NOTES

AVOIDING FCPA SURPRISES: SAFE HARBOR FROM SUCCESSOR LIABILITY IN CROSS-BORDER MERGERS AND ACQUISITIONS

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INTRODUCTION

In November of 2012, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) jointly issued a widely demanded and unprecedented resource guide to the Foreign Corrupt Practices Act (FCPA).[1] "The Guidance" came in response to a letter from the U.S. Chamber of Commerce and a coalition of over thirty business organizations, representing the views of over three million businesses, that identified areas in critical need of clarification regarding the Agencies' enforcement of the FCPA.[2] Among several other requests, the Chamber of Commerce letter asked for particular guidance in mergers and acquisitions. The letter claimed, "[t]he threat of successor liability even if a thorough investigation is undertaken prior to a transaction has had a significant chilling effect on mergers and acquisitions, and therefore clearer parameters for successor liability under the FCPA are needed."[3] The letter, claiming that the FCPA reduces merger and acquisition activity, further explained that there "has been a chilling effect on legitimate business activity" as a result of uncertain enforcement practices.[4]

In response, the Guidance pays close attention to FCPA enforcement in mergers and acquisitions and takes a significant step toward reducing uncertainty for businesses engaged in cross-border mergers and acquisitions. The Guidance, however, is not entirely clear and still presents companies with significant legal questions that they must weigh when considering cross-border transactions. This Note argues that although the Guidance dramatically reduces uncertainty in some instances, the FCPA still lacks clarity. To increase clarity and transactional certainty, the DOJ and SEC should provide additional clarification or include a provision that

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1. U.S. DEP'T OF JUSTICE, CRIMINAL DIV. & U.S. SEC. & EXCH. COMM'N, ENFORCEMENT DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012) [hereinafter FCPA GUIDANCE], *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

2. Letter from the U.S. Chamber of Commerce et al., to Lanny A. Breuer, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice, and Robert Khuzami, Dir. of Enforcement, U.S. Sec. & Exch. Comm'n 1, 10-11 (Feb. 21, 2012) [hereinafter Chamber Letter], http://www.uschamber.com/press/releases/2012/february/21-february-2012.

3. *Id.* at 6.

4. *Id.* at 2.

grants safe harbor from successor liability for FCPA violations in certain transactions.[5] Such change is especially necessary in cross-border mergers and acquisitions, in which proper pre-acquisition due diligence is inherently more difficult and sometimes impossible.[6]

Part I presents the background of the FCPA and its impact on mergers and acquisitions. Part II discusses how unanticipated successor liability for FCPA issues can be difficult to discover and can be a significant barrier to mergers and acquisitions (M&A)[7] activity. This Part also notes the unique safe harbor from liability that was granted for a transaction in 2008 and analyzes the 2012 Guideline's expansion of this safe harbor. Part III argues that a clear safe harbor provision should be added to the FCPA and discusses how that provision should be structured, and Part IV explains how a safe harbor provision, whether as extended in the Guidance or as proposed in Part III, is good economic and legal policy.

Some academics and practitioners have previously suggested the possibility of a safe harbor as a solution to the FCPA's successor liability issues. Outside of this Note, none have examined the potential operation and effect of such a change, and none have discussed it with respect to the Agencies' recent Guidance.[8]

I. BACKGROUND

A. FCPA Rules

The Foreign Corrupt Practices Act is a federal law that criminalizes the bribery of foreign officials by businesses or

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5. *See* George J. Terwilliger III, *Can the FCPA Be Good for Business?*, NAT'L L.J. (2011) ("[I]n most circumstances, the opportunity for the kind of in-depth examination that is likely to reveal potential FCPA compliance issues is quite limited. As a result, any acquisition abroad, and particularly those in emerging markets, can carry a ticking time bomb of FCPA compliance issues.").

6. *See infra* Part II.A.1.

7. "M&A" is used when it is the industry standard to do so.

8. For the most relevant, yet fleeting, discussions on an FCPA safe harbor in cross-border mergers, see Terwilliger, *supra* note 5, and Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 299-300, 331 (2010).

individuals that fall under the United States's jurisdiction.[9] To prevent such corrupt practices, the FCPA requires companies to maintain certain accounting standards.[10] The primary way that a company violates the FCPA is by making payments to foreign officials or political parties for the purpose of influencing that official or party to grant a business advantage to the payer of the bribe.[11] Although the law preserves certain exceptions and defenses relating to normal business conduct,[12] the main goal of the FCPA is to prohibit the bribery of foreign officials.[13]

The FCPA is jointly enforced by the DOJ and the SEC.[14] Both Agencies co-authored and released the recent Guidance.[15] Although the FCPA was enacted in 1977, it has only recently risen to prominence in the minds of dealmakers for multinational corporations. In 2004, the DOJ and the SEC initiated only five enforcement actions; in 2010, the Agencies initiated a combined seventy-four actions; and in 2011, forty-eight actions.[16]

Recent enforcement trends, combined with potentially huge monetary penalties, have forced companies to take great care to avoid potential FCPA liability or face severe consequences. In the most stark example, Siemens paid $800 million in penalties for FCPA violations in 2008, the highest penalty ever enforced for

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9. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 to -3 (2006); *see* Daniel Margolis & James Wheaton, *Non-U.S. Companies May Also Be Subject to the FCPA*, FIN. FRAUD L. REP., Sept. 2009, at 168, 168.

10. *See* Margolis & Wheaton, *supra* note 9, at 169..

11. 15 U.S.C. § 78dd-1.

12. *Id.* § 78dd-1(b) to (c).

13. U.S. DEP'T OF JUSTICE, *Foreign Corrupt Practices Act: An Overview*, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Sept. 21, 2013) ("The Foreign Corrupt Practices Act ... was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business."); FCPA GUIDANCE, *supra* note 1, at 90 ("The FCPA was designed to prevent corrupt practices, protect investors, and provide a fair playing field for those honest companies trying to win business based on quality and price rather than bribes.").

14. U.S. SEC. & EXCH. COMM'N, *Spotlight on Foreign Corrupt Practices Act*, http://www.sec.gov/spotlight/fcpa.shtml (last modified Nov. 14, 2012).

15. *See* FCPA GUIDANCE, *supra* note 1.

16. *2012 Mid-Year FCPA Update*, GIBSON, DUNN & CRUTCHER LLP (July 9, 2012), http://www.gibsondunn.com/publications/pages/2012MidYearFCPAUpdate.aspx.

foreign misconduct.[17] Eye-opening cases like this and others[18] have caused companies to take keen notice of the reality that FCPA enforcement is a factor that businesses must consider in their operations.[19]

B. Companies Subject to the FCPA

The FCPA is unique because it is a federal law traditionally focused on U.S.-based companies, but it is also enforced on foreign companies.[20] The FCPA holds jurisdiction over companies that fall under one of three categories: (1) companies that are organized under the laws of the United States, which includes U.S. subsidiaries of foreign-owned entities and U.S. nationals acting on behalf of foreign companies;[21] (2) all companies, including those that are foreign-owned and operated, that issue stock or trade their securities in U.S. exchanges;[22] and (3) any company that does not fit into one of the previous two categories, but has violated the FCPA within the territory of the United States.[23]

Combining these three categories, government enforcement of the FCPA has a broad international reach, even where a U.S. claim to jurisdiction might not seem obvious. For example, a Norwegian company that bribed Iranian officials could be held liable because it had securities traded on the New York Stock Exchange,[24] or a

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17. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* http://www.sec.gov/news/press/2008/2008-294.htm.

18. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Alcatel-Lucent with FCPA Violations (Dec. 27, 2010), *available at* http://www.sec.gov/news/press/2010/2010-258.htm; Press Release, U.S. 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. *See generally* U.S. SEC. & EXCH. COMM'N, *SEC Enforcement Actions: FCPA Cases*, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last modified May 29, 2013).

19. *See* Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES, Sept. 4, 2012, at B1 ("[The Siemens] case was a real watershed. It woke up a lot of people .... There had not been a lot of headline cases before that to make people sit up and take notice.").

20. Margolis & Wheaton, *supra* note 9, at 168.

21. 15 U.S.C. § 78dd-2(h) (2006).

22. *Id.* § 78dd-1(a).

23. *Id.* § 78dd-3(a).

24. Press Release, U.S. Sec. & Exch. Comm'n, SEC Sanctions Statoil for Bribes to Iranian Government Official (Oct. 13, 2006), http://www.sec.gov/news/press/2006/2006-174.htm.

Taiwanese company could be liable for bribes to Taiwanese officials because the bribes were authorized by an executive in the United States.[25] Recently, FCPA enforcement against Chinese companies that list securities on U.S. stock exchanges has led many of these companies to delist their securities to avoid potential litigation.[26]

C. FCPA Liability in Mergers and Acquisitions

The FCPA's broad international reach, combined with the severe penalties that violations can carry, creates a global business environment that requires cognizance of potential FCPA liabilities. This can have enormous implications in merger and acquisition transactions, in which a target company's liabilities become those of the acquirer through successor liability.[27] Successor liability requires that, when one company acquires or merges with another, the surviving successor company acquires the duties and liabilities of the target company.[28]

Successor liability issues frequently depend on the way that a deal is structured.[29] In transactions that are structured as the merger of two companies, in which the target company is assimilated into the acquiring company, all liabilities of the target are automatically borne by the acquirer upon completing the transaction.[30] In transactions that are structured as an asset sale, the target company may sell specific business assets to the acquirer.[31] Each asset and liability is negotiated prior to sale, and parties frequently address who will assume liability for any issues that

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25. SEC Obtains $500,000 Penalty Against Syncor International Corporation for Violating the Anti-Bribery Provisions of the Foreign Corrupt Practices Act, SEC v. Syncor Int'l Corp., SEC Litig. Release No. 17887 (Dec. 10, 2002), http://www.sec.gov/litigation/litreleases/lr17887.htm [hereinafter SEC Obtains $500,000].

26. Richard L. Cassin, *China Companies Flee U.S. Exchanges,* THE FCPA BLOG (July 27, 2012, 7:08 AM), http://www.fcpablog.com/blog/2012/7/27/china-companies-flee-us-exchanges.html; Richard L. Cassin, *China Companies Grow Skittish About U.S. Listings*, THE FCPA BLOG (Nov. 5, 2012, 10:08 AM), http://www.fcpablog.com/blog/2012/11/5/china-companies-grow-skittish-about-us-listings.html.

27. FCPA GUIDANCE, *supra* note 1, at 28.

28. *Id.*

29. *See* DALE A. OESTERLE, THE LAW OF MERGERS AND ACQUISITIONS 226 (3d ed. 2005).

30. *Id.*

31. *Id.* at 217.

arise after the deal closes.[32] Finally, in transactions that are structured as a stock acquisition, the target company retains its corporate structure, but becomes a subsidiary of the acquirer.[33] In this type of deal, the target company retains all of its liabilities. Those liabilities, however, do not extend to the acquirer because it is still an independent corporate entity, even though it now owns the target company's stock.[34]

While each of these deal structures might determine successor liability differently, it is critical for the target company to determine the existence and extent of any potential liability in each structure. In a merger, the extent of liabilities will determine the risk that the acquirer will be exposing itself to and may have a significant bearing on the likelihood or the cost of the transaction.[35] In asset sales, potential liabilities can dramatically affect the value of an asset, and negotiations regarding the assignment of those liabilities—whether the acquirer will accept them or the target will indemnify them—may significantly impact the asset price.[36] In stock acquisitions, potential liability may decrease the value of the target, and the acquirer risks paying too much for a company that is full of value-reducing liability issues.[37]

As the Guidance explained, "[s]uccessor liability applies to all kinds of civil and criminal liabilities, and FCPA violations are no exception."[38] Therefore, acquiring companies must be especially careful as they "face additional risks because illegal practices ... [of] the target could become the responsibility of the acquiring company or the emerging entity."[39]

A change in FCPA successor liability law is likely to have a large impact on global business in its entirety. Cross-border mergers and acquisitions, in which the FCPA is most likely to be enforced,

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32. *See id.*
33. *Id.* at 226.
34. *Id.*
35. *Id.* at 200-01.
36. *Id.* at 217-18.
37. *Id.* at 226.
38. FCPA GUIDANCE, *supra* note 1, at 28 (footnote omitted).
39. KEVIN CORBETT ET AL., DELOITTE FORENSIC CTR., FCPA DUE DILIGENCE IN M&A 4 (2009), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/FAS_ForensicCenter_us_fas-us_dfc/us_dfc/us_dfc_FCPA_DD_MA_082009.pdf.

accounts for 35 percent of all M&A deal volume.[40] Further, mergers and acquisitions in emerging markets, in which anti-corruption laws are typically weaker and FCPA liability is more likely,[41] account for a full 25 percent of all M&A activity in 2011.[42] This means that a significant percentage of global M&A activity would benefit from such a provision.

In FCPA violation cases, enforced penalties are not trivial, and they increase the risk that companies face. Between 2002 and 2012, the DOJ and the SEC brought charges for FCPA violations related to M&A activity in fifteen transactions. The average penalty imposed in these cases was $95 million, with a range from $300,000 to $579 million in penalties.[43] In the same period, the SEC brought a total of ninety-eight enforcement actions for all FCPA violations.[44] Enforcement actions in the mergers and acquisitions context accounted for more than 10 percent of all FCPA enforcements, making it a very possible threat for many companies.

II. Problem and Partial Solution

A. Problem: Potential FCPA Liability Is a Significant Risk

1. Expensive Due Diligence Slows Transactions

To avoid successor liability issues, an acquiring firm must invest in extensive due diligence to determine its potential liability for the target company's business practices. By investing sufficient

40. Valentina Pasquali, *Value of Cross-Border M&A by Region and Country*, GLOBAL FIN., http://www. gfmag.com/tools/global-database/economic-data/11932-value-of-cross-border-maa-by-region-country.html (last visited Sept. 17, 2013).

41. MICHAEL VOLKOV, WORLD COMPLIANCE, FCPA-MERGERS AND ACQUISITIONS 10 (2010), http://worldcompliance.com/Libraries/WhitePapers/FCPA_Mergers_and_Acquisitions_White_paper.sflb.ashx; Terwilliger, *supra* note 5 ("In many of emerging markets, most acquisition targets are beyond the purview of the FCPA and thus unlikely to employ anti-corruption compliance policies. But these companies have become attractive targets because of their position in growth markets. Those markets are also noted as typically more corrupt than other, more established markets subject to closer scrutiny by governments.").

42. Pasquali, *supra* note 40, at 10.

43. *See* U.S. SEC. & EXCH. COMM'N, *SEC Enforcement Actions: FCPA Cases*, http://www. sec.gov/spotlight/fcpa/fcpa-cases.shtml (last modified May 29, 2013).

44. *See id.*

resources prior to acquisition, "a company may save itself the considerable expense, distraction, and pain of future investigations and prosecutions."[45] Indeed, the DOJ and the SEC recommend pre-acquisition due diligence as the primary means for avoiding liability in situations where an acquiring company suspects potential FCPA violations in a target company.[46]

In practice, however, proper due diligence is not always feasible because "[t]here is often little time to conduct appropriate or adequate due diligence and the excitement around expanding the company's market share overshadows concerns of potential problems."[47] Furthermore, even in situations where companies recognize the necessity for proper due diligence and are willing to commit their monetary resources, significant barriers may still remain because "[d]ue diligence can be time-consuming, since the relevant information is not always easy to obtain."[48] In time-sensitive transactions, the inability to conduct meaningful due diligence can have a huge impact.

Regardless of an acquiring company's willingness to commit both the necessary financial resources and time to conduct traditionally satisfactory due diligence, it may still face significant hurdles if a target company is located in another country.[49] Proper diligence can be even more expensive and time-consuming in foreign countries where important business information is not as easily accessible

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45. *What You Don't Know Can Hurt You: Successor Liability Resulting from Inadequate FCPA Due Diligence in M&A Transactions,* SHEARMAN & STERLING LLP, (Mar. 2009), http://www.shearman.com/files/Publication/b5e57b24-b95c-4007-8347-b92912ea4a49/Presentation/PublicationAttachment/81cbb19e-10a7-4cf6-a2d7-ec11759aa2d0/LT-030209-What-You-Dont-Know-Can-Hurt-You-Liability-Inadequate-FCPA-Due-Diligen.pdf.

46. FCPA GUIDANCE, *supra* note 1, at 28.

47. Carolyn Lindsey, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 959-60 (2009).

48. *Avoiding FCPA Violations in Investment Transactions-Transaction-Specific Measures-Due Diligence*, 1 FOREIGN CORRUPT PRAC. ACT REP. (West) § 5:42 (2d ed. Aug. 2013).

49. For examples of regional difficulties, see KROLL, THE CONTINUAL CHALLENGES OF DUE DILIGENCE IN THE MIDDLE EAST 1-2 (2011), http://www.krolladvisory.com/media/pdfs/The_Continual_Challenges_of_DD_in_the_Middle_East_WP_040811P.pdf; Maarten Roos, *Legal Concerns of Foreign Companies in China*, R&P CHINA LAWYERS (Feb. 2011), http://www.rplawyers.com/wp-content/uploads/2011/02/20130217-Legal-Concerns-of-Foreign-Companies-in-China.pdf; A NEW DAWN IN DEALMAKING: A REPORT ON RUSSIAN M&A ACTIVITY, 19 (Mikhail Rymanov et al. eds., 2010), http://www.mergermarket.com/pdf/GBLP_Russia_Oct_2010.pdf; Shanti Salas, *Brazil: FDI Opportunities and Pitfalls*, LATIN BUS. CHRON. (June 16, 2008), http://www.latinbusinesschronicle.com/app/article.aspx?id=2506.

because information may only be available from unwilling parties, from closed government records, or from outdated public records.[50] This reality means U.S. companies may be at a severe business disadvantage if the target company is located in a foreign country that does not promote pre-acquisition due diligence, or if the transaction is hostile in nature and the target is not legally obligated to provide information. Diligence in these transactions can be extremely difficult because "[r]ather than investigating its own personnel, facilities and accounting records, a potential acquirer conducting FCPA due diligence of a non-related entity investigates a company beyond its control and informational expertise."[51]

Making these transactions even more difficult, an acquiring company's pre-acquisition diligence does not end with simply discovering a potential liability. Even if due diligence uncovers some potential FCPA liability, costs of further investigation can increase dramatically as traditional M&A diligence becomes more like an internal investigation of corrupt practices.[52] Finally, upon initial discovery and subsequent investigation, an acquiring company must report suspected violations and may find "the benefits of such diligence are uncertain and usually unknowable."[53]

2. Companies May Be Forced to Abandon Deals

Companies invest so much into due diligence because it may be the difference between a successful deal and one that brings crippling penalties. Diligence is often the only means to gauge the outcome. In circumstances, however, where due diligence is especially time-consuming, expensive, or inherently difficult, companies sometimes must face the decision of whether to abandon a deal or risk unexpected liability. According to practitioner Daniel Grimm, "[b]usiness 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."[54]

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50. *See supra* note 48.

51. Grimm, *supra* note 8, at 294.

52. *See Recent FCPA Enforcement Actions Involving Internal Investigations—The M&A Context*, 1 FOREIGN CORRUPT PRAC. ACT REP. (West) § 12:2 (2d ed. Aug. 2013).

53. Chamber Letter, *supra* note 2, at 6.

54. Grimm, *supra* note 8, at 296.

In some situations, the burden of proper due diligence may be considerable in comparison to the total value of the transaction, and when the costs of managing this uncertainty subsume the expected value of a transaction, a company is likely to abandon the deal.[55] Even when a company has invested in uncovering potential FCPA violations, the discovery of any misconduct may further hamper acquisition efforts. "In such cases, the planned M&A transactions have been put on hold pending investigation of suspected violations and resolution of the issues with the government."[56]

In the most prominent acquisition abandoned over FCPA liabilities, the proposed merger between Titan Corp. and Lockheed Martin (Lockheed), Lockheed invested in due diligence and uncovered potential corrupt practices by the target company, Titan.[57] After lowering the price and extending its deal timeline twice, Lockheed eventually abandoned the deal because government investigations had not been resolved in a timely manner.[58] Although Lockheed's decision to abandon its pursuit of Titan was well-publicized, any prospective acquirer must consider abandonment when faced with potential liabilities. The acquirer must additionally recognize that "not all FCPA issues may be identified in due diligence and an acquirer may need to remedy any issues post-closing."[59] In fact, numerous cases exist in which FCPA penalties

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55. *See* 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 ("If 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* Wendy B. Davis, *De Facto Merger, Federal Common Law, and* Erie*: Constitutional Issues in Successor Liability*, 2008 COLUM. BUS. L. REV. 529, 537 ("If 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 substantial.").

56. *High-Risk Transactions Under the FCPA-Mergers And Acquisitions*, 1 FOREIGN CORRUPT PRAC. ACT REP. (West) § 11:30 (2d ed. Aug. 2013).

57. *See Recent FCPA Enforcement Actions Involving Internal Investigations-The M&A Context-Lockheed/Titan*, 1 Foreign Corrupt Practices Act Reporter (West) § 12:4 (2d ed. Aug. 2013).

58. *Id.*

59. Frank Aquila et al., *What You Need to Know About the FCPA Before You Do Your Next Deal*, 16 M&A LAWYER 3, 7 (2012), http://www.sullcrom.com/files/Publication/fc044cd3-0854-4003-be20-4e8f3f9c98dd/Presentation/PublicationAttachment/18640370-f7bb-4e90-b395-5279887a10d7/Aquila-Veeraraghavan-Lee_M%26A-Lawyer_July-Aug_2012.pdf.

either delayed an acquisition or were enforced after the transaction was complete.[60]

3. *Select Case Studies*[61]

a. Pre-Acquisition Issues

In December of 2002, the SEC settled enforcement issues against Syncor International Corporation for FCPA violations.[62] These violations, and the necessary subsequent investigation became apparent to the acquirer, Cardinal Health Inc., however, only five days prior to the merger.[63] Consequently, on the first day of the merger, Cardinal Health had to "announce an internal investigation rather than celebrate its first day as a new company."[64]

Issues disclosed prior to the transaction also can cause significant delays. In October of 2003, a syndicated investment group sought to acquire subsidiaries of ABB Ltd., a Swiss corporation with subsidiaries in the United States, but pre-acquisition due diligence revealed numerous potential FCPA violations by the target companies.[65] The following investigation, government reporting, and resolution delayed the acquisition by nine months and resulted in penalties against the target.[66]

In February of 2005, the SEC filed charges against Invision Technologies, Inc. during its acquisition by the General Electric Company.[67] Although this deal eventually succeeded, the merger

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60. *See generally* David S. Krakoff et al., *Foreign Corrupt Practices Act: FCPA Due Diligence in the Context of Mergers and Acquisitions*, 4 BLOOMBERG CORP. L.J. 101 (2009).

61. Most of the SEC's and the DOJ's cases against corporations for FCPA violations have ended in settlement, so case opinions in the discussed cases do not exist. The primary sources for each of these cases are the litigation press releases issued by the enforcing agencies.

62. SEC Obtains $500,000, *supra* note 25.

63. *See* Krakoff, *supra* note 60, at 107.

64. *Id.* at 113.

65. *See id.* at 102.

66. *See* Foreign Corrupt Practices Act Review Opinion Procedure Release No. 04-02 (Dep't of Justice July 12, 2004), http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf.

67. SEC Settles Charges Against InVision Technologies for $1.1 Million for Violations of the Foreign Corrupt Practices Act, SEC v. GE InVision, Inc., SEC Litig. Release No. 19078 (Feb. 14, 2005), http://www.sec.gov/litigation/litreleases/lr19078.htm.

was delayed because the agreement between the companies required resolution of FCPA issues before closing.[68]

b. Post-Acquisition Issues

Post-acquisition issues can be even more troublesome for businesses and dealmakers. In 1998, KBR Inc. became a subsidiary of Halliburton Co. (Halliburton).[69] After the merger, however, KBR continued to carry on corrupt practices from 1998 until 2006 that Halliburton "failed to detect or prevent."[70] As a result, the SEC required both companies to jointly pay a hefty $579 million fine.[71]

In 2001, the energy companies Coastal Corporation and El Paso Corporation merged. But in 2007, long after the completion of the merger, the SEC brought charges based on a kickback scheme that began at Coastal in 2000, prior to the merger, and continued for over a year after the merger.[72] The SEC claimed El Paso either "knew, or was reckless in not knowing" about these violations and held El Paso liable because the misconduct continued after the merger.[73]

In another instance, the SEC charged Tyco International (Tyco) with numerous securities-related violations in 2006.[74] One charge included Tyco's failure to investigate or remedy any potential misconduct in the course of its acquisition of Earth Tech Brazil, even though Tyco had conducted "due diligence revealing that improper payments to government officials were common in Brazil and seen as necessary in Earth Tech's line of business."[75] Tyco's

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68. *See* Krakoff, *supra* note 60, at 105.

69. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), http://www.sec.gov/news/press/2009/2009-23.htm.

70. *Id.*

71. *See id.*

72. SEC Files Settled Books and Records and Internal Controls Charges Against El Paso Corporation for Improper Payments to Iraq Under the U.N. Oil for Food Program—Company Agrees to Pay $7.7 Million, SEC v. El Paso Comp., SEC Litig. Release No. 19991 (Feb. 7, 2007), http://www.sec.gov/litigation/litreleases/2007/lr19991.htm.

73. *Id.*

74. *See* SEC Brings Settled Charges Against Tyco International Ltd. Alleging Billion Dollar Accounting Fraud, SEC v. Tyco Int'l Ltd., SEC Litig. Release No. 19657 (Apr. 17, 2006), http://www.sec.gov/litigation/litreleases/2006/lr19657.htm.

75. Krakoff, *supra* note 60, at 109.

failure to investigate and remedy corrupt practices in this acquisition and others led to an SEC penalty of $50 million.[76]

Finally, even where companies discover and report violations pre-acquisition, the acquirer may ultimately bear the penalties post-acquisition. In 2007, the Monsanto Corporation sought to acquire the Delta & Pine Land Company. During its pre-acquisition diligence, Monsanto discovered potential FCPA violations at Delta and reported them to the SEC.[77] Shortly after the completion of the acquisition, the SEC enforced a penalty Delta and Monsanto paid jointly.[78]

In each of these cases, and in others like them involving issues arising before and after acquisition,[79] FCPA enforcement hampered M&A activity by either delaying the transaction, causing a company to abandon the transaction, or bringing an unexpected penalty post-closing. For companies considering acquisition strategies, all three of these possible outcomes pose risks that increase transaction costs and make M&A activity less attractive. Further, though the SEC reports on the total number of enforcement actions it brings in FCPA cases,[80] compiling empirical data on the number of deals that companies abandon at the early stages of business planning, for fear of potential liability or high costs of diligence, seems an impossible task.

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76. *Id.* at 110.

77. *See id.* at 104.

78. *See* Delta & Pine and Turk Deltaphine Agree to Pay a $300,000 Penalty to Settle FCPA Charges, SEC v. Delta et al., Litig. Release No. 20214 (July 26, 2007), *available at* http://sec.gov/litigation/litreleases/2007/lr20214.htm.

79. *See, e.g.*, Krakoff, *supra* note 60, at 107 (discussing Statoil's acquisition of Norsk Hydro); SEC v. ENI et al., Litig. Release No. 21588 (July 7, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21588.htm (discussing Snamprogetti's acquisition of ENI); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Pfizer with FCPA Violations (Aug. 7, 2012), *available at* http://www.sec.gov/news/press/2012/2012-152.htm (discussing Pfizer's acquisition of Wyeth).

80. *See* U.S. SEC. & EXCH. COMM'N, *supra* note 14.

B. Partial Solution: A Safe Harbor in Opinion Procedure Release 08-02

In a case heralded as "groundbreaking,"[81] Halliburton found a unique solution to the issue of uncertain potential FCPA successor liability in an acquisition. In 2008, Halliburton sought to acquire Expro International Group (Expro), an oil and gas company based in the United Kingdom and operating in fifty countries, including the United States.[82] Due to the United Kingdom's laws surrounding the time-pressured transaction, in which Halliburton was one of several competitive bidders, Halliburton could win the acquisition only by submitting an unconditional bid for the target company.[83] This meant the acquisition could not be contingent on satisfactory completion of FCPA due diligence, and if it won the acquisition, Halliburton would assume all unknown liabilities.[84] Recognizing that it might be taking a huge risk by making such an unconditional bid, Halliburton sought the opinion of the DOJ by requesting an agency opinion that addressed three questions: (1) Would the transaction itself violate the FCPA?; (2) Would Halliburton inherit liabilities for FCPA violations by Expro prior to the acquisition?; and (3) Would Halliburton be held liable for any misconduct by Expro that occurred after the completion of the merger, but before the completion of FCPA and anti-corruption due diligence, if Halliburton identified and disclosed such conduct to the DOJ within 180 days of closing?[85]

The resulting DOJ response, Opinion Procedure Release No. 08-02, has been a hallmark of FCPA enforcement. The Agency responded to Halliburton by allowing an unprecedented offer of safe harbor from FCPA prosecution for liabilities that arose from the

81. Andrew M. Baker et al., *DOJ Releases Groundbreaking FCPA Opinion*, BAKER BOTTS LLP (June 23, 2008), http://www.bakerbotts.com/file_upload/DOJReleasesGroundbreaking FCPAOpinion.htm.

82. *See* TIMOTHY L. DICKINSON ET AL., PAUL HASTINGS, DOJ ISSUES OPINION ON POST-ACQUISITION DUE DILIGENCE REQUIREMENTS (July 2008), http://www.paulhastings.com/assets/publications/954.pdf?wt.mc_ID=954.pdf.

83. *Id.*

84. *Id.*

85. *See* Foreign Corrupt Practices Act Review Opinion Procedure Release No. 08-02 (Dep't of Justice June 13, 2008), http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf [hereinafter Opinion Procedure Release No. 08-02].

transaction.[86] The most unique aspect of this opinion letter was that the DOJ promised not to penalize Halliburton for any violations that occurred during the 180 days post closing if Halliburton disclosed violations to the DOJ.[87] The DOJ also provided a firm disclosure schedule for Halliburton to meet. High-risk due diligence had to be complete within 90 days of closing medium risk due diligence had to be complete within 120 days; and low risk due diligence had to be complete within 180 days.[88]

This meant the government promised to forgive not only corruption by the target company before the transaction but also misconduct that occurred within Halliburton itself as a result of the merger, after the acquisition had been completed.[89] Perhaps recognizing the need to not limit United States companies in their business efforts abroad, the government's justifications for this "safe harbor" are highly favorable to acquiring companies:

> Under the circumstances here ... there is insufficient time and inadequate access to complete appropriate pre-acquisition FCPA due diligence and remediation. [The Acquirer] has no legal ability to require a specified level of due diligence or to insist upon remedial measures until after the acquisition is completed. As a result, [its] ability to take action to prevent unlawful payments by Target or its personnel during the period immediately after the closing has been severely compromised.[90]

This decision facilitated Halliburton's acquisition in a competitive environment and allowed it to go forward in the transaction with a certain consideration of the risk of FCPA liability.

Although Opinion Procedure Release No. 08-02 provides the most specific instructions for complying with a safe harbor provision, the Halliburton case is not the only situation where the Agencies have been willing to provide some leniency. In a similarly rushed

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

transaction, the DOJ allowed Pfizer to disclose violations post-closing even though the target was a United States company.[91]

C. 2012 FCPA Guidance

1. Promotion of a Safe Harbor

The 2012 FCPA Guidance should be considered a significant progression toward an FCPA enforcement regime that is committed to facilitating mergers and acquisitions. First, the guidance confirms the Agencies will not bring penalties against acquiring companies based on corruption by a target company if that target company was not previously subject to the FCPA. As the Guidance explains, "Successor liability does not, however, create liability where none existed before. For example, if an issuer were to acquire a foreign company that was not previously subject to the FCPA's jurisdiction, the mere acquisition of that foreign company would not retroactively create FCPA liability for the acquiring issuer."[92] For companies considering acquisitions in countries where corruption is more prevalent, the Agencies' promise not to prosecute for prior misconduct provides quite clear reassurance.

But assurance that the acquirer will not be held liable for the target's previous misconduct does not address the risk that undetected misconduct may continue after the deal has closed and the acquirer has assumed all potential liabilities. In addressing this concern, the Guidance discusses three hypothetical transactions where a target company was not previously subject to the FCPA.[93]

In Scenario 1, the acquirer conducts extensive due diligence.[94] In the course of its diligence, the acquirer discovers corrupt practices

91. DOJ Deferred Prosecution Agreement at C.2-6, United States v. Pfizer H.C.P. Corp. (D.C. Cir. Aug. 7, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/pfizer/2012-08-07-pfizer-dpa.pdf ("When such anti-corruption due diligence is appropriate but not practicable prior to acquisition of a new business for reasons beyond Pfizer's control, or due to any applicable law, rule, or regulation, Pfizer has conducted and will conduct anti-corruption due diligence subsequent to the acquisition and report to the Department any corrupt payments.").

92. FCPA GUIDANCE, *supra* note 1, at 28.

93. *See id.* at 31-32.

94. *See id.* at 31.

in the target company.[95] Immediately after closing, the acquirer reports the misconduct to the DOJ and the SEC and remedies the practices completely through proper compliance programs.[96] In this case, the acquirer would not be liable for pre-acquisition misconduct, and the acquirer's "extensive pre-acquisition due diligence allowed it to identify and halt the corruption. As there was no continuing misconduct post-acquisition, the FCPA was not violated."[97]

In Scenario 2, the target again is a foreign company not previously subject to the FCPA.[98] In this scenario, however, the acquirer performs minimal pre-acquisition due diligence and does not make a full effort to institute a compliance program after closing.[99] Several months after closing, company officers begin to suspect misconduct in the target's practices, which continues for another two years before being reported to the DOJ and the SEC.[100] In this case, the acquirer would be liable for the misconduct that occurred post-acquisition presumably because the acquirer did not invest enough effort in pre-acquisition diligence and because the misconduct was not reported in a timely manner.[101] In both of these scenarios, the Agencies focus on encouraging pre-acquisition due diligence as the primary means of avoiding successor liability.

Finally, Scenario 3 addresses the situation where the target company is located in a country where the acquirer has limited ability to conduct pre-acquisition due diligence.[102] In this scenario, the acquirer recognizes that the target company is engaged in business in countries or industries where corruption is likely, but is unable to discover any misconduct despite its best efforts to conduct reasonable due diligence.[103] In this situation, the Agencies provide the widest latitude by openly extending the safe harbor provided in Halliburton's 2008 acquisition. According to the Guidance, acquiring "[c]ompanies can follow the measures set forth in Opinion Procedure

95. *See id.*
96. *See id.*
97. *Id.*
98. *See id.*
99. *See id.*
100. *See id.* at 31-32.
101. *See id.* at 32.
102. *See id.*
103. *See id.*

Release No. 08-02, or seek their own opinions, where adequate pre-acquisition due diligence is not possible."[104]

For companies considering foreign acquisitions, the guidance provided in Scenario 3 is significant because it represents the first time that the DOJ and the SEC have explicitly extended the provisions of Opinion Procedure Release No. 08-02 to any transaction in similar circumstances. For acquiring companies, this should provide significant reassurances that if they invest a reasonable effort in due diligence and post-acquisition compliance, they will be able to avoid major liability. As discussed in Part IV, this dramatically reduces uncertainty, which allows U.S. companies to engage in more M&A activity.[105]

The guidance provided in Scenario 3, however, is less than perfect and is inherently bound by the limitations that exist in the provisions of Opinion Procedure Release No. 08-02, which some commentators have called "draconian[,] ... rushed,"[106] and "onerous"[107] because the specific post-acquisition disclosure schedule is inflexible and based only on what is acceptable to the DOJ.

2. Lingering Uncertainty

Despite providing the possibility of safe harbor in transactions, the Guidance still retains uncertainty for companies considering these transactions. The guidance provided in Scenario 3 suggests that companies may either follow the requirements provided in Opinion Procedure Release No. 08-02 *or* seek their own opinions from the Agencies, but the Guidance does not provide any other discussion regarding how or when a company should pursue these options.[108] Companies in this situation must guess between following the strict schedule of Opinion Procedure Release No. 08-02 or requesting their own opinion, which carries with it uncertainties

104. *Id.*
105. *See infra* Part IV.
106. ARNOLD & PORTER LLP, NEW DOJ OPINION EXPANDS OPTIONS FOR MINIMIZING FCPA RISK IN INTERNATIONAL MERGERS AND ACQUISITIONS 2 (2008), http://www.arnoldporter.com/resources/documents/CA_NewDOJOpinion_071708.pdf.
107. GARY DIBIANCO & COLLEEN P. MAHONEY, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, DOJ CONFIRMS APPROPRIATENESS OF RISK-BASED FCPA TRANSACTIONAL DUE DILIGENCE (2008), www.skadden.com/sites/default/files/publications/DOJ.pdf.
108. *See* FCPA GUIDANCE, *supra* note 1, at 32.

of timeliness and outcome. Because it does not provide further clarification, "the resource guide leaves plenty of uncertainty about enforcement. One result is that companies will continue to need outside legal counsel to help navigate in this area—at a hefty cost."[109]

III. COMPLETE SOLUTION: A SAFE HARBOR PROVISION IN THE FCPA

A. Uncertainty Creates Need for Consistency

In light of the limitations and uncertainty in the Agencies' Guidance on successor liability, the FCPA itself should be amended to include a provision that automatically extends safe harbor protections in certain transactions. The provision would be modeled after Opinion Procedure Release No. 08-02, but would address its limitations and apply recent departures from its strict disclosure schedule.[110] This provision could take effect as guidance similar to the 2012 Guidance, again published jointly by the DOJ and the SEC. But the U.S. Chamber Institute for Legal Reform has argued that with proposals such as this, when "the FCPA is ripe for much needed clarification and reform through improvements to the existing statute[,] ... [s]uch improvements ... are best suited for Congressional action."[111]

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109. Peter J. Henning, *In Bribery Law, the Watchword is Uncertainty*, N.Y. TIMES DEALBOOK (Nov. 15, 2012, 1:29 PM), http://dealbook.nytimes.com/2012/11/15/in-bribery-law-the-watchword-is-uncertainty/.

110. *See* Deferred Prosecution Agreement at 9-11, United States v. Data Sys. & Solutions, LLC, No. 1:12-CR-262 (E.D.V.A. June 18, 2012) [hereinafter Deferred Prosecution Agreement, *Data Systems*], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/data-systems/2012-06-18-data-systems-dpa.pdf (granting deferred prosecution contingent on implementing a two-year remediation program and reporting progress at regular intervals); Deferred Prosecution Agreement ¶¶ 10-12, United States v. Bizjet Int'l Sales & Support, Inc., No. 12-CR-61CVE (N.D. Okla. Mar. 14, 2012) [hereinafter Deferred Prosecution Agreement, *Bizjet*], *available at* http://www.mainjustice.com/wp-admin/documents-databases/293-2-Deferred-Prosecution-Agreement.pdf (granting deferred prosecution contingent on implementing a three-year remediation plan).

111. ANDREW WEISSMANN & ALIXANDRA SMITH, THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 7 (2010), http://www.instituteforlegalreform.com/sites/default/files/restoring balance_fcpa.pdf. "There is evidence that Congress may be open to such a proposal. In 1988, the United States House of Representatives proposed adding a similar 'safe harbor' to the FCPA, which would have shielded companies that established procedures that were 'reasonabl[y] expected

B. A Proposed Safe Harbor Provision

1. Provision Text

The following is a proposed amendment to the FCPA that would provide safe harbor in certain transactions:

> A) Types of protections granted
>
> 1) Any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 780(d) of this title and is engaged in a corporate acquisition of a separate corporate entity will be eligible for immunity from enforcement actions for *pre-acquisition violations* of this title committed by the target company, provided that the acquiring company:
>
> a) reports such violations as quickly as is reasonably practicable following the closing of the acquisition transaction, and
>
> b) promptly institutes a full remediation program to correct such violations and prevent subsequent violations.
>
> 2) Any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 780(d) of this title and is engaged in a corporate acquisition of a separate corporate entity will be eligible for immunity from enforcement actions for any *post-acquisition violations* of this title during the twelve months immediately following closing of the acquisition transaction, provided that the acquiring company:
>
> a) reports such violations as quickly as is reasonably practicable after closing of the acquisition transaction,
>
> b) remedies such violations as soon as they reasonably can be stopped, and
>
> c) completes due diligence and remediation, including completion of investigation of any issues that are identified, by not later than one year from the date of closing of the acquisition transaction.

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to prevent and detect' FCPA violation from vicarious liability for FCPA violations of employees." *Id.* at 93 n.44.

B) General Requirements

1) An acquiring company may receive the immunity outlined in Section A(1) and (2) only if the acquisition transaction is conducted under circumstances where reasonable due diligence is not feasible due to any combination of the following factors:

a) significant time sensitivity, such that the time required to conduct reasonable due diligence would not allow the acquiring company to complete the transaction,

b) regulations in the country where the target company is located that prevent reasonable due diligence, or

c) market characteristics or information deficiencies in the country or region where the target company is located that prevent reasonable due diligence.

2) An acquiring company may not receive the immunity outlined in section A(1) and (2) if any officer, director, employee, or agent of such company knowingly plays a role in the violation of this title.

3) A target company may not receive the immunity outlined in section A(1) and (2) in order to intentionally avoid enforcement actions for identified misconduct through merger and acquisition activity. Under this requirement, the target company cannot receive immunity if violations of this title occur with the intent to avoid penalties through future sale of the company.

a) As an exception to Section B(3), this requirement does not apply to target companies that were not subject to the FCPA prior to acquisition.

4) The acquiring company bears the burden of proving to the government's satisfaction:

a) the acquiring company implemented reasonable efforts to conduct pre-acquisition due diligence in an effort to discover potential FCPA liability, and

b) all post-acquisition disclosure and remediation was implemented and conducted by the acquiring company as quickly as reasonably practicable.

2. Hypothetical Provision Explained

Section A of this statute seeks to follow the provisions of Opinion Procedure Release No. 08-02, with some significant changes. First, following deferred prosecution agreements granted in other similar cases,[112] an acquiring company would be required to make all disclosures within a period that is reasonably practicable,[113] and remedy any violations within a one year period.[114] This would still place a burden on acquiring companies to invest dedicated efforts to discover and remedy corruption, but the amendment's flexibility would recognize that misconduct may be very difficult or very easy to identify and address in differing transactions.

Section B(1) of the statute specifies that this safe harbor provision is only available in unique circumstances in which an acquiring firm is unable to conduct proper due diligence because of limited time or the characteristics of the target's business operations. Sections B(2) and B(3) are intended to ensure that this provision is not used to intentionally commit FCPA violations and avoid liability. Without this section, a company subject to the FCPA could knowingly allow profitable corrupt practices, then sell or merge the company for the

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112. Deferred Prosecution Agreement, *Data Systems supra* note 110, at 4-5; Thomas R. Fox, *The DOJ Listens: The Evolution of FCPA Compliance in M&A*, FCPA COMPLIANCE & ETHICS BLOG (June 20, 2012, 5:59 PM), http://tfoxlaw.wordpress.com/2012/06/20/the-doj-listens-the-evolution-of-fcpa-compliance-in-ma/; *see* DOJ Deferred Prosecution Agreement, *supra* note 91; *see also* Deferred Prosecution Agreement at 5, United States v. Johnson & Johnson, No. 1-11-CR-99-JDB (D.D.C. Jan. 14, 2011), *available at* http://lib.law.virginia.edu/Garrett/prosecution_agreements/pdf/johnson.pdf.

113. The phrase "reasonably practical" appears to be favored by the enforcing agencies, as it appears repeatedly in recent deferred prosecution agreements (DPA). In this hypothetical provision, this phrase is intentionally subject to interpretation, permitting the enforcing agency to retain control in setting what it deems to be appropriate remediation and reporting schedules, while also recognizing that the necessary timetables may vary widely depending on circumstances. A likely timeframe for these disclosures might range from 90 days post-close, as in Halliburton's obligation to disclose egregious violations, to 18 months, as in Johnson & Johnson's obligation to conduct full FCPA audits.

114. *See* PAUL T. FRIEDMAN ET AL., MORRISON & FOERSTER, FCPA + ANTI-CORRUPTION DEVELOPMENTS: 2012 END OF SUMMER ROUND-UP (2012), http://www.mofo.com/files/Uploads/Images/121010-FCPA-Anti-Corruption-Developments.pdf ("[N]otably, DOJ seems to be relaxing the timeline for conducting such diligence when compared to the strict requirements set forth in the Halliburton Opinion Procedure Release 08-02, which set forth aggressive deadlines for conducting a post-close review and reporting findings.").

sole purpose of avoiding penalties, thereby dodging all consequences.

The exception in section (B)(3)(a) exists because if a company was not previously subject to the FCPA pre-merger, and intentionally commits violations, it would not be liable for those violations. This exception recognizes that a target company should not be liable for violating a foreign jurisdiction's law that it was not subject to, even if that violation was intentional. Further, the (B)(3)(a) exception exists to encourage target companies that might intentionally violate the FCPA to conform to the FCPA through merger. The promise not to prosecute creates an incentive to merge and institute compliance remedies, rather than a reason to continue misconduct with impunity.[115]

3. Comparison with Other Laws

The idea of a safe harbor in certain transactions, as extended in the Guidance and proposed here, is not unique to corruption law. In several other areas of law, safe harbor provisions are provided to reconcile differing legal regimes and encourage business practices where disparate rules might otherwise make transactions less likely.

In the field of export law, the United States and the European Union take different approaches to data protection and personal privacy.[116] Without a safe harbor provision, the E.U.'s stricter law "would prohibit the transfer of personal data to non-European Union countries that do not meet the European Union ... 'adequacy' standard for privacy protection."[117] But the U.S.-E.U. Safe Harbor Program acts "to bridge these differences in approach and provide a streamlined means for U.S. organizations to comply with the [E.U. law]."[118] The Safe Harbor Program creates a presumption of compliance that allows transactions to continue unchallenged and balances strict enforcement with business operation.[119] Like the

115. *See infra* Part IV.B.

116. *See Welcome to the U.S.-E.U. & U.S.-Swiss Safe Harbor Frameworks*, EXPORT.GOV, http://export.gov/safeharbor/index.asp (last updated Apr. 11, 2012).

117. *Id.*

118. *Id.*

119. Robert R. Schriver, *You Cheated, You Lied: The Safe Harbor Agreement and Its Enforcement by the Federal Trade Commission*, 70 FORDHAM L. REV. 2777, 2780 (2002) ("Under the Safe Harbor agreement, U.S. firms agree to abide by basic ... principles .... Those

U.S.-E.U. Safe Harbor Program, the FCPA safe harbor proposed here also should have a presumption of compliance that is intended to facilitate transactions.

Similarly, health care law includes a safe harbor provision with respect to fraud and abuse in anti-kickback laws.[120] The purpose of this safe harbor provision is to promote valuable, "non-abusive" mergers that may be within the scope of the Anti-Kickback statute.[121] Likewise, the FCPA's safe harbor provision should be designed to avoid penalizing productive M&A activity where egregious misconduct has not occurred.

Further, the U.K. Bribery Act is considered by many to be an even stricter anti-corruption law than the FCPA,[122] but it does not enforce successor liability. Rather, it "limits an acquiring company's liability to the date of the closing, when it became 'associated' with the target entity. Under the Act, an acquiring company is liable only for ongoing bribery that continues after the acquisition, as opposed to any historic conduct."[123] This is similar to the guarantee provided in the Guidance that the DOJ and the SEC will not prosecute an acquirer for a target's misconduct prior to acquisition. It also seems to extend leniency to the target company after acquisition because any penalty against the target company post-acquisition would

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that do so will be presumed to provide 'adequate protection,' and the European ... authorities will allow their [transactions] to continue unchallenged. [Authorities] fear the agreement might be too lenient, especially concerning enforcement. U.S. companies fear the agreement might be too strict.").

120. *See* Medicare and State Health Care Programs: Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute, 64 Fed. Reg. 63518 (Nov. 19, 2009) (to be codified at 42 C.F.R. pt. 1001).

121. *Id.*

122. *See* Ben Kerschberg, *FCPA-Inspired UK Bribery Act Projected to Hit the Oil and Gas Industry Hardest*, FORBES (May 20, 2011), http://www.forbes.com/sites/benkerschberg/2011/05/20/fcpa-inspired-uk-bribery-act-projected-to-hit-the-oil-and-gas-industry-hardest/; Mike Koehler, *UK Bribery Act: Sensible and Senseless*, FCPA PROFESSOR (Apr. 25, 2011), http://fcpaprofessor.blogspot.com/2011/04/uk-bribery-act-sensible-and-senseless.html; WYNN H. SEGALL ET AL., AKIN GUMP STRAUSS HAUER & FELD LLP, UK BRIBERY ACT RAISES THE BAR ON FCPA STANDARDS FOR ANTIBRIBERY COMPLIANCE (Aug. 2, 2010), http://www.cdn.akingump.com/images/content/6/7/v4/6732/100802-UK-Bribery-Act-Raises-the-Bar-on-FCPA-Standards-for-Antib.pdf.

123. Matthew J. Freeley, *Successor Liability Can Be Limited Before Acquisition Is Made*, DAILY BUS. REV. (Mar. 5, 2012), http://www.bipc.com/files/Publication/d759195c-9121-4536-929f-c20208d54a82/Preview/PublicationAttachment/438706e5-296c-4908-9da7-c2e7cffd397b/100031203%20Buchanan.pdf.

ultimately be borne by the acquirer. The proposed FCPA provision would similarly shelter the acquirer from liability that may exist in the target immediately following closing.

Finally, the SEC and the DOJ themselves each have programs that grant leniency under certain conditions when a company self-reports misconduct.[124] Because the Agencies focus on self-reporting when determining leniency in these situations,[125] the Agencies should be equally willing to grant leniency when an acquirer reports misconduct that it was not aware of and made diligent efforts to prevent and correct.

C. The Proposed Safe Harbor Provision in Practice

The proposed safe harbor provision would apply most clearly in transactions similar to Scenario 3 discussed in the Guidance. In this situation, the acquiring company is unable to conduct proper due diligence on the target due to local law. The acquirer, however, would first satisfy the safe harbor provision by showing that it made every reasonable attempt at conducting proper due diligence, but that it was unable to do so because of the local laws.

As an example, upon closing the acquisition, the acquirer might have some suspicion of misconduct in the target, which is now part of the surviving company. The acquirer begins full FPCA due diligence immediately in order to satisfy the requirement that an investigation be conducted as quickly as reasonably practicable. Hypothetically, in the course of its internal investigation, the acquirer discovers that the target conducted corrupt practices for several years prior to acquisition. The acquirer immediately

124. *Enforcement Cooperation Initiative*, SEC. & EXCH. COMM'N COOPERATION INITIATIVE, http://www.sec.gov/spotlight/enfcoopinitiative.shtml (last visited Sept. 21, 2013); *Leniency Program*, U.S. DEP'T OF JUST. ANTITRUST LENIENCY PROGRAM, http://www.justice.gov/atr/public/criminal/leniency.html (last visited Sept. 21, 2013).

125. *See* U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), *available at* http://www.justice.gov/atr/public/guidelines/0091.pdf (stating that leniency is contingent on reporting misconduct with completeness and candor); Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Securities Exchange Act Release No. 44969, Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001), http://www.sec.gov/litigation/investreport/34-44969.htm ("Self-policing, self-reporting, remediation and cooperation with law enforcement authorities, among other things, are unquestionably important.").

initiates a compliance program and reports this misconduct to the DOJ and the SEC, and the Agencies would decline to prosecute.

A short time later, the acquiring company discovers that some corrupt practices of the target are still being conducted within the operations of the surviving company. Again, the acquirer immediately reports to the DOJ and the SEC and institutes compliance efforts to remedy the misconduct. Upon the showing of the acquirer's reasonable and timely efforts, the DOJ and the SEC would decline to prosecute and would allow the acquirer up to twelve months after the acquisition to completely remedy the misconduct.

IV. A Safe Harbor Provision Would Be Beneficial for Both Businesses and the Government

A. Benefits for Companies

1. Lower Transaction Costs

Whether in a definitive codified provision, as suggested above or as extended in the Guidance, allowing some form of safe harbor from FCPA enforcement penalties in certain transactions is good policy from the perspective of both business and law enforcement. First, a safe harbor provision lowers transaction costs in cross-border mergers and acquisitions because it reduces the cost of due diligence and subsequent investigation for FCPA violations.

As discussed above, the cost of due diligence is directly related to the amount of risk a company faces when considering a transaction.[126] Because of this, one of the primary effects the FCPA has on mergers and acquisitions is that it increases transaction costs through increased due diligence efforts that are intended to mitigate such risk.[127]

In some deals, however, a high risk of FCPA violations requires a company to decide between investing more in due diligence or

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126. *See supra* Part II.

127. N.Y. CITY BAR ASS'N, COMMITTEE ON INTERNATIONAL BUSINESS TRANSACTIONS, THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS—SHOULD ANYTHING BE DONE TO MINIMIZE THE CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON COMBATING OFFSHORE CORRUPTION? 1, 2-3 (Dec. 2011), http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf.

abandoning a deal, which can have negative economic consequences. As explained by Daniel Grimm:

> 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.[128]

A safe harbor rule, however, removes the need to compensate for uncertainty with expensive due diligence, decreasing the costs of these types of transactions because companies are able to pursue transactions with greater assurance that even if violations exist, they will not be penalized for those violations if otherwise compliant. A safe harbor provision allows companies to fully understand the requirements for compliance and approach transactions with more confidence that they will be able to satisfy such requirements. Ultimately, the certainty of compliance requirements, provided by a safe harbor provision, would reduce transaction costs that are related to uncertainty.[129]

Reducing uncertainty would be beneficial to companies because unexpected successor liability, which may arise in situations in which it is not possible to conduct proper due diligence, can have a damaging economic effect. As the Second Circuit noted in the concurrence to *New York v. National Services Industries Inc.*, "A rule of successor liability that threatened good-faith buyers with huge, unpredictable liability would also impose serious systemic costs on the economy. Such a rule would depress the price purchasers would be willing to pay for assets, as buyers would risk acquiring massive hidden liability."[130] But a safe harbor provision can be a powerful tool to decrease transaction costs by reducing uncertainty and risk.

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128. Grimm, *supra* note 8, at 297.

129. *Cf.* LORIE SRIVASTAVA & SANDRA S. BATIE, GREAT LAKES PROTECTION FUND, THE EFFECT OF UNCERTAINTY ON COMPLIANCE WITH ENVIRONMENTAL PERFORMANCE STANDARDS (Jan. 2002), *available at* http://www.michigan.gov/documents/deq/deq-ogl-mglpf-tmdls_249819_7.pdf ("[T]he regulator may also wish to reduce these significant ... transaction costs associated with compliance uncertainty by increasing compliance certainty.").

130. 352 F.3d 682, 694 (2d Cir. 2003) (Leval, J., concurring).

As explained by one author, "[T]he development of a safe harbor from successor liability for business entities performing FCPA due diligence that satisfies the guidelines would calm market nerves and facilitate compliance without jeopardizing beneficial M&A transactions."[131]

2. Facilitating Mergers and Acquisitions

By reducing transaction costs and uncertainty, a safe harbor provision allows U.S. companies to be more competitive in the global market because it "tip[s] the balance toward overseas expansion by reducing the risk of hidden FCPA liability."[132] In Opinion Procedure Release No. 08-02 and in the Guidance, the Agencies' extension of the safe harbor shows a commitment to facilitating innocuous business transactions:

> [F]or United States companies that are contemplating cross-border merger and acquisition deals involving FCPA issues, the granting of a "grace period" 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.[133]

The net impact of a safe harbor is that it allows U.S. companies to conduct more mergers and acquisitions, which in the aggregate facilitates more activity in the market for corporate control, allows willing participants of market transactions to engage in voluntary mergers and acquisitions, and allocates resources through efficient mergers.

A safe harbor provision also reduces the chilling effect on cross-border deals. Without a safe harbor, the total result of increasing transactions costs and risks of hefty penalties is that "the extensive due diligence required and the fear of FCPA repercussions have a chilling effect on many mergers and acquisitions in today's business

131. Grimm, *supra* note 8, at 299-300.
132. Terwilliger, *supra* note 5, at 2.
133. Baker et al., *supra* note 81, at 6.

world."[134] The U.S. Chamber of Commerce's Guidance Request Letter also focused on the FCPA's chill on mergers and acquisitions, noting that a strong deterrent effect exists "even if a thorough investigation is undertaken prior to a transaction."[135] Though the Chamber's letter represents over three million businesses, even the Chamber itself was incapable of tallying the number of deals avoided because of potential FCPA successor liability issues.[136] But a safe harbor provision counteracts any chilling effect from the FCPA by facilitating leniency in high-risk transactions where uncertainty would have been highest.

B. Furthering the Purpose of the FCPA

Likewise, a safe harbor provision is also beneficial policy for law enforcement because it reinforces the FCPA's purpose to reduce corruption.[137] The safe harbor allows more companies to engage in the acquisition of foreign companies, which reduces global corruption by allowing more entities to become subject to FCPA via acquisition.[138] In a hypothetical transaction without a safe harbor provision, an acquiring company that is already subject to the FCPA might avoid acquiring a target that is not subject to the FCPA because that target is in a high risk country or industry. In this case, with the merger abandoned, the target company has no incentives to discontinue its corrupt practices. In this event, the FCPA actually works against its purpose of reducing bribery while

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134. D. Michael Crites & Mark A. Carter, *Why the Foreign Corrupt Practices Act is Hurting Our Businesses and Needs to Be Reformed*, NAT'L L. REV., May 15, 2011, at 1, http://www.natlawreview.com/article/why-foreign-corrupt-practices-act-hurting-our-businesses-and-needs-to-be-reformed.

135. Chamber Letter, *supra* note 2, at 6; *see id.* at 2 ("The result of these circumstances has been a chilling effect on legitimate business activity ... and a costly misallocation of compliance resources (as companies dedicate resources to policing and investigating even such remote and attenuated situations).").

136. *See supra* Part II.

137. *See* FCPA GUIDANCE, *supra* note 1, at 90 ("The FCPA was designed to prevent corrupt practices, protect investors, and provide a fair playing field for those honest companies trying to win business based on quality and price rather than bribes.").

138. Terwilliger, *supra* note 5, at 2 ("At its most elemental level, this procedure would serve the fundamental objectives of the FCPA, which are to root out and eliminate corruption in the global marketplace."); Andy Spalding, *Beyond Balance VII: Lost Opportunities of Successor Liability*, FCPA BLOG (Feb. 21, 2012, 5:28 AM), http://www.fcpablog.com/blog/2012/2/21/beyond-balance-vii-lost-opportunities-of-successor-liability.html.

also placing the compliant company at a disadvantage. But if the transaction was regulated with a safe harbor provision, there would be less risk for the acquirer, making the transaction more likely. Once the target is merged into the acquirer, all business operations of the target become subject to the FCPA, and all of its corrupt practices must be discontinued quickly and permanently. The ultimate result is that, by reducing risk, the safe harbor provision facilitates more mergers and acquisitions, brings more businesses under the governance of the FCPA, and reduces global corruption.

C. Alternatives and Counterarguments

Companies engaged in cross-border mergers and acquisitions may consider alternative strategies to avoid risk of successor liability. Where a safe harbor is unavailable, companies may change the deal structure from a complete purchase or merger. In some situations, companies could structure the deal as an asset purchase or a stock purchase.[139] In these structures, dealmakers could negotiate who would retain the liability for penalties or isolate those liabilities in a subsidiary.[140]

One reason why a safe harbor provision would still be preferable to such deal structures is that the liability avoidance strategies in both asset sales and stock purchases are merely ways to allocate uncertain risk.[141] A safe harbor provision is preferable because, instead of allocating uncertain risk, it provides certainty that any risk has been removed.[142] This means that parties are able to conduct more efficient business transactions because prices are not distorted by uncertain risk that may or may not exist.

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139. *See supra* Part II.

140. *See* OESTERLE, *supra* note 29, at 215-17; *see also* Henning, *supra* note 109 ("In practical terms, this means deal lawyers concerned about potential exposure to the Foreign Corrupt Practices Act will probably structure transactions to ensure the company being acquired retains its legal incorporation, so that unit can absorb any charges.").

141. *See* WALT LEMANSKI, PATTON BOGGS LLP, RISK ALLOCATION: DRIVING FORCE BEHIND THE M&A PROCESS (2008), http://www.pattonboggs.com/files/News/616c75c6-2167-49a4-8b5b-101e699ef03e/Presentation/NewsAttachment/33f670f1-25a0-4546-88e3-10dbee1a3fda/FinancierWwd_RiskAllociation_06.08.pdf.

142. The safe harbor may not remove all risk permanently, but it can remove all risk for the period to which it applies.

Another alternative to a safe harbor provision would be case-by-case deferred prosecution agreements that grant similar post-acquisition leniency, as the DOJ has done in several recent cases.[143] These decisions have results similar to a safe harbor provision because they allow for post-acquisition due diligence and reporting. Unlike a safe harbor provision, however, the issued agreements do not allow the parties the assurance that they will not be penalized. Instead, a deferred prosecution allows a company to avoid a formal indictment, but still pay penalties as if it had been found guilty.[144] Some agreements, such as the one granted to Pfizer, allow for post-acquisition reporting as part of its requirements, but only as part of a complex penalty structure.[145] A safe harbor provision, on the other hand, is much simpler to navigate because it is not issued on a case-by-case basis. Companies enter into a transaction with confidence that they will not be prosecuted, which they would lack if requesting individual opinions and deferred prosecution agreements from the DOJ and the SEC. Furthermore, while deferred prosecution agreements carry with them a backdrop of enforced penalties,[146] the basis for the safe harbor is a grace period from any penalties and the facilitation of beneficial transactions.

One possible argument against a safe harbor provision is that instead of reducing transaction costs, it only defers them until after

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143. FRIEDMAN, *supra* note 114, at 8 ("For example, the *Data Systems* and *Bizjet* deferred prosecution agreements require that the companies conduct 'appropriate risk-based' anti-corruption due diligence for potential mergers and acquisitions, implement anti-corruption policies and procedures 'as quickly as practicable,' and conduct FCPA-specific audits of newly acquired or merged businesses.").

144. Lanny A. Breuer, Assistant Att'y Gen., Criminal Div., Address at the Meeting of the New York City Bar Ass'n (Sept. 13, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html ("[A] DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea: when a company enters into a DPA with the government, or [a non-prosecution agreement] for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve ... its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement. All of these components of DPA are critical for accountability.").

145. *See* Pfizer Deferred Prosecution Agreement, Attachment C.2-6 ¶ 9 (Aug. 7, 2012), *available at* http://www.morganlewis.com/pubs/PfizerFCPA-AttachmentC.pdf ("When such anticorruption due diligence is appropriate but not practicable prior to acquisition of a new business for reasons beyond Pfizer's control, or due to any applicable law, rule, or regulation, Pfizer has conducted and will conduct anti-corruption due diligence subsequent to the acquisition and report to the Department any corrupt payments.").

146. Breuer, *supra* note 144.

a merger is finalized and when the acquiring party loses its flexibility to negotiate or abandon a deal. If the acquirer does not have the benefit of a safe harbor provision, then greater pre-acquisition due diligence is required. If that due diligence reveals that the target company is likely to have liability for severe FCPA violations, the acquirer can simply abandon the deal, which avoids further due diligence and costly remediation measures that would be required post-acquisition. On the other hand, if given a safe harbor period, acquiring companies might delay certain due diligence processes pre-acquisition, knowing they have a post-acquisition grace period. But if serious problems are later identified, the subsequent remediation and compliance measures could be far more expensive than proper pre-acquisition due diligence and avoidance of the target.[147] This means that uncertainty of a risk would still be priced into the deal, retaining its transaction costs, although in a different form. Instead of risking the cost of law enforcement penalties, the acquiring company must instead risk the cost of post-acquisition remedies and compliance.

The response to this argument is that even if the safe harbor delays some transaction costs, it ultimately reduces the total transaction costs for the deal. In cross-border deals where proper due diligence is difficult, the costs of diligence and remediation are much lower post-closing than they would be pre-acquisition because the deal avoids pre-merger antitrust and exchange of information laws.[148] This means that total transaction costs are reduced in the aggregate because the pre-acquisition expenses are reduced much more than any increase in post-acquisition expenses.

CONCLUSION

In its letter representing over three million businesses and organizations, the U.S. Chamber of Commerce highlighted the uncertainty that businesses face when navigating FCPA successor liability in cross-border mergers and acquisitions.[149] Part of this difficulty is inherent in many of these transactions where proper

147. E-mail from Kevin Grady, Associate, Gibson, Dunn & Crutcher LLP, to author (Sept. 4, 2012) (on file with author).

148. *See supra* Part II.A.1.

149. *See* Chamber Letter, *supra* note 2, at 28-34.

pre-acquisition due diligence can be costly, time-consuming, or impossible.[150] As a result, in previous circumstances the DOJ and the SEC have allowed acquiring companies to have some safe harbor from continuing misconduct that occurs post-acquisition. In their recently issued Guidance, the Agencies explained that an acquiring company in this situation has the option to proactively avail itself of the safe harbor provisions granted to Halliburton in Opinion Procedure Release No. 08-02. This new extension is a strong step in the right direction towards reducing uncertainty and facilitating transactions, but more should be done because of the inherent limitations in its disclosure schedule and the remaining uncertainty. In addition to the Guidance, the FCPA should be amended to grant a clearly defined safe harbor to all transactions that meet the articulated requirements and that allows for companies to bear the burden of complying with a quick, but reasonable disclosure schedule that conforms to the nature of the transaction.

Such a safe harbor provision, whether extended by the Guidance or clearly amended in the FCPA, would benefit both multinational businesses and the agencies enforcing the FCPA because it would reduce transaction costs, facilitate more mergers and acquisitions, and bring more companies under the jurisdiction of the FCPA. As a result, more companies would be able to engage in cross-border mergers and acquisitions while decreasing global corruption.

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150. *See supra* Part II.

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