchange Act Release No. 44,784 (Sept. 12, 2001), 2001 SEC LEXIS 1835. As Low & Davis discuss, the SEC's cease-and-desist order states that payments were made to agents in India and Brazil "without making an adequate inquiry as to whether the agents might give all or part of the payments to foreign government officials in violation of the FCPA." *Id.* at 3. No fine was imposed. *Id.*

In a related case, Baker Hughes and its wholly-owned subsidiary, Baker Hughes Services International, Inc. ("BHSI"), were pursued by the DOJ and

While FCPA due diligence is a critical means of reducing the risk of successor liability, it is not always clear when a particular due diligence plan will be acceptable to enforcement agencies. The risk is compounded by the fact that evidence of FCPA violations could evade even the most thorough due diligence.[250] As a result, companies engaging in FCPA due diligence have little assurance that their efforts will be deemed sufficient by enforcement agencies, even though "the quality of an acquirer's pre-acquisition due diligence efforts and vol-

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the SEC for conduct related to the retention of an agent in Kazakhstan. *See* United States v. Baker Hughes, Inc., No. 07-cr-130 (S.D. Tex. 2007); United States v. Baker Hughes Servs. Int'l, Inc., No. 07-cr-129 (S.D. Tex. 2007); SEC v. Baker Hughes Inc. & Roy Fearnley, No. H-07-1408 (S.D. Tex. 2007). In its complaint, the SEC repeatedly focused on due diligence, claiming, "Baker Hughes had conducted no due diligence as to the agent's background, competence or track record," and "failed to conduct any meaningful due diligence on the agent until more than two years after its retention, after approximately $2.5 million had already been paid to the agent." Complaint ¶ 2, SEC v. Baker Hughes, No. H-07-1408, *available at* http://www.sec.gov/ litigation/complaints/2007/comp20094.pdf. The complaint contains other mentions of Baker Hughes's alleged failure to perform due diligence before retaining agents or making payments. *See* Complaint ¶ 14 (alleging that no "meaningful due diligence" was conducted until 2003, although the agent was retained in 2000); ¶¶ 48-50 (alleging that a wholly-owned subsidiary of Baker Hughes retained a different agent in connection with a chemical contract with KazTransOil, the national oil transportation operator of Kazakhstan, without conducting "any due diligence with respect to [the agent], or the individual who purported to work on its behalf, either before or after the engagement"); ¶ 54 (while conducting business in Angola, Baker Hughes is alleged to have made payments to an "Angolan agent whose principal, Baker Hughes later learned when it conducted appropriate due diligence, was then the brother of a senior-level [state-owned oil company] employee"); ¶ 88 (with respect to payments made to a Kazakh nuclear official, "no due diligence was conducted on the Kazakh individual or his company prior to the transaction."). This conduct also placed Baker Hughes in violation of the SEC's 2001 cease-and-desist order. Press Release, Sec. and Exch. Comm'n, SEC Charges Baker Hughes With Foreign Bribery and With Violating 2001 Commission Cease-and-Desist Order (Apr. 27, 2007), *available at* http://www.sec.gov/news/press/2007/2007-77.htm. Baker Hughes and BHSI eventually resolved the SEC and DOJ actions by paying a combined $44 million in fines and disgorgement, which at the time was the largest monetary sanction in an FCPA case. *See* Press Release, Dep't of Justice, 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 (Apr. 26, 2007), *available at* http://www.justice.gov/opa/pr/2007/April/07_crm_296.html.

250. *See generally* Baldassano, *supra* note 231.

untary disclosure of any potential FCPA issues uncovered during that process may influence the government's position regarding successor liability."[251]

The centerpiece of the available guidance from the DOJ regarding sufficient FCPA due diligence is provided in Opinion Procedure Release 04-02 ("Opinion Release 04-02"), which involved an investment group's acquisition of certain businesses of ABB Ltd. ("ABB").[252] The acquisition discussed in Opinion Release 04-02 occurred on treacherous ground. Six days before the Release was made public, two of the ABB subsidiaries being acquired had entered guilty pleas for violating the FCPA by making improper payments in several foreign countries.[253] The SEC filed a settled enforcement action against parent and seller ABB on the same day, charging it with several violations of the FCPA's anti-bribery, books and records and internal control provisions.[254]

Previously, the acquirers and ABB had agreed to jointly conduct an FCPA compliance review of ABB and its subsidiaries.[255] The investigation involved more than 115 lawyers, 44,700 work-hours and the review of over four million pages of documents.[256] Forensic accountants were retained and deployed to twenty-one countries to review "hundreds of thousands of transactions."[257] Finding that these massive efforts were sufficient, the DOJ represented that it did not presently intend[258] to bring an enforcement action against the ac-

251. Warin et al., *supra* note 1, at 45.

252. DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 04-02, *supra* note 230.

253. *Id.* at 1. *See also* United States v. ABB Vetco Gray, Inc., No. 4:04-cr-00279 (S.D. Tex. 2004).

254. DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 04-02, *supra* note 230, at 1. *See also* SEC v. ABB Ltd., No. 1:04CV01141 (D.D.C. 2004); SEC v. ABB Ltd., Litigation. Release No. 18775, 2004 SEC LEXIS 1425 (July 6, 2004).

255. DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 04-02, *supra* note 230, at 1.

256. *Id.*

257. *Id.*

258. In 2007, however, it was revealed that the acquired entities had violated the FCPA by providing improper payments to Nigerian customs officials. *See* United States v. Vetco Gray Controls Inc., No. 4:07-cr-00004 (S.D. Tex. 2007); *see also* United States v. Aibel Group Ltd., No. 4:07-cr-00005 (S.D. Tex. 2007); *see* discussion *supra* note 151. The new FCPA allegations, as well as the Vetco subsidiaries' failure to abide by the terms of the 2004 plea agreements, resulted in a new round of guilty pleas, underscoring the point that "[r]egardless of pre-transactional compliance levels, the SEC and DOJ

quirers or their new subsidiaries for FCPA violations occurring prior to the acquisition.[259]

While each situation poses unique risks and requires a tailored due diligence strategy, the scope of review in Opinion Release 04-02 far exceeds what could be reasonably expected in the majority of transactions. Indeed, "[t]he extent and evident cost of the extensive measures cited in the Opinion are such that many would consider this to be wholly impractical in many circumstances and thus of limited value as a template for other merger/acquisition situations."[260] As a result, Opinion Release 04-02 does "not represent . . . a plausible minimum standard for avoiding successor liability" in M&A transactions.[261]

More definitive guidance arrived four years later. In Opinion Procedure Release 08-01 ("Opinion Release 08-01"), the DOJ represented that it would not bring an FCPA enforcement action in connection with a majority investment in a foreign company by a Delaware corporation's wholly-owned, foreign subsidiary.[262] At the time of the proposed investment, the target company was jointly-owned by a foreign government-owned entity and a foreign private entity.[263] The government-owned entity held 56 percent of the shares in the target, which were to be sold to the private sector following a bidding process.[264] The contemplated transaction involved the foreign private entity (the "Owner") establishing a second company that would both purchase the foreign government-owned entity's majority stake in the target, and take ownership of the foreign private entity's 44 percent stake.[265] A joint venture

expect the post-transactional organization to fully comply with the FCPA and other anti-corruption laws." DiBianco & Pearson, *supra* note 188, at 131.

259. DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 04-02, *supra* note 230, at 4.

260. Low & Davis, *supra* note 154, § 5:23(1), at 5-22.

261. *Id.* As to the desired scope of due diligence, Low & Davis note, "[i]n our view, the test for whether a due diligence effort has been sufficient should be thoroughness within the standards of reasonableness." *Id.* at § 5:23, at 5-21.

262. *See* DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 08-01 (Jan. 15, 2008), at 1, *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf.

263. *Id.* at 1-2.

264. *Id.* at 2.

265. *Id.* at 3.

would then be formed by the Requestor purchasing a majority stake in the target, thus leaving the new foreign entity with a minority interest.[266]

The Requestor conducted due diligence on the entities involved in the transaction, which did not uncover any negative information.[267] Specifically, the Requestor (1) commissioned a report on the Owner through a reputable investigative firm; (2) retained in the foreign country a consultant to advise on due diligence procedures; (3) commissioned International Company Profiles of the target and the foreign private entity from the U.S. Commerce Department; (4) searched for the various parties on watch lists; (5) met with U.S. Embassy representatives in the foreign country to confirm the absence of negative records; (6) retained outside legal counsel to perform due diligence and issue reports; (7) retained a forensic accounting firm to prepare due diligence reports; and (8) retained a different law firm to review the due diligence.[268]

Despite the absence of negative information,[269] the Requestor did uncover two "FCPA-related risks," causing it to demand additional disclosures from the Owner.[270] The Requestor withdrew from the transaction when the Owner resisted making the new disclosures.[271] However, the parties soon renewed negotiations, conditioned on additional due diligence.[272] The Requestor also committed to obtain "representations and warranties regarding past and future anti-corruption compliance," and to requiring a termination provision into the joint venture component of the deal that would allow the Requestor to walk away if it found "violations of anti-corruption laws."[273]

By casting the eight initiatives conducted by the Requestor in a favorable light, Opinion Release 08-01 provides helpful guidance into specific factors that may cause the DOJ to

266. *Id.*
267. *Id.* at 4.
268. *Id.* at 4-5.
269. *Id.* at 4.
270. *Id.* at 5.
271. *Id.*
272. *Id.* at 6.
273. *Id.* at 12. *See also* Madubuko, *supra* note 1, at 591 (arguing that acquirers should secure FCPA representations and warranties from target entities, as well as termination and audit rights).

view an FCPA due diligence program as adequate.[274] The DOJ also recognized the costs and transactional complications of FCPA due diligence, granting the Requestor expedited review.[275] The DOJ acknowledged that the deal was "highly valued" and "a matter of significant importance and urgency to the Requestor," thus making delay a high-risk event that could prevent the transaction from closing.[276] Finally, the Release makes clear that the DOJ views representations, warranties, and termination provisions as important to reducing FCPA risks.[277]

Still, while Opinion Procedure Release 08-01 is encouraging in that it recognizes the business consequences of FCPA compliance, and while it outlines the components of what the DOJ is likely to view as an adequate due diligence plan, the unique circumstances of the transaction at issue, as well as the inherent limitations regarding Opinion Procedure Releases,[278] remain in force.

C. *The FCPA in Active Transactions*

Nowhere are the potential effects of FCPA successor liability clearer than in the 2004 failed merger of defense contractors Lockheed Martin Corporation ("Lockheed") and The Titan Corporation ("Titan"). In September of 2003, Titan's shareholders approved an agreement that would facilitate the company's acquisition by Lockheed Martin.[279] Lockheed's due diligence soon uncovered evidence that Titan and one of its subsidiaries had used third-party agents to make improper payments in several foreign countries,[280] and that these payments were improperly recorded in corporate books and records.[281] The payments were funneled to the President of

274. *See* DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 08-01, *supra* note 262, at 4-5.

275. *Id.* at 1.

276. *Id.*

277. *Id.* at 12.

278. Like all Opinion Procedure Releases, 08-01 applies only to the Requester. *Id.* at 13.

279. Complaint ¶ 8, SEC v. Titan Corp., No. 05-0411 (D.D.C. 2005), *available at* http://www.sec.gov/litigation/complaints/comp19107.pdf.

280. *Id.* ¶¶ 1-6.

281. *Id.* ¶ 6.

Benin's reelection campaign,[282] and were intended to increase Titan's involvement in a telecommunications project.[283]

Lockheed caused Titan to disclose its FCPA violations to the DOJ and the SEC,[284] leading both agencies to launch investigations.[285] Lockheed and Titan amended the acquisition agreement to make completion of the deal contingent on resolution of criminal liability, confirmation that the DOJ would not bring charges against Titan, or the entry of a plea agreement between Titan and the DOJ plus the conclusion of sentencing.[286] The deal collapsed when Lockheed exercised the termination provision in the amended acquisition agreement, which provided that either party could abandon the deal if it was not completed by June 25, 2004.[287] Lockheed decided to "terminate the transaction rather than subject itself to potential liability" for Titan's FCPA violations.[288] As a Lockheed in-house attorney explained, "Lockheed had no desire to acquire an FCPA violation," which "ma[de] the resolution of FCPA issues a pre-condition to closing."[289]

As a result of the deal's collapse, "Titan, having begun the acquisition process celebrating a rapid increase in share price,

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282. *Id.* ¶ 2.

283. *Id.* ¶ 6.

284. Gibeaut, *supra* note 149, at 51 (explaining, "Lockheed forced Titan to report the violations to the government.").

285. *See, e.g.*, Claudius O. Sokenu, *DOJ Again Clarifies FCPA Due Diligence Expected in Business Combinations*, 40 SEC. REG. & L. REP. 1340, 1343 (2008); *see also* David S. Krakoff et al., *FCPA Due Diligence in the Context of Mergers and Acquisitions*, BLOOMBERG LAW REPORTS-MERGERS & ACQUISITIONS, Sept. 29, 2008, *available at* http:// www.mayerbrown.com/securitiesenforcement/article.asp? id=5805&nid=11478.

286. F. Joseph Warin & Justin A. Monahan, *Foreign Corrupt Practices Act Due Diligence and Voluntary Disclosure,* J. PAYMENT SYS. L. 425, 429 (2005). *See also* ROLAND L. TROPE & GREGORY E. UPCHURCH, CHECKPOINTS IN CYBERSPACE: BEST PRACTICES TO AVERT LIABILITY IN CROSS-BORDER TRANSACTIONS xxxi (2005) ("Titan was forced to negotiate with the Justice Department with a gun to its head, when a successfully concluded plea agreement was added as a condition to Lockheed's closing.").

287. *Id.*

288. Urofsky & Newcomb, *in* Shearman & Sterling LLP, FCPA DIGEST 2009, *supra* note 150, at 17.

289. Howard Weissman, Assistant Gen. Counsel, Lockheed Martin Corp., quoted in panel discussion with Homer E. Moyer et al., *Roundtable: The Foreign Corrupt Practices Act – Its Many Lives,* METRO. CORP. COUNS. (July 1, 2005), at 51.

found itself just nine months later with no buyer, a reduced international presence, a plummeting share price, and onerous remedial measures."[290] Among those measures was the requirement in Titan's eventual plea agreement[291] that it would retain an independent compliance consultant to review the company's FCPA compliance systems and provide binding recommendations to the board of directors.[292] Titan paid a total of $28 million to resolve the DOJ charges and the related SEC enforcement action, which at the time represented the largest fine imposed upon a public company for violating the FCPA.[293] Titan also came under additional regulatory scrutiny regarding its compliance with federal securities law disclosure requirements.[294]

The Lockheed / Titan situation has attracted significant attention because it represents a dire transactional consequence combined with an expensive enforcement problem. More typically, FCPA concerns have delayed M&A transactions and increased costs, but have not prevented eventual closure. Rather than abandon a transaction, "in a number of cases, the

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290. ALEXANDRA ADDISON WRAGE, BRIBERY AND EXTORTION: UNDERMINING BUSINESS, GOVERNMENTS AND SECURITY 62 (2007).

291. For a discussion of Titan's plea agreement and sentencing, see News Release, Carol C. Lam, Office of the U.S. Att'y, S. Dist. of Ca. (Mar. 1, 2005) *available at* http://www.dodig.mil/IGInformation/IGInformationReleases/Titan_030105.pdf.

292. Warin & Monahan, *supra* note 286, at 429.

293. *See* News Release, *supra* note 291, at 3.

294. On the day of Titan's settlement with the SEC, the SEC issued a report discussing Titan's potential liability under the federal securities laws for its failure to disclose the FCPA matter in its proxy statement. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on Potential Exchange Act Section 10(b) and Section 14(a) Liability, Exchange Act Release No. 51283 (Mar. 1, 2005), 2005 SEC LEXIS 4482. The SEC explained that while "the shareholders of Titan were not beneficiaries of the FCPA Representation as it appeared in the Merger Agreement," appending the Representation in the proxy statement required Titan to update it with material facts relating to the FCPA investigations. *Id.* The Report "served as a warning to companies that [the SEC] may bring enforcement actions . . . for violations of the anti-fraud provisions of the securities laws when it believes companies have made false or misleading public disclosures regarding FCPA compliance whether based on negligence, recklessness, or intent." Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards, in* FOREIGN CORRUPT PRACTICES ACT 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 711, 747 (2008) [hereinafter Low et al., Handbook].

buyer [has] forced the selling company to settle the potential [FCPA] criminal charges prior to closing."[295]

One such case is the 2002 acquisition of radiopharmaceutical company Syncor International Corporation ("Syncor") by Cardinal Health, Inc. ("Cardinal"). In the course of post-signing transactional due diligence, Cardinal discovered that foreign subsidiaries of Syncor had made corrupt payments to doctors at state-owned hospitals in Taiwan, Mexico, Belgium, Luxembourg and France.[296] Cardinal notified Syncor of its findings, which responded by establishing an internal committee to investigate the issue, and then voluntarily disclosing the matter to the DOJ and the SEC.[297] Soon after, Cardinal issued a press release stating that there " 'can be no assurance"' that the transaction would close, but that it intended to comply with the terms of the acquisition agreement.[298]

On December 4, 2002, Syncor revealed that it had entered into agreements with the DOJ and the SEC to resolve its FCPA liability, prompting Cardinal's then-CEO to announce that the agreements provided "confidence that Cardinal Health shareholders will be protected as we move forward to complete the acquisition."[299] To resolve the SEC's claims that it had violated the anti-bribery and accounting provisions of the FCPA, Syncor agreed to pay a $500,000 civil fine and to retain an independent compliance consultant.[300] The parallel DOJ proceeding was resolved through a guilty plea by Syncor's foreign subsidiary, Syncor Taiwan, Inc., pursuant to which it paid a $2 million criminal penalty.[301]

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295. Urofsky & Newcomb, *in* Shearman & Sterling LLP, FCPA DIGEST 2009, *supra* note 150, at 19.

296. *See, e.g.*, SEC Obtains $500,000 Penalty Against Syncor International Corporation for Violating the Anti-Bribery Provisions of the Foreign Corrupt Practices Act, 2002, Litigation. Release No. 17887, SEC LEXIS 3143 (Dec. 10, 2002); *see also* Low et al., Handbook, *supra* note 294, at 749.

297. 2 MARTIN LIPTON ET AL., TAKEOVERS AND FREEZEOUTS 22 (1978).

298. *Id.*

299. Cardinal Health Co., (File No. 000-08640) (Dec. 4, 2002), at 2, *available at* http://www.secinfo.com/drDX9.31db.htm.

300. Litigation. Release No. 17887, *supra* note 296.

301. Press Release, Dep't of Justice, Syncor Taiwan, Inc. Pleads Guilty to Violating the Foreign Corrupt Practices Act (Dec. 10, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/December/02_crm_707.htm.

The Cardinal / Syncor deal reveals how FCPA concerns uncovered through M&A due diligence can alter pricing and the strategic positions of transacting parties. As the transaction illustrates, "FCPA probes have triggered price cuts in pending deals," as the costs of an investigation and the risk that the acquirer will walk away can degrade the value of a target.[302] A target's stock price can be further depressed by market perceptions that the FCPA issues will cause the deal to bepriced lower, thus causing the value of the target's shares to decline.[303]

In the Cardinal / Syncor transaction, once Syncor's FCPA problems came to light, "the terms of the merger shifted dramatically in Cardinal's favor."[304] Syncor's stock price was "hammered" as speculation that the deal would implode became common.[305] And while the transaction eventually closed, Cardinal paid approximately $90 million less for Syncor than it had originally offered.[306] Rather than an exchange of 0.52 shares of Cardinal stock for each share of Syncor, Cardinal in the end provided only 0.47 shares.[307]

A 2004 transaction between General Electric Company ("GE") and InVision Technologies Inc. ("InVision") provides additional insight into the consequences that can arise when FCPA issues are uncovered during M&A transactions. There, GE sought to acquire InVision, an explosives detection systems company, in a $900 million cash merger.[308] Soon after the deal was announced, it was revealed that InVision and GE had conducted an internal investigation of InVision's foreign operations and had disclosed the results to the DOJ and the SEC.[309] The FCPA concerns involved corrupt payments by In-

302. Scott Stuart, *Invision Down on FCPA Query*, DEAL, Aug. 2, 2004, at C-1.

303. *Id.* (arguing that speculation that FCPA issues could reduce the value of InVision stock actually caused the stock price to decline).

304. Sokenu, *supra* note 285, at 1346.

305. E. Scott Reckard & Ronald D. White, *Syncor May Have Broken Bribery Laws*, L.A. TIMES, Nov. 7, 2002, *available at* http://articles.latimes.com/2002/nov/07/business/fi-syncor7.

306. Witten et al., *Prescriptions*, *supra* note 222, at 722.

307. Sokenu, *supra* note 285, at 1346.

308. *InVision Investigation Could Jeopardize GE Deal*, S.F. CHRON., Aug. 3, 2004, at C-1.

309. GE InVision, Inc., Current Report (Form 8-K) ex. 99.1 (July 30, 2004).

Vision sales agents and distributors to officials in China, the Philippines and Thailand.[310]

The GE / InVision deal eventually closed, but not before the transaction was substantially complicated by FCPA concerns. The immediate effect of public disclosure of the investigation was to depress InVision's stock price[311] and trigger a shareholder class action lawsuit.[312] The revelation that InVision was at risk of regulatory action temporarily delayed the deal and increased costs for both InVision and GE.[313] The merger agreement provided that the transaction would not close in the face of pending or threatened litigation, thus placing the transaction in limbo until agreements had been reached with the DOJ and the SEC.[314] Prior to closing, there was concern that the transaction would fail or would price considerably lower than originally expected.[315]

Eventual resolution of the matter was not cheap, as InVision entered into a non-prosecution agreement with the DOJ in which it agreed to pay an $800,000 fine, retain an independent compliance monitor, and engage in good-faith settle-

310. Press Release, Dep't of Justice, InVision Technologies, Inc. Enters into Agreement with the United States (Dec. 6, 2004), *available at* http://www.justice.gov/opa/pr/2004/December/04_crm_780.htm [hereinafter Press Release, Dep't of Justice, InVision Agreement]; *see also* SEC Settles Charges Against InVision Technologies for $1.1 Million for Violations of the Foreign Corrupt Practices Act, Litigation Release No. 19078, 2005 SEC LEXIS 356 (Feb. 14, 2005).

311. Stuart, *supra* note 302, at C-1.

312. *See* Glazer Capital Mgmt. LP v. Magistri, 549 F.3d 736 (9th Cir. 2008) (later dismissed).

313. *See, e.g.*, Wilmer Cutler Pickering Hale and Dorr LLP, *DOJ Agrees Not To Prosecute InVision; InVision Enters Non-Prosecution Agreement with DOJ and Agreement in Principle with SEC; Path Cleared for GE Acquisition of InVision*, FOREIGN CORRUPT PRACTICES UPDATE (Wilmer Cutler Pickering Hale and Dorr LLP, Wash., D.C.), (Jan. 5, 2005), http://www.wilmerhale.com/files/ Publication/2169810a-9c0a-46ad-93c2-7fcb1ff1aa12/Presentation/PublicationAttachment/de152104-ecd5-418e-9eff-80de37b356c4/FCPupdate_Jan2005.pdf.

314. Low et al., Handbook, *supra* note 294, at 747. *See also* Low et al., *Uncertain Calculus*, *supra* note 49, at 8 n.30 (explaining that the GE / InVision deal "was nearly derailed by FCPA violation allegations until InVision was able to settle with the [DOJ].").

315. *See InVision Investigation Could Jeopardize GE Deal*, *supra* note 308, at C-1 (quoting an investment analyst expressing concern that GE "'may not take the deal, or . . . . might price the deal lower.'").

ment negotiations with the SEC.[316] After the merger closed, InVision paid a $500,000 civil penalty to settle the SEC action.[317] GE entered into a separate letter agreement with the DOJ which provided that GE would not be prosecuted for InVision's past FCPA violations so long as such violations were disclosed to the DOJ by either GE or InVision.[318] GE further agreed to "[i]ntegrate the InVision business into GE's FCPA compliance program" and to retain a DOJ-approved compliance consultant to evaluate the integration process.[319]

The risk that a valuable acquisition can be quickly transformed into an expensive compliance problem has created incentives for acquirers to demand pre-closing disclosures to enforcement agencies, which was the result in Monsanto Company's ("Monsanto") 2007 acquisition of Delta & Pine Land Company ("Delta Land"). Monsanto, a U.S. global agricultural company, sought to acquire Delaware-based Delta Land, a company engaged in the development and production of proprietary cottonseed.[320] Turk Deltapine, Inc. ("Deltapine"), a wholly-owned, Delaware-based subsidiary of Delta Land, produced and sold cottonseed in Turkey through business arrangements with Turkish farmers.[321] The farmers would own and grow cottonseed for Deltapine, which would then purchase the seed and channel it to exports and to domestic use in Turkey.[322]

The seed grown by Turkish farmers was subject to a series of inspections by the Turkish Ministry of Agricultural and Ru-

316. Low et al., *supra* note 294, at 748.

317. *Id.*

318. *Id.*; *see also* Willkie Farr & Gallagher LLP, InVision Acquisition Closes After InVision and GE Reach Agreement with the Department of Justice Over FCPA Allegations, CLIENT MEMORANDUM (Willkie Farr & Gallagher LLP, N.Y.C.), Dec. 15, 2004, at 2, *available at* http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C2116%5CInVision_Acquisition_Closes.pdf [hereinafter Willkie Farr & Gallagher LLP, InVision Acquisition].

319. Press Release, Dep't of Justice, InVision Agreement, *supra* note 310. The agreement called for the compliance consultant to be retained for up to one year. Willkie Farr & Gallagher LLP, InVision Acquisition, *supra* note 318, at 2.

320. *See* Complaint ¶ 2, SEC v. Delta & Pine Land Co. & Turk Deltapine, Inc., No. 1:07-cv-01352 (D.D.C. 2007).

321. *Id.* ¶¶ 3, 5.

322. *Id.*

ral Affairs ("MOA").[323] Inspectors from the MOA conducted time-sensitive evaluations of the fields and were required to file reports prior to Deltapine being permitted to purchase the seeds from farmers.[324] The MOA was also responsible for issuing certifications regarding proper chemical treatment and bagging of the seeds before export.[325] Organisation for Economic Co-Operation and Development quality standards also required that the cottonseed undergo laboratory testing prior to sale.[326]

Deltapine's FCPA problems grew out of this complicated inspection process. In exchange for improper payments made by Deltapine, MOA officials issued approvals to Deltapine without ensuring compliance with the regulatory controls governing the seeds.[327] The SEC alleged that when Delta Land discovered the improper payments in May 2004, it directed Deltapine to use a chemical company as an intermediary to channel payments to the MOA officials.[328] The intermediary would submit inflated invoices to Deltapine and then transfer the excess funds to MOA officials, taking a ten percent surcharge as a fee for acting as the conduit for the bribes.[329] The total value of the bribes was approximately $43,000, which included cash as well as travel and hotel expenses, and gifts including air conditioners, refrigerators, computers and office furniture.[330]

The bribes continued until 2006, when Monsanto uncovered them while performing pre-acquisition due diligence on Delta Land.[331] Upon discovering Deltapine's FCPA problems, Monsanto "required [Delta Land] to report the conduct to the DOJ and SEC, ultimately leading to a post-closing FCPA settlement"[332] of $300,000 based on violations of the anti-bribery

323. *Id.* ¶¶ 5-6.

324. *Id.* ¶ 5.

325. *Id.* ¶ 6.

326. *Id.*

327. *Id.*

328. *Id.* ¶¶ 8-9.

329. *Id.* ¶ 9.

330. Delta & Pine Land Co., Exchange Act Release No. 56138, at 2, 2007 SEC LEXIS 1643 (July 26, 2007).

331. *See* Compl. ¶ 10, *Delta & Pine Land Co.*, No. 1:07-cv-01352.

332. Gibson, Dunn & Crutcher LLP, *2007 Update*, *supra* note 218, at 9.

and accounting provisions.[333] Monsanto completed the acquisition in June 2007, just prior to entry of the SEC settlement.[334]

As with the other cases in this section, FCPA problems in *Delta & Pine* were uncovered during transactional due diligence, with the scope of both the alleged violations and the response of U.S. authorities developing in tandem with the transaction. The result in every case was to delay closure of the transactions,[335] and, in the Lockheed / Titan deal, to prevent the transaction entirely.[336] The risks to acquirers are not always easy to predict; Cardinal and Monsanto were willing to proceed with their acquisitions, but Lockheed was not.[337]

While the cases above involved situations in which emerging knowledge of FCPA issues met transactional concerns head-on, in other cases FCPA risks have been revealed only after a merger or acquisition has closed. When an FCPA concern is uncovered prior to closing, the prospective acquirer can often insist that the matter be resolved before the transaction is finalized, and, like Lockheed, often has the option to terminate the deal. The situation is far more dangerous when FCPA problems are uncovered post-closing, as acquirers or newly-merged entities must negotiate with enforcement agencies without the security of a termination provision. As will be seen, the costs of late discovery can be immense.[338]

D. *Post-Closing Settlements*

The number of post-closing FCPA cases in the M&A context has grown significantly in recent years. In one case, York

333. *See* Final Judgment at 2, *Delta & Pine Land Co.*, No. 1:07-cv-01352.

334. Sokenu, *supra* note 285, at 1345.

335. *See* Sokenu, *supra* note 285, at 1344 (discussing the GE / InVision deal and explaining, "as is to be expected, government investigations will slow down the closing of corporate merger and acquisition transactions.").

336. *See supra* Section V.C.

337. Lockheed may have abandoned the Titan acquisition because bribery could have jeopardized Lockheed's ability to secure future government contracts, a "potential catastrophic penalty" for a defense contractor. Lindstrom & Riddle, *supra* note 53, at 7.

338. *See, e.g.*, Ivan R. Lehon et al., *Staying Ahead of Corruption Liabilities*, MERGERS & ACQUISITIONS (Ernst & Young, N.Y.C.), Feb. 2009, *available at* http://www.ey.com/Publication/vwLUAssets/FIDSFI_StayAheadCorruptionLiabilities.pdf/$FILE/FIDS-FI_StayAheadCorruptionLiabilities.pdf.

International ("York"), a Pennsylvania-based global heating and cooling company with subsidiaries across the globe, conducted an internal investigation that revealed numerous FCPA violations, which were disclosed to enforcement agencies.[339] Following investigations by the DOJ and the SEC, York was alleged to have violated the FCPA in connection with the United Nations Oil-for-Food Program ("OFFP") and by using an intermediary to channel other payments to foreign officials.[340] York's participation in the OFFP scheme from 2000 to 2003 involved over $647,000 in kickbacks paid to Iraqi officials by Delaware and Dubai subsidiaries.[341] The kickback scheme rested on inflating contract prices by ten percent prior to submission to the United Nations, such that the U.N. would inadvertently finance the ten percent kickback on approved contracts.[342] In other cases, kickbacks were concealed as "after sales service fees," although no service would be performed by the supplier, and the funds would be transferred to Iraqi officials in exchange for selecting the contractor's bid.[343]

Aside from the OFFP kickback scheme, York, through subsidiaries, was alleged to have made corrupt payments to foreign officials in the United Arab Emirates, Egypt and India.[344] These payments usually took the form of fictitious consulting fees for services that were never performed.[345] The false consulting fees were made from 2001 through 2006, during which

339. Deferred Prosecution Agreement at 3, United States v. York Int'l Corp., No. 1:07-cr-00253 (D.D.C. 2007).

340. Information ¶¶ 2, 9-10, *York Int'l Corp.*, No. 1:07-cr-00253; Complaint ¶¶ 2-6, 9, *York Int'l Corp.*, No. 1:07-cv-01750 (D.D.C. 2007).

341. Information, *supra* note 340, ¶¶ 1-5; Complaint, *supra* note 340, ¶¶ 2, 10-11.

342. Information, *supra* note 340, ¶¶ 18-19, 23; Complaint, *supra* note 340, ¶¶ 20-21.

343. Information, *supra* note 340, ¶¶ 18-19; Complaint, *supra* note 340, ¶ 19.

344. Press Release, Sec. & Exch. Comm'n, SEC Files Settled Foreign Corrupt Practices Act Charges Against York Int'l Corp. Improper Payments to UAE Officials, to Iraq Under the U.N. Oil for Food Program, and to Others – Company Agrees to Pay Over $12 Million and to Retain an Independent Compliance Monitor (Oct. 1, 2007), *available at* http://www.sec.gov/news/digest/2007/dig100107.htm [hereinafter Press Release, Sec. & Exch. Comm'n, SEC Files Charges Against York]; Information, *supra* note 340, ¶¶ 47-48; Complaint, *supra* note 340, ¶¶ 30-34.

345. Information, *supra* note 340, ¶¶ 47-48; Complaint, *supra* note 340, ¶¶ 30-34.

time approximately 774 contracts were affected by bribes totaling over $7.5 million.[346]

On December 9, 2005, York became a wholly-owned subsidiary of Johnson Controls, Inc. ("Johnson Controls").[347] Nearly two years later, York agreed to settle FCPA claims brought by the SEC and entered into a deferred prosecution agreement with the DOJ, obligating it to pay a $2 million civil penalty, a $10 million criminal fine, and to disgorge $10 million in profits.[348] York also agreed to allow an independent compliance monitor to review its FCPA compliance systems for a period of three years.[349]

Significantly, Johnson Controls was not charged with any FCPA violations for York's conduct, even though York resolved the matter with enforcement agencies two years after it was acquired by Johnson Controls. This is perhaps due to the DOJ specifically recognizing that "nearly all of the conduct described in the Information took place prior to York's acquisition by Johnson Controls."[350] *York* may thus be a positive signal from enforcement agencies that successor liability for a target's FCPA violations is not inevitable, even where resolution occurs after a deal has closed. Nonetheless, parties to M&A transactions would greatly benefit from firm guidance regarding expected FCPA due diligence and post-closing compliance initiatives.

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346. Complaint, *supra* note 340, ¶ 45.

347. *Id.* ¶ 9.

348. Press Release, Dep't of Justice, Justice Dep't Agrees to Defer Prosecution of York Int'l Corporation in Connection with Payment of Kickbacks Under the U.N. Oil for Food Program (Oct. 1, 2007), at 1, *available at* http://www.justice.gov/opa/pr/2007/October/07_crm_783.html; Press Release, Sec. & Exch. Comm'n, SEC Files Charges Against York, *supra* note 344; Deferred Prosecution Agreement, *supra* note 339, ¶ 3.

349. Press Release, Dep't of Justice, *supra* note 348; Press Release, Sec. & Exch. Comm'n, SEC Files Charges Against York, *supra* note 344; Deferred Prosecution Agreement, *supra* note 339, ¶¶ 10-11.

350. Deferred Prosecution Agreement, *supra* note 340, ¶ 4. Some of the conduct at issue was alleged to have continued after the acquisition closed. *See* Information, *supra* note 340, ¶ 10 (alleging that York subsidiaries offered foreign officials bribes "[f]rom in or about September 1999 through December 2005"); Complaint, *supra* note 340, ¶ 45 (alleging that York subsidiaries made improper consulting payments "[f]rom September 2001 through 2006").

Also in 2007, the SEC alleged violations of the FCPA's books and records and internal control provisions by Texas oil and gas company El Paso Corporation and its wholly-owned subsidiary, El Paso Energy Corporation (together, "El Paso"), the latter of which had merged with The Coastal Corporation ("Coastal") in 2001.[351] The complaint alleged that between August 2000 and March 2003, Coastal filtered approximately $5.5 million in surcharge payments to Iraq's State Oil Marketing Organization ("SOMO") in connection with the OFFP.[352] According to the complaint, the former Chief Executive Officer of Coastal was well-connected to the Iraqi regime and to Saddam Hussein personally, and was thus able to secure the first oil contract ever issued under the OFFP in 1996.[353]

In September 2000, Coastal received its first request for an illegal surcharge payment on each barrel of oil it purchased.[354] The SEC alleged that Coastal made the first surcharge payment, but soon after stopped dealing directly with SOMO when it learned that all future oil contracts under OFFP would require surcharges.[355] Nonetheless, while Coastal "knew from first-hand experience" that SOMO required illegal surcharges on oil sold under the OFFP, it still purchased oil from third parties that continued to provide SOMO with the surcharge payments.[356]

The SEC's complaint asserted books and records and internal control violations against El Paso for indirect surcharge payments made through third parties occurring both before and after Coastal was merged into the company, claiming that "El Paso knew or was reckless in not knowing that illegal surcharges were paid in connection with [oil] purchases."[357] In total, approximately $5.5 million was alleged to have been paid in illegal surcharges.[358] El Paso settled the matter with the SEC by agreeing to pay a civil penalty of approximately

351. Complaint ¶¶ 1, 8, SEC v. El Paso Corp., No. 07-CV-899 (S.D.N.Y. 2007), *available* at http://www.sec.gov/litigation/complaints/2007/comp19991.pdf.

352. *Id.* ¶¶ 1, 14, 20.

353. *Id.* ¶ 19.

354. *Id.* ¶ 20.

355. *Id.* ¶ 22.

356. *Id.* ¶¶ 22-23.

357. *Id.* ¶ 1.

358. *Id.* ¶ 3.

$2.2 million,[359] and entered into a non-prosecution agreement with the DOJ, obligating it to disgorge nearly $5.5 million in illicit profits.[360] *El Paso* thus underscores the risks to an acquirer both in assuming control of a target that has violated the FCPA, as well as in failing to prevent ongoing violations from continuing after the transaction has closed.

In 2009, the SEC filed a settled civil action and an administrative proceeding against Avery Dennison Corporation ("Avery Dennison") for violations of the FCPA's books and records and internal control provisions following improper payments made to foreign officials in China and elsewhere.[361] The bulk of the SEC's complaint was that Avery Dennison, a Delaware manufacturer of products that include adhesive and reflective materials for road signs and vehicles, had provided improper gifts and funneled surcharge-funded kickbacks to foreign officials in China through an indirect, wholly-owned subsidiary.[362]

The SEC also alleged that Avery Dennison acquired Paxar Corporation ("Paxar") in June 2007, three months after which it learned that Paxar employees had bribed foreign officials in China, Indonesia and Pakistan to secure bonded zone licenses and to sidestep related regulatory requirements.[363] In both the complaint and the cease-and-desist order, the SEC noted the post-acquisition payments, but nevertheless asserted that "[i]n all three locations, illicit payments were made both before and after the acquisition,"[364] demonstrating that, as in *El Paso*, pre-acquisition FCPA violations of an acquired entity can create liability for the purchaser.

2009 also saw "the first FCPA enforcement action ever filed based entirely on pre-acquisition conduct that was unknown to the acquirer when the transaction closed."[365] In

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359. Final Judgment at 2, *El Paso Corp.*, No. 07-CV-899.

360. *Id.* at 2-3; *see also* Press Release, Office of the U.S. Att'y, S. Dist. of N.Y., U.S. Announces Oil-for-Food Settlement with El Paso Corporation, (Feb. 7, 2007), at 1, *available at* http://www.justice.gov/usao/nys/pressreleases/February07/ elpasoagreementpr. pdf.

361. Complaint, SEC v. Avery Dennison Corp., No. CV09-5493DSF (C.D. Cal. 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp21156.pdf.

362. *Id.* ¶¶ 8-15.

363. *Id.* ¶¶ 16-17.

364. *Id.* ¶ 17; Avery Dennison Corp., Exchange Act Release No. 60393, ¶ 17, 2009 SEC LEXIS 2599 (July 28, 2009).

365. Warin et al., *supra* note 1, at 41.

United States v. Latin Node, Inc., the DOJ charged Latin Node Inc. ("Latin Node"), a privately-held Florida telecommunications company, with a single count indictment for violating the FCPA's anti-bribery provision in connection with efforts to secure contracts in Honduras and Yemen.[366] Latin Node was alleged to have made "questionable payments" in excess of $1 million from approximately March of 2004 to June of 2007.[367] On June 28, 2007, Latin Node was acquired by eLandia International, Inc. ("eLandia"), a publicly-traded company organized in Florida.[368] After the acquisition had closed, eLandia "subsequently discovered" the improper payments by Latin Node, prompting it to conduct an internal investigation and voluntarily disclose the results to the government.[369]

Despite acknowledging that "the criminal payments charged in the information were made entirely prior to eLandia's acquisition of Latin Node,"[370] and that "[t]he disclosure and internal investigation undertaken by eLandia and Latin Node substantially assisted the Department in its investigation,"[371] the DOJ nonetheless brought charges against Latin Node and secured a guilty plea requiring the company to pay $2 million over three years.[372] This penalty was to be born entirely by eLandia, which had discontinued Latin Node's operations, terminated most of its employees and caused it to file "a state-law equivalent of bankruptcy" in Florida.[373] By the

366. *See* Government's Sent. Mem. at 1, United States v. Latin Node, Inc., No. 1:09-cr-20239 (S.D. Fla. 2009).

367. *Id.* at 2.

368. *Id.* at 1, 5.

369. *Id.* at 1-2.

370. *Id.* at 5.

371. *Id.* at 2.

372. Judgment at 1, United States v. Latin Node, Inc., No. 1:09-cr-20239-PCH (S.D. Fla. 2009); Press Release, Dep't of Justice, Latin Node Inc. Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (Apr. 7, 2009), *available at* http://www.justice.giv/opa/pr/2009/April/09-crm-318.html.

373. Shearman & Sterling LLP, *Latin Node Inc.: Undiscovered FCPA Violations Wipe Out an Investment*, CLIENT PUBLICATION (Shearman & Sterling LLP, Wash., D.C.), Apr. 15, 2009, at 2, *available at* http://www.shearman.com/files/Publication/81a34505-4321-4cb5-85dd-3af9ccd1b420/Presentation/PublicationAttachment/d3a57fd3-b057-42ec-9b98-6201ef464642/LT-041509-Latin-Node-Inc-Undiscovered-FCPA-Violations-Wipe-Out-an-Investment.pdf [hereinafter Shearman & Sterling LLP, Undiscovered FCPA Violations]; *See also* Government's Sent. Mem. at 6, United States v. Latin Node, Inc., No.

time Latin Node pleaded guilty, it was in a '"shell' state, ha[d] few remaining assets and minimal capital, and none of the employees or officers involved in the relevant conduct remained employed by Latin Node or eLandia."[374] As the Sentencing Memorandum explains, eLandia "dissolved Latin Node from an operational perspective, at a cost to eLandia of millions of dollars, and has ceased doing business relating to the tainted contracts."[375]

Among several possible reasons behind the DOJ's decision to indict Latin Node despite the facts discussed above, one motivation may have been the limited due diligence performed by eLandia prior to the acquisition, as well as its reliance on Latin Node's representations about its FCPA compliance.[376] The charge—while limited to a single count levied only at Latin Node rather than eLandia—is nonetheless "a loud warning" that pre-acquisition due diligence and remedial post-closing measures are essential to mitigate FCPA liability.[377]

If *Latin Node* is ambiguous about the risks an acquirer faces when a target is later found to have violated the FCPA, clarity may be found in a 2010 SEC civil action against GE and certain of its subsidiaries. In that case, the SEC alleged that GE, through four subsidiaries—two of which were owned by GE at the time of the violations and two that were purchased years later—had violated the books and records and internal control provisions of the FCPA through contracts under the OFFP.[378]

Between 2000 and 2002, Nycomed Imaging AS ("Nycomed"), a Norwegian company, and Ionics Italba S.r.L.

1:09-cr-20239-PCH (S.D. Fla. 2009) ("[Latin Node's] parent corporation, eLandia, has agreed to provide the funds necessary for the recommended fine.").

374. Sent. Mem. at 6, United States v. Latin Node, Inc., No. 1:09-cr-20239-PCH (S.D. Fla. 2009).

375. *Id.* at 7.

376. *See* Shearman & Sterling LLP, Undiscovered FCPA Violations, *supra* note 373, at 2-3.

377. Urofsky & Newcomb, *in* Shearman & Sterling LLP, FCPA DIGEST 2009, *supra* note 150, at 23. *See also* Shearman & Sterling LLP, FCPA DIGEST 2010, *supra* note 11, at iii ("the *Latin Node* case demonstrates the risks a buyer faces when relying on a seller's representations in an M&A matter rather than conducting thorough pre-acquisition due diligence.").

378. SEC v. Gen. Elec. Co., et al., No. 1:10-cv-01258 (D.D.C. 2010).

("Italba"), an Italian company, were alleged to have violated the books and records and internal control provisions of the FCPA by providing cash kickbacks to the Iraqi Ministry of Health and the Iraqi Ministry of Oil.[379] Nycomed is alleged to have paid approximately $750,000 in kickbacks to the Ministry of Health in exchange for selecting Nycomed as a provider of contrast agents used in X-ray and magnetic resonance imaging procedures.[380] Nycomed negotiated nine contracts with the Ministry of Health using a Jordanian agent, who was "explicitly authorized" to pay the kickbacks by Nycomed's sales agent in Cyprus.[381] The illicit profit reaped by Nycomed under these contracts was estimated to be approximately $5 million.[382]

For its part, Italba was alleged to have entered into five water treatment equipment contracts with the Ministry of Oil, under which it netted $2.3 million in illicit profits by securing business through $795,000 in kickback payments.[383] Like Nycomed, Italba used a Jordanian agent to negotiate the contracts, and then routed kickbacks through a Saudi Arabian front company.[384] The kickbacks tendered by Nycomed and Italba were alleged to have violated the books and records and internal control provisions of the FCPA rather than the anti-bribery arm, likely because they were provided directly to government agencies rather than foreign officials.[385]

GE acquired Amersham plc ("Amersham"), the parent company of Nycomed, in 2004, and Ionics, Inc. ("Ionics"), the parent of Italba, in 2005.[386] The fact that there was a gap of at least two years (and as large as five years) between the FCPA violations by Nycomed and Italba and GE's acquisitions of their parent companies seemingly did nothing to mitigate GE's successor liability. The SEC noted several times in its complaint that GE held no ownership in Nycomed or Italba during the time of the violations, and that the companies'

379. Complaint ¶¶ 12-13, 45-50, *Gen. Elec. Co., et al.*, No. 1:10-cv-01258.
380. *Id.* ¶ 35.
381. *Id.* ¶ 36.
382. *Id.* ¶ 35.
383. *Id.* ¶ 40.
384. *Id.* ¶ 43.
385. Mike Koehler, *The FCPA's Long Tentacles*, FCPA PROFESSOR (Aug. 3, 2010), http://fcpaprofessor.blogspot.com/2010/08/fcpas-long-tentacles.html.
386. Complaint, *supra* note 379, ¶¶ 12-13.

"conduct occurred prior to the acquisition[s]" by GE,[387] but nonetheless alleged that Nycomed and Italba, while now owned by GE, "are the respective successors to the liabilities of Ionics and Amersham."[388] GE resolved the matter by paying $23.4 million to the SEC, composed of more than $18 million in disgorgement, more than $4 million in interest, and a $1 million penalty.[389]

Unlike in *Latin Node*, where the DOJ did not name acquirer eLandia in the indictment against its new subsidiary, the SEC in *General Electric* determined that GE was responsible for the pre-acquisition violations of Nycomed and Italba. The situation is further complicated in that GE purchased the parents of Nycomed and Italba,[390] and was thus one additional level removed from the violators than was eLandia when it purchased Latin Node.[391]

Among the possible explanations for the apparently different treatment of the acquirers in these cases is that GE was subject only to civil liability for books and records and internal control violations, whereas eLandia would have faced criminal liability for Latin Node's conduct.[392] Alternatively, the SEC may have come down harder on GE than did the DOJ on eLandia because two of the offending subsidiaries in *General Electric* were owned by GE prior to the FCPA violations occurring.[393] Under this theory, GE, while not the owner of Nycomed and Italba during the time that those companies provided illicit kickbacks, was nonetheless otherwise culpable in the same scheme.One could also argue that the cases are really not very different, as eLandia, while not formally named in the DOJ indictment, was functionally responsible for shouldering the burden of Latin Node's conduct, as that entity had

387. *Id.* ¶¶ 34, 39. *See also id.* ¶ 1 (acknowledging that Amersham and Ionics were both "acquired by GE after the conduct at issue in this Complaint.").

388. *Id.* ¶ 49.

389. Press Release, Scarboro & Price, Sec. & Exch. Comm'n, *supra* note 14, at 1, 2.

390. Complaint, *supra* note 379, ¶¶ 12-13.

391. Sent. Mem., United States v. Latin Node, Inc., No. 1:09-cr-20239-PCH (S.D. Fla. 2009), at 1, 5 (eLandia acquired Latin Node directly).

392. *See supra* Section IV.A. (successor liability for civil claims is less controversial than successor liability for criminal conduct).

393. Complaint, *supra* note 379, ¶ 1.

been rendered an insolvent "shell."[394] Regardless of interpretation, *General Electric*, like *Latin Node*, makes clear the successor liability risks that an acquiring entity may face under the FCPA. The next section discusses post-closing FCPA compliance measures, which should be used jointly with due diligence to reduce successor liability risks.

E. *Post-Closing Compliance Programs*

While this Article is primarily concerned with liability for pre-acquisition conduct, a discussion of the FCPA in M&A transactions would be incomplete without addressing post-closing compliance.[395] The 2006 case of *SEC v. Tyco International Limited* provides insight into the importance of implementing effective post-closing FCPA compliance measures in M&A transactions.[396] In *Tyco*, an acquirer's failure to implement post-closing FCPA compliance resulted in liability for the actions of the target and drove home the reality that substan-

394. Sent. Mem., United States v. Latin Node, Inc., No. 1:09-cr-20239-PCH (S.D. Fla. 2009), at 6.

395. Like FCPA due diligence, post-closing compliance measures can include a variety of efforts. Some of these measures are listed in Opinion Procedure Release 03-01, involving a transaction in which the acquirer discovered FCPA violations at the target. DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 03-01 (Jan. 15, 2003), *available at* http:// www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf. Disclosures were made to the DOJ and the SEC following parallel global investigations by the acquirer and the target. *Id.* at 1. The acquirer was "concerned that by acquiring [the target] it is also acquiring potential criminal and civil liability under the FCPA for the past acts of [the target's] employees." *Id.* As a result, the acquirer represented to the DOJ that after the deal closed, it would, among other things, discipline the employees involved in the conduct, extend its compliance program to the target, and ensure that the target enacted internal controls to ensure the accuracy of its books and records. *Id.* The DOJ represented that it did not intend to bring an FCPA enforcement action against the acquirer based on the transaction, but that its "statement of intent" did not apply to post-closing corrupt payments, or to the individuals involving in "making or authorizing the payments." *Id.*

396. Post-closing integration is essential in transactions posing FCPA risks. *See* Lindsey, *supra* note 165, at 985 (arguing, "even the most thorough pre-merger due diligence can fail to uncover problems in a small, remote operating unit and therefore acquirers should quickly undertake post-merger integration training and due diligence for employees and third parties.").

tial measures must be put in place to ensure compliance after a transaction has closed.[397]

Tyco is largely an accounting and securities law disclosure case, as the bulk of the SEC's complaint focused on allegations that Tyco International Ltd. ("Tyco") had improperly inflated its operating income, undervalued acquired assets, overvalued acquired liabilities and failed to disclose information related to compensation, debt and related-party transactions.[398] The complaint also alleged violations of the FCPA's anti-bribery and books and records provisions based on Tyco's efforts to push a widespread global expansion through a "massive acquisition campaign"[399] during which it "acquired hundreds of companies."[400] Two of those companies were Earth Tech Brasil Ltda. ("Earth Tech")[401] and Dong Bang Industrial Co. Ltd.,[402] both of which were acquired despite due diligence indicating that illicit payments were common in the markets in which they operated.[403]

The Earth Tech acquisition was especially significant. The SEC alleged that after its acquisition by Tyco, Earth Tech violated the FCPA's anti-bribery provision by making payments to Brazilian government officials to secure municipal water and wastewater treatment contracts.[404] The complaint faulted Tyco for failing to have "a uniform, company-wide FCPA compliance program in place or a system of internal controls sufficient to detect and prevent FCPA misconduct in its globally dispersed business units."[405] The SEC alleged that improper payments made to Brazilian officials by Earth Tech "were so widespread" that approximately sixty percent of all of the company's contracts involved a payment to a government offi-

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397. *See* SEC v. Tyco Int'l Ltd., No. 06-CV-2942, 2006 SEC LEXIS 864 (S.D.N.Y. 2006).

398. *See, e.g.*, SEC Brings Settled Charges Against Tyco International Ltd. Alleging Billion Dollar Accounting Fraud SEC, Litigation. Release No. 19657, 2006 SEC LEXIS 864 (Apr. 17, 2006) [hereinafter Press Release, Sec. & Exch. Comm'n, SEC Brings Settled Charges Against Tyco].

399. Complaint ¶ 13, *Tyco Int'l Ltd.*, No. 06-CV-2942.

400. *Id.* ¶ 2.

401. Earth Tech Brasil Ltda. was originally known as Multiservice Engenharia Ltda. and was renamed by Tyco after the acquisition. *Id.* ¶ 48.

402. *Id.* ¶ 53.

403. *Id.* ¶¶ 48, 53.

404. *Id.* ¶ 49.

405. *Id.* ¶ 55.

cial.[406] While the complaint focused on pre-acquisition due diligence, the corrupt payments by Earth Tech occurred *after* the acquisition.[407] Tyco eventually resolved the matter by disgorging $1 and paying a $50 million civil penalty.[408]

One commenter has suggested that *Tyco* reveals "a belief from the government's perspective" that acquirers must closely examine their foreign targets to detect and resolve any corrupt practices.[409] The DOJ has taken the position that "an acquiring company may be held liable as a matter of law for any unlawful payments made by an acquired company or its personnel after the date of acquisition."[410]

VI.
Government Intervention in M&A Transactions

The cases discussed in this Article have followed a relatively consistent pattern, with business entities responding to a perceived risk of FCPA liability by conducting FCPA due diligence, voluntarily disclosing violations to enforcement agencies and cooperating with subsequent government investigations. Rather than actively involving themselves in M&A deals, the DOJ and the SEC often entered the picture—sometimes with an enforcement action—only after the transacting parties had conducted FCPA due diligence and voluntarily disclosed any suspected wrongdoing. In situations where the government becomes involved in negotiating resolutions of FCPA investigations prior to an M&A transaction closing, "enforcement authorities' presence in the transaction will in many cases have a chilling effect on the appetite of the parties for proceeding" with the deal.[411] This is likely to be true even though "genuinely corrupt transactions . . . may be the extreme, and less prevalent victims of such a practice."[412] In other cases, enforcement agency involvement in a pending

406. *Id.* ¶ 49.
407. *See id.* ¶¶ 48-49.
408. Press Release, Sec. & Exch. Comm'n, SEC Brings Settled Charges Against Tyco, *supra* note 398.
409. F. Joseph Warin, quoted in Melissa Klein Aguilar, *FCPA Enforcement Keeps Hitting New Highs*, Compliance Week, Feb. 27, 2007.
410. Dep't of Justice Opinion Procedure Release 08-02, *supra* note 221, at 5.
411. Low & Davis, *supra* note 154, at §5:23(3), at 5-26.
412. *Id.*

transaction may increase costs and delays without derailing eventual closure.[413]

A. *The Halliburton Opinion Release*

Opinion Procedure Release 08-02 ("Opinion Release 08-02") provides an additional window into the effects of enforcement agencies' involvement in pending M&A transactions.[414] In the Release, Halliburton Company and its controlled subsidiaries ("Halliburton") sought a DOJ opinion on the likelihood of incurring an FCPA enforcement action based on the conduct of a potential U.K. target for which Halliburton was considering submitting a competitive bid.[415] As a result of U.K. legal restrictions on the bidding process, Halliburton "had insufficient time and inadequate access to information to complete appropriate FCPA and anti-corruption due diligence" prior to the transaction closing.[416] Halliburton had also entered into a confidentiality agreement with the target, which severely restricted Halliburton's ability to discuss any potential FCPA issues with the DOJ.[417]

As a result of these constraints, Halliburton sought DOJ guidance as to (1) whether completing the proposed acquisition would violate the FCPA, (2) whether proceeding with a bid for the target would cause Halliburton to "'inherit' any FCPA liabilities of the target for pre-acquisition unlawful conduct," and (3) whether Halliburton could face criminal liability for any post-closing FCPA violations by the target occurring

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413. *See, e.g.*, the GE / InVision transaction and the Monsanto / Delta Land transaction, *supra* Section V.C.

414. Opinion Procedure Release 08-02 "was issued on a timely basis in the middle of a fast-paced, dynamically changing competition for a foreign target." Andrew M. Baker et al., *DOJ Releases Groundbreaking FCPA Opinion*, FCPA CLIENT UPDATE (Baker Botts LLP, Wash., D.C.), June 23, 2008, *available at* http://www.bakerbotts.com/file_upload/DOJReleasesGroundbreakingFCPAOpinion.htm.

415. DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 08-02, *supra* note 221, at 1.

416. *Id.*

417. *Id.* at 2. A footnote in Opinion Release 08-02 discusses the confidentiality agreement and notes that while the DOJ accepted Halliburton's representation that the confidentiality agreement was critical to its ability to bid on the target, "the Department discourages companies wishing to receive an FCPA Opinion Release in the future from entering into agreements which limit the information that may be provided to the Department." *Id.* at 6 n.1.

prior to completion of due diligence, where such violations were disclosed to the DOJ within 180 days of closing.[418]

Recognizing the limitations on Halliburton's ability to conduct thorough pre-acquisition due diligence or to disclose any potential FCPA issues prior to closing, the DOJ offered Halliburton what amounted to a safe harbor, provided that Halliburton would comply with an extensive "post-closing plan."[419] The post-closing plan had numerous components, including, (1) that upon closing, Halliburton would immediately meet with the DOJ and disclose any information suggesting that an FCPA problem existed at the target; (2) that Halliburton would provide the DOJ with a "risk-based FCPA and anti-corruption due diligence work plan"; (3) that Halliburton would provide the DOJ with a tiered disclosure schedule requiring risk-based progress reports at 90, 120 and 180 day intervals; (3) that Halliburton would take remedial action in response to any FCPA violations; and (4) that Halliburton's business conduct, FCPA, and anti-corruption policies would be immediately applied to the target upon closing.[420] As long as Halliburton complied with the post-closing plan, the DOJ represented that it would not bring an FCPA enforcement action in connection with the acquisition, including for any pre-transaction violations by the target.[421]

Opinion Release 08-02 has been described as "a groundbreaking statement on an acquirer's successor liability for FCPA violations by a target company," as it "creates a framework through which U.S. acquirers might seek amnesty for pre- and even post-acquisition FCPA violations by the target, particularly in deals negotiated under the laws of foreign jurisdictions . . . ."[422] Opinion Release 08-02 appears to directly acknowledge the business consequences of balancing transactional needs with FCPA compliance, recognizing that if Halliburton were to submit a bid conditioned on pre-closing FCPA due diligence, the "[t]arget would be under no legal obligation to agree to any such terms, *and might well reject a conditional, higher bid* by Halliburton in favor of the lower, but un-

418. *Id.* at 1.
419. *Id.* at 2.
420. *Id.* at 2-4.
421. *Id.* at 4.
422. Gibson, Dunn & Crutcher LLP, *2008 Update*, *supra* note 239.

conditional bid of a competitor."[423] While this is an encouraging sign from the DOJ, ending the discussion here would gloss over at least two important factors.

First, Halliburton's ability to conduct pre-acquisition due diligence was limited "as a result of U.K. legal restrictions" under the U.K. Takeover Code.[424] In granting Halliburton relief from the obligation to conduct pre-acquisition FCPA due diligence, Opinion Release 08-02 warns, "[i]n issuing this Opinion Release, the Department specifically notes the particular circumstances of this transaction, including the foreign legal impediments to robust pre-acquisition due diligence."[425] The Release does not speak to whether a prospective acquirer would receive similarly-flexible treatment if other business considerations, such as a compressed closing time, rather than "the particular restrictions in U.K. law," were responsible for the difficulty in pursuing pre-closing FCPA due diligence.[426]

Second, while the Release may produce a desirable balance between transactional necessity and strict FCPA compliance, the process invoked created a new set of concerns, as relief hinged on the DOJ occupying a central role in the post-closing due diligence process. Had Halliburton proceeded with the transaction, it would have been required to meet with the DOJ and make disclosures "[i]mmediately following the closing,"[427] after which it would have been obligated to "present to the [DOJ] a comprehensive, risk-based FCPA and anti-corruption due diligence work plan" addressing specific issues selected by the DOJ, and would have been further required to "consult with the [DOJ] regarding the work plan."[428] Halliburton would have also been required to provide the DOJ with periodic "progress reports" of its due diligence process.[429]

Criticized as "more draconian and rushed than necessary in most cases,"[430] the process used in Opinion Release 08-02—

423. DEP'T OF JUSTICE OPINION PROCEDURE RELEASE 08-02, *supra* note 221, at 4 (emphasis added).

424. *Id.* at 1, 5.

425. *Id.* at 4.

426. *Id.* at 6.

427. *Id.* at 2.

428. *Id.*

429. *Id.* at 2-4.

430. Arnold & Porter LLP, *New DOJ Opinion Expands Options for Minimizing FCPA Risk in International Mergers and Acquisitions*, CLIENT ADVISORY (Arnold

while perhaps indicating a growing awareness of the potential transactional consequences of FCPA compliance[431]—may nonetheless significantly increase transaction costs and provide enforcement agencies with a greater ability to alter transactions.[432] While these issues are concerning, perhaps the most troubling aspect of the Release is that, were it to be broadly applied, "companies w[ould] have to go to the [DOJ] before the deal closes and be prepared to make compliance commitments."[433] The introduction of pre-closing commitments to the DOJ would predictably encumber transactions with additional pressures and complexities.

VII.
INFORMATION EFFICIENCY

While this Article has focused on the effects of heightened successor liability risks on parties to M&A transactions, it is essential to point out that the new enforcement regime may also generate negative consequences for FCPA enforcement agencies. In addition to chilling corrective transactions that could bring entities with weak FCPA compliance programs into an acquirer's more robust systems,[434] the increased emphasis on successor liability may also cause premature disclosures to enforcement agencies, and even disclosures that are not necessary at all. Casting the disclosure net too expansively

& Porter LLP, Wash., D.C.) July 2008, at 2, *available at* http://www.arnoldporter.com/resources/documents/CA_NewDOJOpinion_071708.pdf.

431. *See* Baker et al., *supra* note 414 (arguing that the "grace period" for FCPA due diligence provided in Opinion Release 08-02 "represents an extremely significant attempt to reconcile the Department's law enforcement objectives with the need of the United States business community to be able to compete internationally on a level playing field.").

432. *See* Gary DiBianco & Colleen P. Mahoney, DOJ Confirms Appropriateness of Risk-Based FCPA Transactional Due Diligence (Skadden Arps Slate Meagher & Flom LLP, Wash., D.C.), Nov. 2008, at 1, *available at* http://www.skadden.com/content/Publications/DOJ.pdf (noting that the restrictions placed on Halliburton in Opinion Release 08-02 are "onerous," and that "[a]bsent special circumstances, a company conducting pre-closing anticorruption due diligence likely would not voluntarily subject itself to such disclosure obligations.").

433. Richard Cassin, quoted in Melissa Klein Aguillar, *DOJ Opinion Release on FCPA Risks*, COMPLIANCE WEEK, July 8, 2008, *available at* http://www. complianceweek.com/article/4245.

434. Gibson, Dunn & Crutcher LLP, *2008 Update*, *supra* note 239.

risks undercutting the quality of information enforcement agencies may receive.[435] This issue was raised during a roundtable discussion in 2008, when a partner at a large law firm asked the then-Deputy Director of the SEC Enforcement Division the following question:

> [D]o you really think it's better policy that every time a company finds [an FCPA problem], they pick up the phone and they put it on your plate, rather than making some judgments about dealing with some situations internally, assuming that they don't reach the conclusion that they're endemic, that they have been going on for a long time, that they involve senior managers? At lower levels, aren't you better off trying to incentivize companies to take responsible action in their own right?[436]

The former Deputy Director responded, "[b]ut why not have the relationship where you do everything right? The reason you're hesitant to report it is not because you're trying to save us work. You're hesitant to report it because you're afraid there'll be an overreaction by regulators."[437] Still, it is difficult to put aside concerns that the heightened fear of successor liability—a testament to enforcement agencies' success in influencing the business community[438]—may come at a cost to those agencies, which will experience reduced informational efficiency as they sort through a flood of disclosures, some of which may be unnecessary. While designed to ease the government's investigatory costs by transferring the burdens of detection to the private sector,[439] the increased emphasis on successor liability may at times compromise the quality of information received by enforcement agencies.

In the M&A context, prospective acquirers, motivated by a desire to protect themselves from successor liability, may be prone to disclosing (or requiring targets to disclose) ultimately

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435. *See, e.g.*, Jacqueline C. Wolff, *Voluntary Disclosure Programs*, 47 FORDHAM L. REV. 1057, 1063 (1978) (arguing, "[b]ecause the voluntary nature of these programs avoids corporate resistance, voluntary disclosure programs provide an agency with better information in less time and at less expense than can investigations.").

436. Mahoney, *supra* note 146, at 8.

437. Ricciardi, *supra* note 122, at 8.

438. *See* Diamond, *supra* note 145, at 1495.

439. *See supra* Section III.C.

non-existent FCPA issues uncovered through due diligence. The concern is that such disclosures will not only needlessly delay and increase the costs of M&A transactions, but will also consume finite agency resources that would be better directed to actual FCPA problems.[440] The risk of inefficient resource allocation exists because potential acquirers in particular now have great incentives to make wide-ranging disclosures regarding FCPA risks at target entities.[441]

VIII.
Conclusion

The DOJ and the SEC can be expected to continue aggressively enforcing the FCPA in the coming years.[442] Business entities will likely respond by continuing to develop and refine self-regulatory compliance measures. In the M&A market, concerns that a transaction may result in successor liability for the FCPA violations of another entity will produce further enhancements to due diligence procedures and post-closing compliance systems. Further, business entities now investigate each others' conduct, report FCPA concerns to enforcement agencies and install compliance measures once transactions close. While successor liability has made FCPA compliance a key consideration in M&A transactions, this result has come with high costs, as burdens lifted from the shoulders of enforcement agencies are transferred to the private sector, often with little guidance or predictability.

The uncertainty surrounding FCPA successor liability risks can impose significant costs on the M&A market. Business opportunities may be impaired by rising transaction costs and the inevitable delays and complications caused by efforts to reduce the risk of acquiring an FCPA enforcement action. Fearing these costs and impediments, some companies may simply walk away from a transaction rather than incur the risk that expensive mitigation efforts remain insufficient to protect them from inheriting FCPA liability.[443] This is detrimental not

440. *See supra* Sections V.A., VI.B.

441. *See supra* Section V.A.

442. *See supra* Section I.

443. *See* the Lockheed / Titan transaction, *supra* Section V.C.

only to economic strength and efficiency,[444] but also to FCPA compliance, as successor liability fears may discourage companies with strong compliance systems from acquiring—and reforming—those with weaker systems.[445] Failing compliance systems will remain intact so long as companies with healthy systems are deterred from participating in reformative transactions.[446] Regulatory efficiency may also suffer in the new enforcement environment—as ramped-up enforcement creates increased pressure for disclosures from a broadened array of entities, the quality of information flowing to U.S. authorities may be lessened.[447]

Solutions for these deficiencies are available. The DOJ and the SEC could significantly reduce uncertainty in cross-border M&A transactions by providing reasonable and firm FCPA due diligence and post-closing compliance guidelines that can be relied upon by transacting parties. A safe harbor from FCPA successor liability for business entities that can show they have met the newfound guidelines would provide an effective antidote to the current malaise.[448] These initiatives would also help companies channel resources into the most effective initiatives for uncovering and preventing FCPA violations. In this way, additional clarity would be beneficial not only for the private sector, but also for enforcement agencies.

444. *See* Fellmeth, *supra* note 166, at 178; *see also* Davis, *supra* note 162, at 537 ("The importance of mergers and acquisitions to the economy cannot be overstated.").

445. *See* Gibson, Dunn & Crutcher LLP, *2008 Update*, *supra* note 239.

446. *See id.*

447. *See supra* Section VI.B.

448. *See* Doty, *supra* note 226, at 1245-1246 (advancing the idea of a regulatory safe harbor as part of his proposal for a "Reg. FCPA").