

The Market for Corporate Criminals

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This Article identifies problems and opportunities at the intersection of mergers and acquisitions (M&A) and corporate crime and compliance. In M&A, criminal successor liability is of particular importance, because it is quantitatively less predictable and qualitatively more threatening to buyers than successor liability in tort or contract. Private successor liability requires a buyer to bear bounded economic costs, which can in turn be reallocated to sellers via the contracting process. Criminal successor liability, however, threatens a buyer with non-indemnifiable and potentially ruinous punishment for another firm's wrongful acts.

This threat may inhibit the marketability of businesses that have criminal exposure, creating social cost in the form of inefficient allocations of corporate control. Such a result would be unfortunate because M&A could instead be a lever for promoting compliance. Yet criminal successor liability undermines this possibility and, in turn, the public's interest in compliance. To countervail these problems, this Article proposes new prosecutorial policies that, through better-targeted sanctions and compliance-enhancing mergers, would promote M&A markets, deter corporate crime, and foster corporate reform.

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Introduction

This Article tackles problems at the intersection of two seminal papers, George Akerlof's *The Market for "Lemons"*¹ and Henry Manne's *Mergers and the Market for Corporate Control*.² The problems arise from the acquisition by M&A buyers of not just target firms' private assets and liabilities³ but also their criminal or regulatory (i.e., quasi-criminal⁴) offenses.⁵ That is, if A commits a criminal offense, and if B then acquires A, B is liable for A's offense despite being uninvolved in its commission. In the case of private-law (i.e., tort or contract) claims, successor liability can be justified as preventing firms from evading private obligations through restructuring.⁶ In arm's-length M&A transactions, buyers can manage private successor liability through contractual terms that reallocate those costs and risks onto sellers.⁷ In the case of successor liability for criminal offenses, however, the serious non-financial consequences of criminal conviction cannot be neatly managed through contractual risk

1. George A. Akerlof, *The Market for "Lemons": Quality and Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

2. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

3. Not all M&A activity gives rise to successor liability. For example, mere asset purchases, as a default rule, do not. To the extent that applicable law forecloses successor liability, those acquisitions are outside the scope of this Article. See Devine & Devine Food Brokers, Inc. v. Wampler Foods, Inc., 313 F.3d 616, 618 (1st Cir. 2002) ("Under generally accepted corporate law principles, the purchaser of the assets of another corporation does not assume the debts and liabilities of the transferor. The traditional rule is subject to four generally recognized exceptions: (1) the purchasing corporation expressly or impliedly agrees to assume the selling corporation's liabilities; (2) the transaction is a merger of the two entities; (3) the purchaser is a mere continuation of the seller corporation; and (4) the transaction is a fraudulent attempt to evade the seller's liabilities."); accord 15 WILLIAM M. FLETCHER, CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 7122 (2022) ("A fifth exception, sometimes incorporated as an element of one of the four listed above, is the absence of adequate consideration for the sale or transfer."); RONALD GILSON & BERNARD BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 1505–08 (2d ed. 1995) (analyzing the effects of transactional forms on successor liability).

4. That is, regulatory offenses that could also constitute crimes or that, in their seriousness, approximate criminal offenses. For simplicity, this Article uses "criminal" or "crime," but that term should be understood as capturing those serious regulatory offenses. See CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY 7–8 (2001) (articulating the distinctions and commonalities between "true" crimes and quasi-crimes).

5. See *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 274 (1959) (recognizing successor criminality liability). Mihailis Diamantis argues that the question of successor liability should turn on fine-grained analysis whether successors and predecessors truly share a criminal identity, versus the rote approach of imposing liability on successors for predecessors' violations. Mihailis E. Diamantis, *Successor Identity*, 36 YALE J. ON REGUL. 1, 5 (2019).

6. For example, without successor liability, a firm might merge with a new entity and eschew the liabilities of the predecessor entity. See John H. Matheson, *Successor Liability*, 96 MINN. L. REV. 371, 372–73 (2011) ("Successor liability law . . . fundamentally seek[s] to balance two competing, and often conflicting, policy goals: to provide a necessary remedy to injured parties, often tort claimants, and to provide transactional clarity and certainty for business parties engaged in fundamental corporate transactions."). These concerns are least likely to arise in the case of contractual succession. Voluntary contract creditors can protect themselves ex-ante through succession and assignment terms. Involuntary tort creditors do not have that ex-ante ability, however, and thus successor liability in tort has proven to be more challenging doctrinally. See generally Mark J. Roe, *Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559 (1984) (identifying costs of non-uniform judicial approaches to successor tort liability).

7. See *infra* Section I.A for a discussion of how buyers manage these costs and risks.

allocation. Instead, distinctive consequences of criminal liability could, at the margin, frighten potential buyers away from otherwise-attractive deals. The result would be a suboptimal level of M&A activity: firms that would be ideal targets for acquisition but for their potential criminal exposure might sell for suboptimal prices or to suboptimal buyers, or they might not sell at all. This problem represents a social cost in that one of corporate law's key mechanisms for addressing business deficiencies—the market for corporate control—might fail when the deficiency in question is a culture of lawbreaking.

The acquisition of Bankrate—a once-public financial firm—by Red Ventures—a private marketing company—is an instructive example. In 2012, the U.S. Securities and Exchange Commission (SEC) raised concerns with Bankrate about its financial reporting, leading to the discovery that its CFO had regularly engaged in a form of securities fraud known as a cookie-jar accounting.⁸ In 2017, Red Ventures, although it was aware of the accounting issues, bought Bankrate for approximately \$1.4 billion.⁹ The investigation continued and later that year Red Ventures and the U.S. Department of Justice (DOJ) entered into a non-prosecution agreement (NPA).¹⁰ Under the NPA, DOJ acknowledged that “Red Ventures acquired Bankrate, Inc. after the criminal conduct had taken place and had been investigated by the government, and Red Ventures had no involvement in any of the misconduct”¹¹ By that point, Bankrate was no longer an independent concern and its former directors, executives, and shareholders were long gone. Nevertheless, Red Ventures “admit[ted], accept[ed], and acknowledge[d] that it [wa]s responsible under United States law for the acts of [Bankrate’s former] officers, directors, employees, and agents” in connection with the old CFO’s fraud.¹²

By the time Red Ventures signed the NPA, Bankrate’s former CFO was a year into a ten-year fraud sentence and had not worked at the company for over four years.¹³ Nevertheless, Red Ventures was obliged to pay \$15 million, plus

8. U.S. Dep’t of Just., Crim. Div., Letter to Jeffrey H. Knox, Partner, Simpson Thatcher & Barlett LLP, and Eric Corngold, Partner, Friedman Kaplan Seiler & Adelman, LLP, at A-1–A-3 (Mar. 5, 2019), <https://www.justice.gov/criminal-fraud/file/1143061/download> [<https://perma.cc/5K2B-BWB3>] [hereinafter Bankrate NPA]. Cookie-jar accounting involves taking excessive accounting reserves in flush quarters that do not represent good-faith expectations of future expenses. Those reserves reduce profits in the quarter in which they are taken. Because the reserves are not actually needed for future expenses, they can be “released” back to the company’s earnings in leaner quarters. The result is falsely smooth quarter-to-quarter earnings. See ORIOL AMAT, DETECTING ACCOUNTING FRAUD BEFORE IT’S TOO LATE 6 (2019) (explaining cookie-jar accounting).

9. See Bankrate, Inc., Current Report (Form 8-K) (Sept. 14, 2014) (announcing that SEC had opened an investigation into the former CFO’s accounting practices and that prior financial reports could not be relied upon by investors); *Red Ventures Announces Closing of Acquisition of Bankrate, Inc.*, PR NEWSWIRE (Nov. 8, 2017), <https://www.prnewswire.com/news-releases/red-ventures-announces-closing-of-acquisition-of-bankrate-inc-300552067.html> [<https://perma.cc/N9YF-92TX>].

10. See generally Bankrate NPA, *supra* note 8.

11. *Id.* at 1.

12. *Id.* at 3.

13. Press Release, U.S. Dep’t of Just., Former Chief Financial Officer of Bankrate Inc. Sentenced to 10 Years in Prison for Orchestrating a Complex Accounting and Securities Fraud Scheme (Sept. 25, 2018), <https://www.justice.gov/opa/pr/former-chief-financial-officer-bankrate-inc-sentenced-10-years-prison-orchestrating-complex> [<https://perma.cc/4RJ4-E8NH>].

interest, in disgorgement and another \$13 million in restitution to former Bankrate shareholders harmed by the fraud.¹⁴ These payments were just: victims were compensated and Red Ventures was not allowed to keep its predecessor's ill-gotten gains.¹⁵ In one light, this criminal resolution had a similar effect to successor liability for private claims: those with tort or contract claims against a predecessor may seek compensation from its successor. Yet, beyond those compensatory provisions, the NPA also required Red Ventures to pay an additional \$15.54 million *penalty*.¹⁶ That is, Red Ventures was punished for misconduct that DOJ acknowledged it had nothing to do with.¹⁷ These amounts were in addition to the company's legal fees and other costs of cooperating with the government's investigation. The NPA also imposed future costs in the form of cooperation and compliance undertakings, which were meant to ensure that Red Ventures would not engage in further misconduct notwithstanding that it did not own Bankrate at the time of the fraud.¹⁸ The disclosed restitution, disgorgement, and penalties represented about 3% of Bankrate's \$1.4 billion purchase price.¹⁹ Other costs, like legal fees, are not publicly available but were likely significant: similar matters have cost companies tens of millions of dollars.²⁰

All this, despite the government's acknowledgment that Red Ventures hadn't engaged in the prior misconduct: Bankrate, the company it acquired, had. Yet the Bankrate case demonstrates that what would be remarkable in the individual context—that one person assumes criminal liability for another—is unremarkable in the corporate context. This effect follows from two doctrines. First, a firm is vicariously liable for crimes committed by employees and agents within the scope of their employment, so long as they had some intent to benefit the firm, however slight the intent or the benefit.²¹ Second, an acquirer bears successor liability for wrongdoing of a predecessor firm, even if all misconduct stopped before the succession.²² Successor liability makes a buyer responsible for torts or contractual breaches committed by its predecessor. Indeed, the restitution Red Ventures paid under the NPA to Bankrate shareholders had a compensatory effect akin to successful private securities litigation. But successor

14. Bankrate NPA, *supra* note 8, at 5.

15. *But see* Kokesh v. SEC, 581 U.S. 455 (2017) (holding that disgorgement in an SEC enforcement action is a penalty).

16. Bankrate NPA, *supra* note 8, at 5.

17. *See supra* note 11 and accompanying text.

18. *Id.* at 3-7 & Attachment C – Corporate Compliance Program.

19. Absent a government investigation, the \$13 million payment for restitution might have occurred as part of a securities-litigation settlement. Because Red Ventures knew of this exposure before acquiring Bankrate, the purchase price likely reflected the acquirer's ultimate settlement costs. *See infra* Section I.B.2 for an analysis of this scenario.

20. These investigative expenses are sometimes so high as to be financially material, thus requiring line-item disclosure in securities filings. *See* Samuel Rubinfeld, *Costly Corporate Investigations Have No Natural End-Point*, WALL ST. J. (Oct. 10, 2017), <https://www.wsj.com/articles/costly-corporate-investigations-have-no-natural-end-point-1507630214> [<https://perma.cc/4AEK-4FUH>] (reporting on six corporate investigations costing between \$130 million and \$1.3 billion).

21. *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493 (1909).

22. *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 274 (1959).

liability also makes an acquirer responsible for criminal offenses committed by its predecessor. Beyond the economic transfer effected by its NPA with DOJ, Red Ventures was made to bear penalties and other sanctions as if it itself should be blamed for Bankrate's past securities fraud.

This motivating example evokes fundamental questions of corporate criminality: why should a firm, which can “act” only through human beings, be said to be a “criminal,” form criminal intent, or be blamed for criminal acts?²³ And doesn't the idea of *acquired* crimes mock the legal fiction of corporate crime all the more? These questions are left open here. Instead, given the reality of corporate criminal liability, I theorize the problems it creates for M&A and corporate compliance. These problems appear in three sometimes-overlapping scenarios:²⁴ a buyer learns of unsettled criminal liability after closing; it learns of unsettled²⁵ criminal liability before closing,²⁶ or the target's criminal liability has been settled but is subject to ongoing probationary obligations at the time of closing.²⁷ Together, these scenarios raise a subset of M&A practice I call “criminal M&A.” The criminal-M&A problem I focus on is not so much the potential for normatively unjust punishment of buyers for sellers' misdeeds.²⁸ Rather, it is that vicarious and successor liability, in concert with enforcement agencies' exercise of prosecutorial discretion,²⁹ can inhibit the market for corporate criminals.³⁰ That is because acquirers will rationally wish to avoid the

23. See generally V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1477-78 (1996) (recognizing that entity-level, as opposed to individual, criminal liability “has generated considerable debate”); Albert Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009) (comparing corporate criminal liability to the doctrine of deodands (punishment of non-humans and objects for crimes) and frankpledge (collective punishment of groups for individual crimes)). See also Andrew K. Jennings, *Follow-Up Enforcement*, 70 DUKE L.J. 1569, 1570 n.1 (2020) (collecting sources).

24. For a discussion of how these three markets overlap, see *infra* note 113.

25. “Unsettled” means a liability that still has the potential to impose costs on the responsible firm. That is the case when the liability is undiscovered but still within statutes of limitations or it has been discovered and the outcome is still contingent, such as when there is an active investigation or a settlement that has outstanding obligations. “Settled” liabilities, on the other hand, have been fully discharged or the statute of limitations has expired. Cf. Mihailis Diamantis, *Invisible Victims*, 2022 WIS. L. REV. 1, 15 (“Many criminals can become unpunishable if they are patient enough. The vast majority of criminals are never caught. Once the statute of limitations runs, they become immune from punishment.”).

26. A buyer that learns of unsettled liability before closing might not sign onto a deal.

27. A fourth scenario—settled criminal liability that is not subject to continuing probation—could also be included. Such a liability would be “water under the bridge” from an M&A standpoint unless it were to count against criminal-history calculations that the combined company might care about in the future. See note 105 *infra* and accompanying text for a discussion of potential problems with corporate criminal histories.

28. Cf. Albert H. Choi, *Successor Liability and Asymmetric Information*, 9 AM. L. & ECON. REV. 408, 410 (2007) (observing that vicarious liability in the tort context appears, at first glance, “to punish an innocent buyer for the seller's wrongs”).

29. Federal prosecutors have broad discretion over investigation, charging, and settlement decisions. Even for settlements that formally invoke judicial process, like DPAs, judges have limited power to police that discretion. See *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 138 (2d Cir. 2017) (“Put simply, our role is not to act as ‘superprosecutors,’ second-guessing the legitimate exercise of core elements of prosecutorial discretion, but rather as neutral arbiters of the law.”).

30. See George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 530–31 (1970) (“[I]t may be useful to reinterpret the offending activity as providing a variety of products

substantial economic, stigmatic, opportunity, and collateral costs of acquired criminal liability.³¹

The inhibition of criminal M&A imposes social cost to the extent that M&A is thought to increase economic efficiency, promote entrepreneurship and innovation, and reduce agency costs.³² These benefits are lost if, at the margin, fear of successor criminal liability prevents, or leads to inefficient, deals.³³ Instead, criminal M&A could be promoted as a means by which buyers reform inadequate compliance levels in targets. This reformative potential finds analogs in other contexts: a typical M&A buyer might correct ineffective sales practices, underinvestment, managerial agency costs, and so on, thereby putting acquired assets to higher-value use. Criminal M&A's reformative potential means that it could promote the public's interest in corporate compliance: one way for a criminal firm to become law abiding is to be acquired by a law-abiding buyer with the ability and wherewithal to reform it.³⁴ A mirror social concern is that criminal M&A could lead to undesirable selection effects in which low-compliance firms obtain misconduct synergies by acquiring other low-compliance firms.³⁵ Such deals could run counter to public interest because the combined concern would continue to break the law, but at greater scale.

Criminal M&A can also make possible the imposition of tougher penalties than would be feasible in other enforcement contexts. Prosecutors are reluctant to impose high, but perhaps penologically appropriate, penalties on going

(offenses). These offenses are in a sense demanded by the society The costs of production of the offenses are the ordinary outlays of offenders plus the penalties imposed by the society.”)

31. These doctrines can be, and are, questioned on normative or pragmatic grounds, but this Article takes them as a given. It focuses on M&A as one area in which these doctrines can impose social costs and undermine the policy objectives they are meant to support. There are other critiques about that same unintended effect. For example, Jennifer Arlen has observed that strict vicarious liability can disincite offender firms from reporting violations or assisting in identifying culpable individuals because doing so would expose the *firm* to liability. Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM 62, 69 (Anthony S. Barkow & Rachel E. Barkow eds., 2011). To avoid that result, prosecutors must adopt internal policies to soften, via prosecutorial discretion, the application of the doctrine. *See id.* at 71–72.

32. *See* Marcel Kahan & Michael Klausner, *Lockups and the Market for Corporate Control*, 48 STAN. L. REV. 1539, 1542 (1996) (“[T]o the extent that managers . . . run their companies inefficiently, an actual hostile takeover can increase the value of a company by moving its assets to a more efficient management team.”). There is doubt, however, whether M&A in the aggregate or in specific cases actually is socially beneficial. *See, e.g.*, Caleb N. Griffin, *The Hidden Cost of M&A*, 2018 COLUM. BUS. L. REV. 70 (2018) (conducting a meta-analysis suggesting that M&A gains might derive primarily from market-power gains, suggesting that M&A imposes social costs).

33. *See* Payne v. Jones, 711 F.3d 85, 94 (2d Cir. 2013) (“The threat of excessive damages . . . encourages overspending on ‘socially excessive precautions’ that cost[] more than the reduction of harm produced by [them].”) (citation omitted); *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991) (“Obviously [the plaintiff] could have taken more precautions. But at a cost, and the question is whether the additional benefit in security would have exceeded that cost.”).

34. This possibility of a law-abiding firm reforming a criminal must be tempered, though, by considering the consequences of a failed integration. There is a risk of contagion for the acquirer, for example. The acquired “bad” company could spread non-compliant culture at the “good” acquiring firm, resulting in a larger-scale (and thus more socially harmful) corporate offender. This risk is especially high when the target company is in a higher-margin or higher-growth business (such that the acquirer will want to learn from the target and adopt its practices). For more discussion of these sorts of risks, see *infra* notes 223–228 and accompanying text.

35. *See infra* note 149 and accompanying text for a discussion of this concept and effect.

concerns due to the social cost of doing so.³⁶ As an example of this prosecutor’s dilemma, imagine a hospital that has defrauded insurers through tens of millions in false billings.³⁷ A hefty penalty might be appropriate for that kind of wrongdoing.³⁸ But if such a penalty would financially destabilize the hospital or reduce its ability to care for patients and provide employment in its service region, prosecutors would discount an otherwise-appropriate penalty to a level that would not risk reductions in patient care or local employment.³⁹ The social and political costs would be too high to do otherwise.

Yet when an offender firm is sold, for a brief moment, its value is fully liquid, allowing those third-party costs to be avoided. If there is an acceptable offer on the table, then some part of the consideration could be used to cover the target’s criminal liabilities or even to fund the buyer’s remediation efforts. Prosecutors could further offer the buyer amnesty from criminal successor liability—or spare it punitive sanctions, at least—for any pre-closing liability for which the target is liable. In cases when there is no imminent M&A deal, prosecutors could impose a full penalty but make its payment contingent on being paid from the purchase price of any *future* acquisition. This approach would in effect allocate the costs of corporate crime to current shareholders, in turn de-risking criminal M&A for future acquirers. As a result, there would be stronger ex-ante deterrence due to the greater incentive for shareholders to monitor compliance. That is, if M&A gives prosecutors methods to isolate the full costs of corporate crime to shareholders, then they would have no need to

36. *But see* A. Mitchell Polinsky & Steve Shavell, *The Economic Theory of Public Enforcement Law*, 38 J. ECON. LIT. 45, 48 (2000) (“We assume . . . that fines are socially costless because they are mere transfers of money . . .”). In the most extreme case, sanctions high enough to effect a “corporate death penalty” could put employees out of work, wipe out shareholders’ equity, threaten creditors’ interests, harm suppliers and customers, and so on. Prosecutors will wish to avoid imposing sanctions that lead to these effects.

37. *See, e.g., Settlement Agreement*, ATT’Y GEN. OF THE STATE OF N.Y. & STATEN ISLAND UNIV. HOSP. 3-4 (May 17, 2005), <https://ag.ny.gov/sites/default/files/press-releases/archived/SIUH%20SETTLEMENT%20AGREEMENT.pdf> [<https://perma.cc/MX3G-A4HE>] (requiring a hospital to repay \$76.5 million in Medicaid overbilling in thirteen annual installments and promising not to impose other sanctions related to the offense or information discovered in the investigation of the offense); *see also* Press Release, U.S. Dep’t of Just., Staten Island University Hospital to Pay the U.S. \$74 Million to Settle Claims of Defrauding Federal Health Care Programs (Sept. 15, 2008), <https://www.justice.gov/archive/opa/pr/2008/September/08-civ-815.html> [<https://perma.cc/6QPR-R92W>] (announcing Staten Island University Hospital’s entry into yet another settlement for \$74 million for overbilling healthcare programs).

38. For instance, the federal sentencing guidelines would allow for imposing a fine on an organizational defendant equal to “the pecuniary gain to the organization from the offense” or “the pecuniary loss from the offense caused by the organization.” U.S. SENT’G GUIDELINES MANUAL § 8C2.4(a) (U.S. SENT’G COMM’N 2004). For an organization like Staten Island University Hospital that overbilled healthcare programs, *see supra* note 37; 18 U.S.C. § 1035 (2018), a sentencing court following the guidelines could have imposed the full amount of overbilling in restitution *plus* the same amount as a penalty.

39. *See supra* note 37 (providing an example in which two separate enforcement agencies required an offender hospital only to repay false billings and imposed no further financial penalties); *cf.* U.S. Dep’t of Just., S.D. Cal., Letter to M. Kendall Day, Partner, Gibson Dunn, at 1 (July 2, 2020), <https://www.sec.gov/Archives/edgar/data/1580063/000119312520197933/d949628dex104.htm> [<https://perma.cc/U5N9-CSHM>] (including “the significant collateral consequences to health care beneficiaries and the public from further criminal prosecution” among the reasons that the DOJ would not pursue a conviction of a medical-testing company that overbilled healthcare programs).

discount sanctions to protect third-party stakeholders. And if, as a result, shareholders expect to bear the undiscounted cost of corporate wrongdoing, they will be more likely to use levers of shareholder power to ensure that management maintains an effective, as opposed to cosmetic, compliance program.⁴⁰ This move would create a new compliance environment in which preventing corporate wrongdoing would be imperative to shareholders because they would bear its costs otherwise.

This Article addresses the questions raised by criminal M&A in three parts. Part I frames criminal M&A as an interaction of information asymmetries, adverse selection, agency- and corporate-law doctrine, and prosecutorial policy. It analyzes the effects of these causes on three M&A submarkets: the markets for unknown corporate criminals, for known corporate criminals, and for corporate probationers.⁴¹ Part II shows that three persistent problems of corporate crime and compliance—ex-post enforcement, ex-ante compliance, and post-enforcement reform—find partial causes and solutions in the market for corporate criminals. Part III recommends reforms to prosecutorial practice that would serve to disinhibit criminal M&A. It further explains how a healthy market for corporate criminals can promote ex-ante compliance (i.e., deterring corporate offenses), ex-post enforcement (i.e., appropriately sanctioning corporate offenses), and post-enforcement reform (i.e., preventing corporate recidivism).

These Parts lead to several principal conclusions. First, criminal liability is a special problem in M&A in that compared to private successor liability, it tends to be quantitatively less predictable and qualitatively more threatening to prospective buyers.⁴² Second, the doctrines of vicarious and successor liability, which drive the problem of successor criminal liability, can undermine M&A markets. And last, these problems can be addressed through prosecutorial policies that promote a socially beneficial market for corporate criminals.

40. See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491-92 (2003) (describing the incentives that result in only superficial compliance programs).

41. These submarkets are evocative of former Secretary of Defense Donald Rumsfeld's infamous "known knowns" speech. Donald Rumsfeld, U.S. Sec'y of Def., General Myers, U.S. Department of Defense Briefing (Feb. 12, 2002), <https://transcripts.cnn.com/show/se/date/2002-02-12/segment/04> [<https://perma.cc/68YU-UG6R>] ("[A]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.").

42. See Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035, 1062-63 (2008) (identifying collateral costs associated with a corporate criminal case). Jennifer Arlen has suggested that corporate criminal liability might be justified in part because it is a potent supplement to civil and regulatory enforcement, especially in light of the economic incentives firms have to direct, endorse, or ignore profitable misconduct by employees and agents. See Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW (Keith N. Hylton & Alon Harel eds., 2014)

I. The Markets for Corporate Criminals

A. M&A, Information Asymmetry, and Adverse Selection

M&A is the market for used businesses.⁴³ Like most used goods, businesses vary in quality (quality heterogeneity), and sellers understand their quality far better than prospective buyers do (information asymmetry). Markets with quality heterogeneity and information asymmetry tend to degrade.⁴⁴ That is, if buyers do not know whether they are buying a high- or a low-quality good, then, to account for this uncertainty, they will discount how much they are willing to pay, if they are willing to deal at all.⁴⁵ But sellers of high-quality goods are unwilling to accept less than full price, meaning that they will exit the market, leaving only lower-quality goods available (adverse selection).⁴⁶ Buyers will eventually grow wise and become unwilling to buy available goods even at a discount, causing the market to collapse.⁴⁷

This market collapse can be avoided, however, in transactions in which parties negotiate over, as opposed to take, prices. In such transactions, private information can be signaled and thus adverse selection mitigated. As one kind of negotiated transaction, M&A transactions require the reduction of information asymmetries to avoid adverse selection's deleterious effects. That task is made more difficult because quality in the case of used businesses is multifaceted, nuanced, and context specific. An acquirer might care about dozens of qualities and sub-qualities, including earnings and financial performance, future business prospects, technology, product and service offerings, human capital, contractual arrangements, intellectual property, and debts and other liabilities.⁴⁸ A target company's managers typically possess the information necessary to understand these qualities, or they at least have the ability to obtain that information.⁴⁹ But the acquirer at first knows only what it can observe from outside, which might

43. The used business in question could be either an entire company or one of its subsidiaries or operating divisions.

44. See generally Akerlof, *supra* note 1. The lemons-market analysis has been applied previously to M&A by Vivek Ghosal and D. Daniel Sokol. See Vivek Ghosal & D. Daniel Sokol, *Compliance, Detection, and Mergers and Acquisitions*, 34 *MANAGERIAL & DEC. ECON.* 514 (2013).

45. See Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 *YALE L.J.* 848, 860 (2010) ("Bearing in mind the risk of adverse selection with respect to [information asymmetry], the buyer might decline to contract or demand a significant discount on the price.").

46. See generally Akerlof, *supra* note 1.

47. *Id.*

48. See Malcolm S. Salter & Wolf A. Weinhold, *Choosing Compatible Acquisitions*, *HARV. BUS. REV.* Jan. 1981, <https://hbr.org/1981/01/choosing-compatible-acquisitions> [<https://perma.cc/CJV3-RYNC>] (listing key considerations for M&A decision-making).

49. Cf. Mihailis Diamantis, *Functional Corporate Knowledge*, 61 *WM. & MARY L. REV.* 319, 328 (2019) ("Corporations can manipulate such a mental state by partitioning it across employees so that no one employee has it in its entirety. Today's corporate behemoths, characterized by complex operations that require a diffusion of responsibility and authority, do not even have to try to spread knowledge thinly."); Carliss N. Chatman, *Myth of the Attorney Whistleblower*, 72 *SMU L. REV.* 669, 681-82 (2019) (analyzing the effects of informational silos on corporate compliance).

be little or nothing at all, especially if the target is not a public company.⁵⁰ Thus, up to this point, an M&A market cannot exist. With complete information asymmetry, rational buyers would not offer to acquire businesses.⁵¹ Even if they did, targets would not accept offers that are discounted to account for information asymmetry.⁵² Quality would be so uncertain to buyers that they could only offer purchase prices that are steeply discounted from full, or “fair,” prices. Targets’ managers, knowing their firms’ true quality, would not accept less than full price.⁵³

Of course, M&A markets *do* exist.⁵⁴ That is because market participants deploy transacting technologies to reduce information asymmetries to acceptable levels, thereby mitigating adverse-selection risk. With one such technology, due diligence, a prospective buyer requires the seller to produce information sufficient to allow it to assess the target’s quality prior to signing a deal.⁵⁵ This production takes the form of financial and non-financial data, interviews with the target’s personnel or business counterparties, and so on.⁵⁶ Related technologies allow a prospective buyer to be confident in the information produced, whether because the seller has given a credible guarantee of the information’s accuracy or a third party has. For example, financial statements are audited by an independent auditor, whereas archival records are reviewed by a prospective buyer’s attorneys or other advisers.⁵⁷ Assuming no deception occurs in this process and the buyer asks the right questions, diligence *could* be sufficient for the prospective buyer to enjoy, at least in material respects, the same informational access as the seller’s management, thus closing the gap. By closing that gap, the parties can in turn reach a price based on common information.

50. See generally Andrew K. Jennings, *Disclosure Procedure*, 82 MD. L. REV. (forthcoming 2023) (providing an institutional account of disclosure production by public companies).

51. See generally Akerlof, *supra* note 1.

52. A reverse scenario occurs in a management buyout. That is, the CEO, other senior executives, and an outside group buy the company. Here, the buyers are the managers who enjoy superior information, whereas shareholders—who are less knowledgeable about the facts affecting the business’s quality—are the sellers. The information asymmetry can be closed if there are legal rules that serve to force the buying group to disclose material information to shareholders. See *Corwin v. KKR Fin. Holdings*, 125 A.3d 304 (Del. 2015) (emphasizing the use of fully informed shareholder votes for conflicted buyouts).

53. This point describes a simple market mechanism. But in many cases, corporate law would also render such a transaction infeasible. The management of an acquirer might have fiduciary duties that would preclude it from making such a blind offer, lest it overpay. The same would be true for the management of the seller. It might be unable to accept a price managers consider objectively too low, even if they have some (perhaps conflicted) desire to accept it.

54. See Michael Deyong & Gregory Pryor, *Surging M&A Surpasses Expectations*, WHITE & CASE LLP (Jan. 31, 2022), <https://www.whitecase.com/publications/insight/record-breaker-us-ma-2021/surging-ma-surpasses> [<https://perma.cc/7VU4-7H2P>] (reporting that 2021 was a record year for M&A deals, with 7,891 deals in the U.S. collectively valued at \$2.6 trillion).

55. See Jeffrey J. Reuer, *Avoiding Lemons in M&A Deals*, MIT SLOAN MGMT. REV., Spring 2005, at 15 (“The process of due diligence provides a useful starting point for obtaining detailed and reliable information about the quality of the resources to be acquired . . .”).

56. See *Sample Due Diligence Request Checklist*, K&L GATES LLP https://files.klgates.com/files/uploads/documents/ma_event/rtac-acc_cle_sampleduediligencelist.pdf [<https://perma.cc/JQ4W-7K23>].

57. *Id.*

Due diligence could perhaps on its own render M&A a possibility. But prospective buyers might need more. First, they cannot be confident that they are asking the right questions. Inherent in the information asymmetry is that they cannot anticipate every question relevant to the target's quality.⁵⁸ Second, the context of a given deal might not allow for diligence sufficient to close the gap. In a distressed or highly competitive scenario, a prospective buyer might have only an abbreviated time to conduct diligence.⁵⁹ In less time-sensitive scenarios, the buyer might seek to limit direct diligence costs (e.g., its legal expenses) or even indirect costs (e.g., annoying target management with whom it is trying to negotiate favorable terms).⁶⁰ Third, although a seller's management theoretically has full access to information about the business's quality, that information is highly dispersed throughout the business and can be costly to collect.⁶¹ Management might neglect to learn information relevant to business quality, subordinates might conceal or lie about it, or the information might be external to the company and thus unknown to either party.⁶² For example, if a business has engaged in unlawful conduct, management might overlook it, subordinates might hide the information despite management's efforts to uncover it, or litigation that management does not know about could be in the offing. In other cases, information relevant to quality will sometimes be known to both parties, but its precise impact remains uncertain at the time the parties wish to transact (symmetric uncertainty).⁶³ That is, it might be known that the target faces a class-action lawsuit that is estimated to result in a \$0 (i.e., dismissal or defense verdict) to \$X (i.e., adverse verdict) liability. The parties will wish to know the true cost of this liability and how it affects the business's value, but until the litigation concludes, they are left to their best estimates.⁶⁴ In these ways—for efficiency, relationship, and symmetric-uncertainty reasons—diligence leaves uncertainty.

To manage diligence's residual uncertainty, parties employ several additional technologies. The seller can make representations that, to its management's knowledge, certain statements about the business's quality are

58. See Reuer, *supra* note 55, at 15 (observing that although due diligence can partly close information asymmetries, it “often fails to unearth the sort of deep, and often tacit, knowledge about the target’s resources that can ultimately determine the success or failure of an acquisition”).

59. *Id.*

60. See generally Jeffrey J. Reuer & Arkadiy V. Sakhartov, *Economies of Scope and Optimal Due Diligence in Corporate Acquisitions*, 32 *ORG. SCI.* 909 (2021) (modeling buyers’ optimal allocation of due diligence efforts in M&A transactions).

61. See Diamantis, *supra* note 49 and accompanying text.

62. Sean J. Griffith, *Deal Insurance: Representation & Warranty Insurance in Mergers and Acquisitions*, 104 *MINN. L. REV.* 1839, 1840 (2020) (“Sellers, who presently own and operate the assets, have access to [a wide array of relevant] information. But much of it is costly to produce—buried within the organization, diffusely held by agents, or dependent upon expert intermediaries—and costly to verify.”).

63. See Brian J.M. Quinn, *Putting Your Money Where Your Mouth Is: The Performance of Earnouts in Corporate Acquisitions*, 81 *U. CIN. L. REV.* 127 (2012) (theorizing that M&A parties use earnouts to address symmetric uncertainty, whereas other M&A technologies address adverse selection).

64. Claire Hill calls this the “harder information” in M&A diligence: information that is not asymmetric but is “simply incomplete,” until nature or a third party acts to complete it. *Repetition, Ritual, and Reputation: How Do Market Participants Deal with (Some Types) of Incomplete Information?*, 2020 *WIS. L. REV.* 515, 519.

true.⁶⁵ Examples might include that financial statements are complete and in accord with generally accepted accounting principles⁶⁶ or that the company has engaged in no violations of law.⁶⁷ These representations can be rendered credible, and other uncertainties can be managed, through deal technologies like escrows,⁶⁸ liability retention and indemnification,⁶⁹ purchase-price adjustments,⁷⁰ earnouts,⁷¹ and third-party insurance.⁷² Adverse conditions unknown to target management can be managed using these risk-allocation technologies as well. For instance, if a lawsuit is filed after closing that was not expected and that relates to the acquired business's pre-closing affairs, and if the selling party survives the transaction, then the transaction agreement might require the seller to indemnify all or part of the litigation's costs. Notably, however, these technologies are unlikely to be usable in public whole-company M&A.⁷³ The lack of a surviving seller entity and the dispersion and anonymity of selling shareholders in those deals leave technologies like indemnification, purchase-price adjustment, or escrow unworkable.⁷⁴

65. See Griffith, *supra* note 62, at 1841 (“[Representations and warranties] address the information problem at the heart of M&A contracting by allocating the burden of information production, refining the scope of information required, and enhancing the credibility of information provided.”).

66. See, e.g., Agreement and Plan of Merger by and Among X Holdings I, Inc., X Holdings II, Inc. and Twitter, Inc. 25 (Form 8-K) (Apr. 25, 2022), <https://www.sec.gov/Archives/edgar/data/1418091/000119312522120461/d310843dex21.htm> [<https://perma.cc/Z92H-AQW6>].

67. See, e.g., *id.* at 24.

68. See John C. Coates IV, *Allocating Risk Through Contract: Evidence from M&A and Policy Implications*, 2-3 (Harv. L. Sch., Discussion Paper No. 729, 2012), www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_729.pdf [<https://perma.cc/2NCN-HRLV>].

69. *Id.*

70. *Id.*

71. See generally Ninon Kohers & James Ang, *Earnouts in Mergers: Agreeing to Disagree and Agreeing to Stay*, 73 J. BUS. 445 (2000) (describing earnouts as a tool to mitigate valuation disagreements).

72. See generally Griffith, *supra* note 62.

73. The efficacy of M&A technologies is pragmatically limited when the target is a publicly traded company. Public M&A partly addresses the impracticability of these information-asymmetry and adverse-selection-reducing technologies through voluminous information production—including audited financial reports—via mandatory SEC filings. Such information is primarily for the benefit of buyers and sellers of the target's securities, but it also aids acquirers by putting some of the most critical information for quality assessment into the public domain. Not only do these filings reduce acquirers' transaction costs (e.g., advisory fees), but they are also credible because they are subject to verification regimes (e.g., auditing) and liability for material errors. See 17 C.F.R. § 210.2-02 (2022) (setting forth requirements for audit reports); 17 C.F.R. § 240.10b-5 (2022) (prohibiting material misstatements in securities disclosures).

74. See Choi, *supra* note 28, at 409; Igor Kirman, Ian Boczek & Nicholas C.E. Walter, *The Next Frontier for Representations and Warranties Insurance: Public M&A Deals?*, HARV. L. SCH. F. ON CORP. GOV. (Oct. 24, 2020), <https://corpgov.law.harvard.edu/2020/10/24/the-next-frontier-for-representations-and-warranties-insurance-public-ma-deals> [<https://perma.cc/3UG2-7XK2>] (“[I]n public company deals, where target companies are usually owned by many shareholders who trade in and out of the shares in the public markets, there traditionally has been no post-closing indemnity, in part because of the view that there would be no one left to pay it.”).

B. Three Markets for Corporate Criminals

Just who is a “corporate criminal”? Given the severe consequences for a corporation that loses a criminal trial,⁷⁵ and given that organizational defendants lack a privilege against self-incrimination,⁷⁶ a firm will settle criminal liability if either the government has sufficient evidence to obtain a conviction or if its investigation would be reasonably likely to turn up such evidence. That is, an economically meaningful status of being a corporate criminal does not require that a firm be factually guilty or that it have been adjudicated so.⁷⁷ Rather, the status turns on whether its employees or agents have done or omitted some act for which the firm could be held criminally responsible. Because a firm being held criminally liable is in part a function of the probability of the offense being detected by the government (either through self-reporting or other informational channels), the point at which M&A actors might care about criminal status could be quite remote from an adjudicated status. Indeed, if all goes well for a company exposed to criminal liability, it will be able to settle without being adjudicated at all.⁷⁸ As a result, a prospective buyer could have highly incomplete information yet still reach an economically, if not legally, meaningful determination that the target is a corporate criminal. In other cases, that status will be quite clear, and the buyer need not wonder about potential successor liability based on incomplete information. An example is when a target has already acknowledged damning facts in a settlement with the government.⁷⁹ But, of course, not all criminality is the same. Bribes paid by an immaterial foreign subsidiary, for example, might pose less risk than domestic offenses that resulted in the loss of life or other serious local harms.⁸⁰ How M&A players manage this liability could vary based on misconduct type and its scope.

As Section I.A explains, M&A practitioners have transacting technologies for reducing informational asymmetries—and de-risking those that cannot be

75. Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Consequences of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87, 127 (Jennifer Arlen ed., 2017) (noting that corporate offenders accept settlements rather than face conviction’s consequences).

76. *Braswell v. United States*, 487 U.S. 99, 102 (1988) (“We have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.”).

77. Cf. Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 990-94 (2018) (observing that arrest or criminal allegations are often erroneously conflated with factual or legal guilt).

78. David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1326-29 (2013) (discussing settlement practices and identifying concerns).

79. See, e.g., *Deferred Prosecution Agreement, United States v. Chipotle Mexican Grill*, No. 20-CR-00188, at 8 (C.D. Cal. Apr. 21, 2020), <https://www.courthousenews.com/wp-content/uploads/2020/04/Chipotle-DPA.pdf> [<https://perma.cc/LT8S-SPFP>] (“[Chipotle] and the Government . . . agree that the Statement of Facts is sufficient to support misdemeanor convictions for the charges described in this agreement.”).

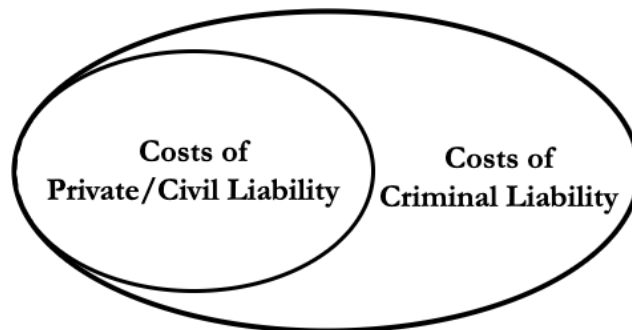
80. Cf. Roy Shapira, *A Reputational Theory of Corporate Law*, 26 STAN. L. & POL’Y REV. 1, 23 (2015) (“[R]eputational impact varies greatly depending on the type of sin for which the defendants are scolded.”).

closed—such that a market for used businesses exists.⁸¹ In the case of corporate crime, however, these technologies are less likely to be effective.⁸² That is for a few reasons.

As a threshold matter, criminal liability is hard to detect given strong incentives those with knowledge of offenses have to conceal it.⁸³ Similar incentives are weaker or missing in the case of private claims. Incentives even run toward disclosure for employees who want their private liabilities to be indemnified. The quality of used businesses, of course, must be understood across multiple dimensions. But one aspect of quality—compliance with law—might prove infeasible for buyers to accurately appraise before closing. Even target management, given the potential for internal concealment, might struggle to obtain all information that is material to compliance quality.

More, criminal liability threatens unpredictable—but significant—economic, stigmatic, opportunity, and other collateral costs beyond those involving private wrongs. The following diagram offers a conceptual relationship between the consequences of private and criminal wrongs.

Figure 1. Comparative Costs of Civil and Criminal Liability



To start the comparison, private liabilities—even contingent or unknown ones—tend to be reasonably estimable or can be managed through risk-management technologies like accounting reserves, insurance coverage,

81. See *supra* notes 68-71 and accompanying text.

82. There are tailored steps that potential acquirers can take to diligence criminal exposure. For example, in the case of Foreign Corrupt Practices Act (FCPA) liability, a potential buyer can examine the “robustness of the target’s existing compliance programs,” whether it “operates in high-risk countries,” how much it relies on “government business and how its employees interact with government authorities,” the “nature and extent” of its government contracts, and the roles of any outside agents or finders. See Sergio J. Galvis, *M&A and Dealmaking Implications of the FCPA Resource Guide, Second Edition*, SULLIVAN & CROMWELL LLP (Feb. 17, 2021), <https://www.sullcrom.com/files/upload/FCPA-Resource-Guide-Best-Practices.pdf> [<https://perma.cc/JH3R-5MMD>]. Although these steps might not directly identify FCPA violations, they allow the acquirer to update its risk assessment for whether it is acquiring criminal liability. Red flags in the diligence process might prompt a prospective buyer to walk away from a deal—so as to avoid the risk of acquiring FCPA liability—or to demand concessions from the seller to accept that risk.

83. See generally *infra* Section I.B.

litigation management, or bankruptcy. Typical private liabilities involve economic costs—such as settlement payments (or trial awards) and litigation expenses—and the opportunity costs of management distraction.⁸⁴ These economic costs might include punitive damages or pre-judgment interest. Under particularly salient facts (e.g., widespread sexual harassment or safety violations), there might be material reputational costs in the labor and product markets offending firms compete in.⁸⁵ The costs of criminal liabilities, however, should be understood as qualitatively different and theoretically more dire.⁸⁶ Although a business entity cannot be imprisoned, it can be forced to pay substantial and punitive sums that outstrip what would be paid as compensation for analogous private claims.⁸⁷ Such penalties serve to disgorge ill-gotten gains and compensate victims of corporate wrongdoing. They are also meant to punish the corporate criminal, to deter other firms from engaging in similar conduct, and to chasten the offender from recidivating.⁸⁸ Sentencing guidelines offer some baseline for what those penalties will be.⁸⁹ But because corporate-criminal practice is driven by negotiated settlements over which prosecutors exercise considerable discretion, there can be little certainty early in a case what the

84. Cf. *Joy v. North*, 692 F.2d 880, 892 (2d Cir. 1982) (noting the “impact of distraction of key personnel by continued litigation” as a cost of derivative litigation).

85. See Kishanthe Parella, *Reputational Regulation*, 67 DUKE L.J. 907 (2018) (classifying corporate reputational sanctions as financial, policy, regulatory spillover, or barriers to entry); David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. UNIV. L. REV. 165 (2019) (analyzing non-disclosure agreements in the context of sexual harassment and misconduct).

86. See Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1882 (2020) (theorizing that whether there will be reputational costs for corporate wrongdoing and at what level is a stochastic function, which “introduces an element of randomness from the facility’s perspective, limiting its ability to control the exact [reputational] penalty given its level of noncompliance”).

87. Criminal enforcement would still, of course, have victim restitution as one of its ends. See Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1429 (2009) (“The application of the criminal law to corporate wrongdoing thus accomplishes one goal that a civil enforcement proceeding might not be able to by ensuring that an order of restitution will be imposed on the organization.”). More, to the extent that criminal conduct also gives rise to private claims, the publicity of public enforcement can signal to entrepreneurial plaintiffs’ attorneys that there is a meritorious claim to pursue, thus compounding the litigation costs associated with the same conduct. See Amy Hutton, Susan Shu & Zin Zheng, *Regulatory Transparency and the Alignment of Private and Public Enforcement: Evidence from the Public Disclosure of SEC Comment Letters*, 145 J. FIN. ECON. 297, 322 (2022) (suggesting that regulatory transparency leads to complementary enforcement actions by public and private actors); Alexander I. Platt, “Gatekeeping” in the Dark: SEC Control Over Private Securities Litigation Revisited, 72 ADMIN. L. REV. 27, 48, 56-59 (2020) (criticizing private securities plaintiffs for “piggybacking” on facts uncovered by the SEC’s Divisions of Enforcement and Corporation Finance).

88. See U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-28.200(B) (2022) (instructing prosecutors to “ensure that the general purposes of the criminal law—appropriate punishment for the defendant, deterrence of further criminal conduct by the defendant, deterrence of criminal conduct by others, protection of the public from dangerous and fraudulent conduct, rehabilitation, and restitution for victims—are adequately met, taking into account the special nature of the corporate ‘person’”).

89. See generally U.S. SENT’G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT’G COMM’N 2018) (providing methodologies for calculating criminal sentences of organizations, including business entities).

penalty will be.⁹⁰ Whatever the eventual settlement cost, the defendant could spend many millions in legal and related fees, consume hundreds of hours of executive attention, and bear other opportunity costs in connection with an investigation and negotiations with the government.⁹¹ More, whatever social or market stigma the underlying misconduct might create, that such conduct is labeled with terms signifying deviance—“crime,” “felony,” “fraud,” “manslaughter,” “bribe,” “steal,” and so on—exacerbates the stigma.⁹²

Imagine a buyer’s CEO who learns of newly discovered acquired liability after closing. That will be bad news in any case, but which of these scenarios would she be more distressed about: that private plaintiffs have filed suit or that a criminal investigation (again, including serious regulatory violations as quasi-crimes) has been opened? The latter, most likely. Why would the CEO be expected to be more alarmed at the latter and less at the former? As discussed above, part of the heightened concern over a criminal investigation might stem from the stigmatic and reputational costs of criminal versus civil litigation. More significant, though, is that compared to private liability, criminal adjudication could cause painful—even potentially ruinous—collateral consequences, such as losing the ability to participate in government contracting⁹³ or in markets in which counterparties cannot deal with firms adjudicated guilty of certain offenses,⁹⁴ to losing access to capital markets⁹⁵ or needed licenses,⁹⁶ to having a monitorship imposed.⁹⁷ Economic sanctions can be written off as one-time expenses and stigmatic or reputational costs might fade over time.⁹⁸ But collateral criminal consequences can cause long-lasting operational and commercial effects. Acquirers in some industries—such as those that rely

90. See Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 206-09 (2016) (analyzing the broad discretion corporate prosecutors have and urging reforms to constrain that discretion).

91. One reason corporate offenders settle is that, under insurance contracts or as a matter of public policy, criminal adjudication might prevent coverage or indemnification for these costs. See *infra* notes 110–111 and accompanying text.

92. See Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 613 (2018) (“[F]elony is a concept with two different and contradictory meanings: a legal meaning wholly contingent on the state’s sentencing choices, and a social meaning that suggests inherent wickedness of character or wrongfulness of action.”).

93. See, e.g., Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 745, 128 Stat. 2130, 2391 (2015) (prohibiting firms convicted of felonies from being government contractors).

94. For example, a public company cannot engage an auditor or securities counsel that has been convicted of a crime of moral turpitude. See 17 C.F.R. § 201.102(e)(2) (2022).

95. See, e.g., 17 C.F.R. § 230.506(d) (2022) (prohibiting firms that have engaged in certain forms of fraudulent conduct from using the private-placement safe harbor under Regulation D’s Rule 506 in securities offerings).

96. See, e.g., 42 U.S.C. § 1320a–7 (2018) (excluding from healthcare programs firms that are convicted of healthcare fraud, patient-abuse, or controlled-substance offenses).

97. See generally Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007) (examining corporate monitors’ role and providing recommendations).

98. See John Gallemore, Edward L. Maydew & Jacob R. Thornock, *The Reputational Costs of Tax Avoidance*, 31 CONTEMP. ACCT. RES. 1103 (2014) (finding that corporate reputational consequences for engaging in improper tax strategies are temporary).

heavily on government contracting or licensure—would be particularly susceptible to those collateral consequences.⁹⁹ Indeed, at some firms, they could prove fatal.¹⁰⁰

In private litigation, firms have some control over these economic, stigmatic, and opportunity costs in that they can decide whether and when to settle with plaintiffs. More, the collateral consequences that would attend a criminal adjudication are largely absent in the civil setting. Thus, firms can decide to settle, perhaps early and on confidential terms.¹⁰¹ Prosecutors, however, are concerned not just by an economic righting of corporate wrongs. They must consider broader public-policy and public-interest concerns.¹⁰² Because individual prosecutors do not have direct personal interests in their cases¹⁰³ (unlike private plaintiffs and their attorneys, who have personal stakes in settlements), they will pace resolutions based on how satisfied they are with the development of the facts and how much of their own resources—specifically, time—they are willing to spend on a case. That is, not only are criminal matters more unpredictable than private claims in terms of their economic, stigmatic, and opportunity costs, but they are more unpredictable on when the piper must be paid.

Even after settlement, the defendant will bear economic and opportunity costs in complying with post-settlement undertakings. For example, if a settlement agreement mandates the appointment of a corporate monitor, the monitor’s fees could be substantial, and the monitorship could impose a significant opportunity cost via reduced managerial flexibility.¹⁰⁴ Another cost of criminal M&A is, ironically, that it increases the cost of *future* crime. That is

99. *But see* Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797 (2013) (collecting literature and finding that through 2010 no company experienced a “corporate death penalty” due to criminal prosecution).

100. *Id.*

101. Confidentiality of private settlements allows the defendant to avoid public stigma. *See generally* Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) (analyzing the stages of litigation at which confidential settlements arise). In contrast, prosecutors publicize their enforcement actions. *See* Verity Winship, *Enforcement Networks*, 37 YALE J. ON REGUL. 274, 327 (2020) (presenting an empirical study “enabled by the SEC’s longstanding practice of publicizing enforcement activity”).

102. *See* U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-28.010 (2022) (identifying economic and market integrity, consumer and competitive protection, environmental protection, and preventing unlawful business practices as among the public interests that corporate prosecutors must consider).

103. They have indirect interests, though. *See* Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 840–47 (2018) (noting that prosecutors seek to obtain support or meet the demands of the public, Congress, and industry); *id.* at 838–40 (noting that prosecutors’ decisions can be motivated by careerist considerations); Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 627, 670 (2007) (“The [SEC] is a collection of people, some interested in any or all of the following: justice; victory; reputation; and political gain.”).

104. *See infra* note 171 (reporting that a single monitorship led to \$52 million in fees paid by a pharmaceutical company); *see also* Veronica Root, *The Monitor-“Client” Relationship*, 100 VA. L. REV. 523, 584 (2014) (“Corporations will also remain concerned that a monitor, who is given largely unrestricted access to the corporation’s records and personnel, may stumble upon, or go looking for, additional improper conduct that could result in increased liability for the corporation.”).

because enforcement agencies might give first-time offenders a relatively favorable resolution, up to declining to bring an action at all.¹⁰⁵ If an acquirer must use a one-time leniency to settle successor liability, it might not get that benefit again if it stumbles in the future. Just as criminal successor liability is an especially daunting risk, a lack of organizational criminal history is an especially valuable asset because having no or little criminal history means comparatively lower penalties. Because liability is vicarious and because management cannot totally control what employees do, even a firm that earnestly seeks to comply with the law could find itself responsible for unlawful employee acts.¹⁰⁶ In that case, if it had already acquired a corporate criminal, it would be a repeat offender in a legal sense despite being a first-time offender in a literal one.¹⁰⁷

But can a savvy buyer contract around these risks, as it could with private liabilities? That is a doubtful prospect because criminal M&A is not fully indemnifiable. In criminal M&A, the risk-allocation technologies that allow a buyer to manage acquired private liability will be less effective. For instance, a selling shareholder could indemnify the buyer for financial penalties—on a dollar-for-dollar basis—it bears due to acquired criminal liability,¹⁰⁸ whereas non-financial sanctions cannot be neatly compensated with cash. Two cousins of indemnification—escrows and representations-and-warranties (R&W) insurance—would be similarly limited in efficacy. The amounts needed to cover the investigative and settlement costs of a criminal case could be underestimated and thus escrows could fall short.¹⁰⁹ R&W insurance, as a matter of both public

105. See, e.g., U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-47.120 (2019) (providing that “[w]hen a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated,” that “there will be a presumption that the company will receive a declination absent aggravating circumstances,” which include “criminal recidivism”); see also, e.g., Bankrate NPA, *supra* note 8, at 2 (noting as one reason for non-prosecution the fact that Bankrate, the criminal target, and Red Ventures, the acquirer, had no criminal history); Order Granting Motion for Approval of Non-Prosecution Agreement at 2, *In re* Miami Metals I, Inc. No. 18-13359 (Bankr. S.D.N.Y. Apr. 16, 2019), <https://www.gibsondunn.com/wp-content/uploads/2019/07/Republic-Metals-NPA.pdf> [<https://perma.cc/6Q8T-DXFG>] (noting that “although the nature of the conduct described in the Statement of Facts is serious and worthy of investigation, [Republic Metals] has no prior criminal history”).

106. See U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.500 (2008) (“[I]t may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee.”).

107. Prosecutors might, however, draw qualitative distinctions between offenses when considering whether to give first-offender leniency. See *id.* at § 9-28.600 (“Prosecutors may consider a corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it . . . [E]nforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates may be considered, if germane.”). See also, e.g., U.S. Dep’t of Just. Crim. Div., Letter to Karen P. Hewitt, Partner, Jones Day, at 3 (June 20, 2019), <https://www.justice.gov/criminal-fraud/page/file/1177596/download> [<https://perma.cc/AGK8-XTFS>] (noting that “[Walmart] ha[d] no prior criminal history *related to corruption*”) (emphasis added).

108. See *infra* notes 152-154 and accompanying text for one such example.

109. Professionals working in the R&W industry as brokers or product-line executives at carriers noted that R&W policies exclude criminal or regulatory fines and penalties. See Interview with R&W Broker #1 (May 27, 2022) (on file with author) (noting that buyers might deal with the risk of regulatory offenses by hiring counsel to assess potential exposure and negotiating either an escrow or compensating adjustment to the purchase price).

policy¹¹⁰ and policy exclusions,¹¹¹ would be unlikely to cover criminal or quasi-criminal violations. Even if escrows or insurance were available, like indemnification, they could compensate buyers for only their out-of-pocket costs and not corporate crime's other consequences. Even if these financial protections were available, prosecutors might prevent defendants from using them by imposing settlement terms that prohibit indemnification or insurance.¹¹²

All in, the scale and uncertainty of criminal sanctions could place the economic justification for an M&A transaction in doubt by reducing its expected return to a level below what the acquirer would have been willing to accept *ex ante*. High-enough costs could even result in a deal having a negative return. The next Sections consider this possibility as it arises in three submarkets, those for known corporate criminals, unknown corporate criminals, and corporate probationers. These markets are temporally driven, as shown by the following figure. Because firms are capable of committing more than one offense, a given firm could be in one, two, or three of these markets concurrently.¹¹³

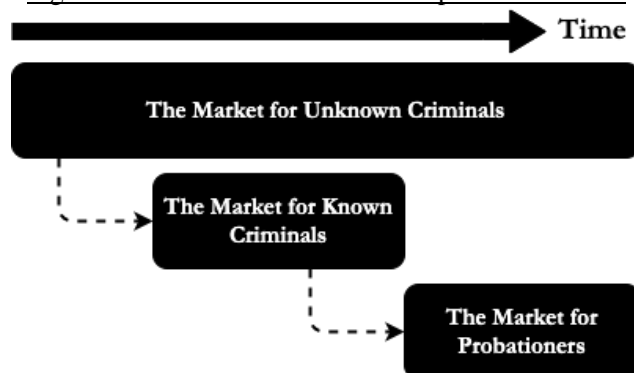
110. STEVEN PLITT, DANIEL MALDONADO, JOSHUA D. ROGERS & JORDAN R. PLITT, *COUCH ON INSURANCE* § 101:22 (3d ed. 2021) (“In general, it is against public policy for an insurance contract to provide coverage for the intentional or willful misconduct of an insured.”). *But see id.* § 101:24 (noting exceptions to the rule).

111. *See* Interviews with R&W Broker #1 (May 27, 2022) *supra* note 109; R&W Product-Line Executive #1 (May 24, 2022) (on file with author); R&W Product-Line Executive #2 (June 1, 2022) (on file with author). Policies also exclude coverage for acts known before closing, which would exclude the known-criminal market from coverage. *Id.* One interviewee noted, however, that policies might have exceptions to the crime/regulatory exclusions if local law permits coverage.

112. *See, e.g.*, Deferred Prosecution Agreement at 10, *United States v. Avanir Pharmaceuticals*, No. 19-CR-00369 (N.D. Ga. Sept. 25, 2019), <https://www.gibsondunn.com/wp-content/uploads/2020/01/Avanir-Pharmaceuticals-DPA.pdf> [<https://perma.cc/BK34-F8X6>] (“The Company agrees that it has no right to and shall not seek or accept from any source reimbursement or insurance coverage for any federal healthcare program claims underlying the penalty and forfeiture amounts that the Company pays pursuant to this Agreement.”). *But see* Bankrate NPA, *supra* note 8 (permitting Bankrate to indemnify an acquirer for pre-closing misconduct so long as indemnification would not undermine the purposes of the NPA).

113. Criminal liability can be viewed in binary terms: does the firm bear liability or not? But given the breadth of vicarious liability and the numerosity of potential criminal offenses, it is likely that in an organization of some size, it is liable for *some* offense. Criminal liability is therefore more meaningfully viewed in terms of discrete offenses or offenses that have common operative facts. Assume a firm has committed two offenses, *X* and *Y*. The market for unknown criminals implies that the firm might be liable for *X*, *Y*, and any number of additional offenses. Whether the firm is liable for *X* or *Y* is unknown to buyers. Now, assume that it is discovered that the firm is liable for *X*; it is now within a known-criminal market with respect to *X*. But buyers still do not know that the firm is liable for *Y*; the firm remains within the unknown-criminal market with respect to *Y*. In other words, these submarkets are concurrent. Each demands distinct risk/reward calculations by prospective buyers.

Figure 2. Three Sub-markets for Corporate Criminals



1. The Market for Unknown Corporate Criminals

M&A is constantly a market for unknown corporate criminals. That is, at the time a deal is signed, the acquirer cannot be certain whether the target firm has unknown or undisclosed criminal liability that will reveal itself in the future.¹¹⁴ Post-closing discoveries of acquired criminal liability involve several forms of substantial and unexpected costs, including investigative costs, restitution and disgorgement, penalties, executive distraction, and the operational costs associated with remediation efforts.¹¹⁵ Acquiring an unknown corporate criminal is dangerous because doing so could not only ruin anticipated returns, but, in some circumstances, it could turn an acquisition into a loss in absolute terms. As a consequence of this danger, buyers would be expected to discount their willingness to pay.¹¹⁶ These discounts could lead to buyers underbidding in the cases of firms that do not turn out to have unknown criminal liability or for whom applicable statutes of limitations have passed before misconduct comes to light. If, at the margin, this uncertainty drives a gap between buyers' willingness to pay and targets' willingness to accept, then fewer acquisitions will occur, and the social benefit of comparatively higher M&A volume will be lost. That is, all

114. Philip Urofsky, *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), https://www.shearman.com/~media/files/newsinsights/publications/2009/03/what-you-dont-know-can-hurt-you-successor-liabil_/files/view-full-text/fileattachment/lt030209whatyoudontknowcanhurtyouliabilityinadeq_.pdf [<https://perma.cc/9P4W-CGHU>] (“As a legal matter, when one corporation acquires another, it assumes any existing liabilities of that corporation, including liability for unlawful payments, regardless of whether it knows of them.”).

115. For a review of the effects of CEO overconfidence and other cognitive biases on M&A activity, see generally Tom Aabo, Mikkel Als, Lars Thomsen & Jesper N. Wulff, *Watch Me Go Big: CEO Narcissism and Corporate Acquisitions*, 13 REV. BEHAV. FIN. 465 (2021); Eric de Bodt, Jean-Gabriel Cousin & Richard Roll, *Empirical Evidence of Overbidding in M&A Contests*, 53 J. FIN. & QUANT. ANALYSIS 1547 (2018); and Nihat Aktas, Eric de Bodt & Richard Roll, *Hubris, Learning, and M&A Decisions*, UCLA ANDERSON SCH. MGMT. (May 11, 2005), <https://escholarship.org/uc/item/7j94111c> [<https://perma.cc/GGU7-F82K>].

116. Interview with R&W Broker #1, *supra* note 109 (explaining that buyers might insist on price discounts in the case of targets with indicia of criminal risk, such as operating in high-risk jurisdictions or having inadequate compliance policies and controls).

equal, the risks of the unknown-offender market could cause there to be a suboptimal level of M&A activity.¹¹⁷

Critically, corporate criminal liability is hard to detect.¹¹⁸ Unlike tort or contract claims, many corporate crimes—such as violations of anti-bribery or anti-money-laundering statutes—do not involve private victims who have incentive to demand compensation.¹¹⁹ In contrast, when private claimants seek compensation, they put management on notice of law violations. Meanwhile, in addition to vicarious liability for firms, employees are directly liable for their actionable conduct.¹²⁰ For example, a truck driver who tortiously injures another while driving for her employer is personally liable, as is her employer.¹²¹ As a practical matter, torts caused by individual employees are likely to be indemnified through insurance coverage or the corporate treasury.¹²² Private litigants are also unlikely to vigorously pursue shallow-pocketed individual defendants when there are deep-pocketed corporate defendants available.¹²³ Exposed employees thus have a good chance of avoiding personal consequences for their torts and would be expected to cooperate with their employers toward that goal.

Claimants seeking compensation and employees seeking indemnification channel information about potential liability to management. In contrast, management is unlikely to learn much from individual employees whose conduct causes vicarious criminal liability. Those employees seek to conceal their misdeeds¹²⁴ because their employer cannot indemnify criminal conduct.¹²⁵ Nor can it go to prison for them. And in contrast with private plaintiffs' incentive to

117. Criminal successor liability is something prospective acquirers think about. It would be expected that these concerns lead to some deals not happening or other deals happening in suboptimal ways. Whether criminal successor liability actually does lead to suboptimal M&A levels, however, admittedly raises a host of empirical questions not answered here.

118. See Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 527 (2004) (“Corporate crime occurs overwhelmingly in private, with evidence hidden in private settings, which makes it exceedingly costly to detect.”).

119. See Polinsky & Shavell, *supra* note 36, at 46.

120. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 13 (2000) (examining liability between tortfeasors and vicariously liable employers).

121. See RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (“An employer is subject to liability for torts committed by employees while acting within the scope of their employment.”).

122. *Id.* at cmt. b (“Respondeat superior also reflects the likelihood that an employer will be more likely to satisfy a judgment. Moreover, an employer may insure against liability encompassing the consequences of all employees’ actions, whereas individual employees lack the incentive and ability to insure beyond any individual’s liability or assets.”).

123. Cf. Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the Deep-Pocket Hypothesis*, 30 LAW & SOC’Y REV. 121, 143 (1996) (“Even if there is no deep-pocket effect in injury verdicts, it is still possible that deep-pocket biases exist at other points in the tort process; for example, in decisions by claimants to file a lawsuit or in decisions by plaintiffs’ attorneys about which cases to pursue and which to reject.”).

124. See Cindy R. Alexander & Mark Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1 (1999) (outlining an agency-cost model of employee criminal conduct).

125. *But see* DEL. CODE ANN. tit. 8, § 145(a) (2022) (permitting a corporation to indemnify a director, officer, employee, or agent “with respect to any criminal action or proceeding” if that person “had no reasonable cause to believe [his or her] conduct was unlawful”).

obtain compensation and thus to focus on deep-pocketed defendants, prosecutors are most interested in holding individual offenders accountable.¹²⁶ Indeed, they offer compelling incentives to firms that assist the prosecution of culpable individuals, such as conditioning cooperation credit for firm-level settlements on whether firms did enough to identify individual wrongdoers within their ranks.¹²⁷

In other words, there is greater divergence between principal-agent incentives in the criminal-liability context than in the private-liability context. Those who commit offenses in the corporate setting know that not only will they be forced to bear the consequences personally if they are found out but also that the company will actively assist in their prosecution. They will thus take pains to conceal their wrongdoing such that management will not know about it.¹²⁸ Even non-culpable employees who know about wrongdoing will stay silent for fear of retaliation.¹²⁹ Indeed, this point is borne out by the government's difficulty in detecting wrongdoing in the corporate context and the boom in agencies establishing programs to incent insiders to blow the whistle.¹³⁰

When individual offenders are successful in concealing corporate criminal liability, that information will be missed in diligence. As a result, buyers must accept the possibility of acquiring firms with unknown criminal liabilities. It is also true that M&A involves the risk of acquiring unknown private liabilities, but a few considerations help mitigate that danger. Tort and contract liabilities will tend to have bounded relationships with their underlying economics.¹³¹ Breaching a nominal \$1 million contract usually will not produce more than a million dollars in damages; injuries from unlawful discharge can be settled for

126. See U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.010 (2015) (directing that “prosecutors should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct”); Memorandum from Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Just., Individual Accountability for Corporate Wrongdoing 1 (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> [<https://perma.cc/W8E6-EHE3>] (“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”).

127. See Merrick G. Garland, Att’y Gen., U.S. Dep’t of Justice, Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-g-garland-delivers-remarks-aba-institute-white-collar-crime> [<https://perma.cc/WC7G-3G4S>] (“[T]o be eligible for any cooperation credit, companies must provide the Justice Department with all non-privileged information about individuals involved in or responsible for the misconduct at issue. This means all individuals, regardless of their position, status, or seniority, and regardless of whether a company deems their involvement as ‘substantial.’”).

128. See Miriam H. Baer, *Organizational Liability and the Tension between Corporate and Criminal Law*, 19 J.L. & POL’Y 1, 5 (2010) (observing that employers might seek to excuse their own liability by blaming a “rogue” employee who might go “to great lengths” to conceal her actions).

129. See *The State of Ethics & Compliance in the Workplace: A Look at Global Trends*, ETHICS & COMPLIANCE INITIATIVE 22 (Mar. 2021), <https://www.ethics.org/wp-content/uploads/2021-ECI-GBES-State-Ethics-Compliance-in-Workplace.pdf> [<https://perma.cc/8D9V-JA4Q>] (“Since [2007], retaliation has been increasing, with a jump from 22% in 2013 to 44% in 2017. In 2020, the rate of retaliation against employees for reporting wrongdoing in the U.S. was 79% in 2020, an increase of 35 percentage points.”).

130. See generally Alexander I. Platt, *The Whistleblower Industrial Complex*, 40 YALE J. ON REGUL. 688 (2023) (conducting an empirical investigation of the SEC’s bounty program); Andrew K. Jennings, *State Securities Enforcement*, 47 BYU L. REV. 67, 105 n.164 (2021) (quoting an anonymous state securities regulator as saying “[s]o often whistleblowers make or break the entire area”).

131. In other words, civil law “prices” misconduct, whereas criminal law “sanctions” it. See generally Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

lost wages and several years' front pay;¹³² damages for wrongful death can be calculated using actuarial data;¹³³ and so on. But penalties for individual criminal offenses could be multiples of the economic harm caused, or ill-gotten gains obtained, by the offenses.¹³⁴ Unlike private litigation, enforcement actions could lead not only to financial disgorgement and penalties¹³⁵ but also costly remediation and compliance mandates¹³⁶ or even ruinous collateral bars.¹³⁷ Imagine, for example, an acquirer that pays \$500 million for a firm in a transaction that it believes has a \$600 million net-present value. These amounts incorporate all the acquirer knows about the company through diligence plus the value of any protective provisions like R&W insurance, indemnification, or escrows. If, after closing, newly discovered criminal liability from the acquired business causes the buyer to pay \$100 million or more in penalties (due, say, to a violation of the Foreign Corrupt Practices Act (FCPA)),¹³⁸ the acquirer's expectations will be upset. Adding the various costs associated with responding to the acquired liability, the acquisition might even prove to be a *loss* for the buyer.

M&A is an often-heady process,¹³⁹ but the savvy buyer will be aware of the risk of acquiring an unknown corporate criminal. A buyer will recognize that target management might not know what unlawful conduct its employees have engaged in.¹⁴⁰ No doubt, this sort of incomplete information and its risks have not rendered the M&A market an impossibility. Yet, they are on acquirers' minds. The risk of acquiring an unknown corporate offender would thus be expected to drive some level of explicit or implicit discounting.¹⁴¹ Conversely, if buyers could be sure that they would not bear successor criminal liability for acquired businesses, or if they had some predictability as to what the costs would be, they would presumably be willing to pay more.

That calculation will vary under different circumstances. After all, in some industries, the risk of hidden criminal liability is not always so great. It is less likely, for example, that the acquisition of a domestic hotel chain will turn up material crimes. Other riskier industries, like healthcare, might enjoy implicit

132. See *Horsford v. Bd. of Trs. of Cal. State Univ.*, 33 Cal. Rptr. 3d 644, 666 (Ct. App. 2005) (articulating unlawful-discharge damages calculations under California law).

133. See SONJA LARSEN, 66 CAL. JUR. 3D WRONGFUL DEATH § 80 (2022) (“[E]xpert testimony of an actuary may be admissible in evidence, in a wrongful death action, as are mortality or life expectancy tables.”).

134. See *supra* note 38; see also, e.g., 15 U.S.C. § 1 (2018) (imposing up to \$100 million in penalties per violation for corporate violations of Section 1 of the Sherman Act).

135. See, e.g., Bankrate NPA, *supra* note 8, at 5.

136. See, e.g., *id.*, at 3-7 and Attachment C – Corporate Compliance Program.

137. See *supra* notes 93-97 and accompanying text.

138. *But see* notes 239 and accompanying text (providing that nonculpable purchasers will generally not be charged with predecessors' violations of the FCPA).

139. See Richard H. Thaler, *Anomalies: The Winner's Curse*, 2 J. ECON. PERSP. 191, 193-201 (1988); Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 601-05, 624 (1989).

140. See *supra* notes 124-130 and accompanying text.

141. See Ghosal & Sokol, *supra* note 44, at 1 (observing that the market for lemons problem in the M&A context can “result[] in low transaction prices and dampening of M&A activity”).

prosecutorial forbearance.¹⁴² Enforcers will not be so aggressive, for instance, as to cause the closure of medical facilities that patients rely on.¹⁴³ Still other factors might augment a buyer's perceived risk of entering the market. For example, is the target in an industry or business that often faces enforcement, such as a firm with a significant overseas presence?¹⁴⁴ Do the comparative sizes of the target and buyer, or the buyer's access to capital, affect the buyer's ability to absorb an unknown offender? The effects of the unknown-offender market are thus unlikely to be uniform across all potential targets and buyers. The dangers of the unknown-offender market could, however, be a broad source of deal-making inefficiency given the inherent uncertainty around criminal M&A. Those effects would, however, be even more pronounced in industries with high risk and little prosecutorial forbearance (e.g., those operating overseas or in vice industries).¹⁴⁵

2. The Market for Known Corporate Criminals

The last Section theorized M&A as a market for unknown corporate criminals: internal wrongdoers hide their misconduct due to their non-indemnifiable personal exposure, making diligence into criminal liabilities harder relative to private liabilities. M&A can also be a market for *known* corporate criminals. Due diligence could turn up criminal wrongdoing. After the deal is announced, non-culpable employees might anticipate the displacement of current management and be emboldened to reveal what they know about hidden wrongdoing. Perhaps the wrongdoing is already known to the company. Or, perhaps—as in the Bankrate case—the wrongdoing is already in the public domain and the acquisition happens when the enforcement process is well underway.

This market for known corporate criminals presents two principal problems. First, the risk of successor criminal liability might render a potential target firm wholly unattractive to potential buyers.¹⁴⁶ This result would represent a social cost if an acquisition that would have occurred but for the target's criminal liability would have produced net social benefit. One such potential benefit would be for an acquirer to reform compliance weaknesses in the target. If a firm is not acquired due to its criminal exposure, it will remain under the control of incumbent management. That management might bear some responsibility for employee wrongdoing, such as failures in creating an

142. See *supra* notes 36-39 and accompanying text.

143. *Id.*

144. See *infra* notes 235-239 and accompanying text for a discussion of unique aspects of FCPA enforcement.

145. See *supra* note 116.

146. One advantage firms in this market have over those in the unknown-criminal market is that there is less uncertainty for buyers whether liability lurks beneath the surface. If the target firm has completed or is working on an internal investigation, the information produced by it could be valuable to prospective buyers when they diligence compliance quality. Section I.B.3, which examines corporate probationers, develops this possibility and explains its ability to reduce information asymmetries.

appropriate culture.¹⁴⁷ Left as a going concern, such a known corporate offender could turn corporate recidivist.

Whether that first problem arises will be based on a balance between the magnitude of the criminal-successor risk, on one hand, and the attractiveness of the target (excluding the criminal-successor risk), on the other. This observation points to the submarket's second potential problem. Targets liable for comparatively minor violations might continue to be viable acquisition targets. Even those exposed to more substantial liability could, if the value of the acquisition to a buyer is great enough, still be acquired. Although it is conceivable that under these conditions a high-compliance firm will be the acquirer, it is more likely that in this market, the *buy side* will exacerbate the criminal-M&A problem. As high-quality acquirers at the margin exit the market for known offenders, if acquirers remain, they will tend to be the low-quality ones.¹⁴⁸ In this context, low-quality acquirers are those that are less inclined toward compliance themselves. In other words, the acquirer *itself* might be a corporate criminal, which suggests that it has a higher risk tolerance around criminal liability. As a consequence, all equal, low-quality firms would be expected to acquire other low-quality firms, and vice versa for high-quality firms.¹⁴⁹

One cause for higher criminal-risk tolerance would be that the low-quality buyer intends to continue practices that risk the commission of future offenses, and so it is less reluctant than a high-quality buyer to acquire marginal criminal liability.¹⁵⁰ In for a pound, in for a penny. Another cause for higher risk tolerance is that the low-quality buyer could enjoy what finance scholars Heather Tookes and Emmanuel Yimfor identify as “misconduct synergies.”¹⁵¹ These synergies arise in the context of a buyer's organic and acquired offenses and would serve to lower its acquisition costs, allowing it to bid comparatively more for a target than high-quality buyers. Part II provides a fuller view of the prosecutor's dilemma that coincides with the criminal-M&A problem. But, in brief,

147. See PRINCIPLES OF THE LAW, COMPLIANCE AND ENFORCEMENT FOR ORGANIZATIONS § 4.06 (AM. L. INST., Tentative Draft No. 2, 2021) (outlining appropriate risk culture within organizations).

148. Even more troubling, it can be difficult for outsiders to tell the difference *ex ante* between high- and low-compliance buyers. See JONATHAN R. MACEY, *THE DEATH OF CORPORATE REPUTATION: HOW INTEGRITY HAS BEEN DESTROYED ON WALL STREET 20* (2013) (making this point regarding financial firms); *cf.* Choi, *supra* note 28, at 411 (“Because the seller, who is privately informed of future liability, is unwilling to voluntarily disclose that information to the buyer, conditional on an offer, only those sellers with worse (or more severe) liabilities will accept.”).

149. For empirical evidence of this effect in the context of the financial services industry, see Heather Tookes & Emmanuel Yimfor, *Misconduct Synergies* (Oct. 13, 2021), https://papers.ssrn.com/abstract_id=3942188 [<https://perma.cc/Y4K2-6CYH>]. See also Mark Egan, Gregor Matvos & Amit Seru, *The Market for Financial Adviser Misconduct*, 127 J. POL. ECON. 233, 275 (2019) (finding that brokers with misconduct records shift to lower-tier firms); Matthew Rhodes-Kropf & David T. Robinson, *The Market for Mergers and the Boundaries of the Firm*, 63 J. FIN. 1169, 1170 (2008) (finding that, in the M&A market, “like buys like”).

150. For example, one study of the financial-advisor labor market theorized that some firms within the industry “‘specialize’ in misconduct.” See Egan, Matvos & Seru, *supra* note 149, at 272.

151. See Tookes & Yimfor, *supra* note 149.

misconduct synergies would be driven by how great a sanction prosecutors are willing to impose on a going concern. Consider a prosecutor who is only willing to impose \$X in total penalties, lest she risk the company's viability by imposing a higher, but penologically appropriate, sanction. If the appropriate combined sanction for the buyer's organic and acquired liability exceeds \$X, then any deserved penalty beyond \$X will not be paid. Further, if the prosecutor imposes compliance reforms or a corporate monitor on the buyer and would have done so for either the organic or the acquired liability standing alone, then further economy is achieved because the fixed cost of one such mandate will be less than the costs of two separate mandates. In comparison, if a high-quality buyer had the bidding capacity to match the low-quality buyer, and if that buyer would bear only the liability of its acquired offenses, then it would bear a comparatively higher cost than would a low-quality buyer. That is because it would be unable to combine organic and acquired offenses to achieve misconduct synergies. If the prosecutor were to impose compliance reforms or a corporate monitor, the high-compliance buyer would have to bear those costs solely by virtue of its acquired liability.

The acquisition of Vadian Bank AG (Vadian) by St. Galler Kantonalbank AG (St. Galler) illustrates this dynamic.¹⁵² Both were part of DOJ's Swiss bank program, which offered—in exchange for cooperation, financial penalties, and remedial undertakings—NPAs to Swiss banks that assisted Americans in evading taxes. In its settlement with DOJ, Vadian paid \$4.3 million in penalties—which its selling shareholder indemnified—and undertook remediation and cooperation obligations.¹⁵³ Vadian's acquirer, St. Galler, had its own history of helping Americans avoid taxes and entered into a separate NPA, agreeing to pay \$9.5 million in penalties and undertaking the same remediation and cooperation obligations as its Vadian subsidiary.¹⁵⁴ These facts point to Vadian being a known offender during the M&A process, meaning that St. Galler could acquire it more cheaply than could a bank that lacked similar exposure. That is because the financial cost (i.e., Vadian's penalty) was allocated to the selling shareholder, whereas the non-financial costs of Vadian's misconduct (e.g., opportunity costs from future obligations or stigma) were fixed costs that St. Galler would have borne on its own even absent the acquisition. In comparison, a bank not facing its own liability would have gotten similar indemnification from the selling shareholder. It would have to bear de novo,

152. See Karen Freifeld, *Second Swiss Bank Reaches Deal Under U.S. Tax Program*, REUTERS (May 8, 2015), <https://www.reuters.com/article/us-banks-swiss-vadian/second-swiss-bank-reaches-deal-under-u-s-tax-program-idUSKBN0NT24520150508> [<https://perma.cc/TR63-E95D>].

153. U.S. Dep't of Just. Tax Div., Letter to Timothy J. Coleman, Partner, Freshfields Bruckhaus Deringer US LLP 2-5 & Ex. A. at 1 (May 5, 2015), <https://www.justice.gov/file/432996/download> [<https://perma.cc/AW5V-3RJG>] (“Vadian’s participation in the program is independent of St. Galler Kantonalbank’s participation. While technically Vadian will pay the penalty due under the program, the proceeds will be supplied by Vadian’s prior owner, which has agreed to indemnify St. Galler Kantonalbank for the penalty payable by Vadian under its non-prosecution agreement.”).

154. U.S. Dep't of Just. Tax Div., Letter to Keith D. Krakaur & Stephen C. Robison, Partners, Skadden, Arps, Slate, Meagher & Flom LLP, at 2–5 & Ex. A. at 1 (Aug. 31, 2015), <https://www.justice.gov/opa/file/772326/download> [<https://perma.cc/98YA-FVGT>].

however, the non-indemnifiable opportunity, stigmatic, and other costs associated with being caught up in the Swiss-bank crackdown. This non-financial liability could have driven high-compliance banks out of the market to buy Vadian, or it could have led them to require steep discounts that would have rendered their offers uncompetitive with those of low-compliance buyers. In either case, it is no surprise that Vadian would be purchased by a bank that had compliance problems similar its own because such a buyer would not add materially to its criminal-M&A costs by purchasing Vadian.

3. The Market for Corporate Probationers

Corporate probationers are firms whose offenses are already known and settled. They remain probationers until their settlements expire.¹⁵⁵ Under typical settlements, probationers bear ongoing reporting, compliance, monitoring, and non-recidivism obligations. As a theoretical enforcement mechanism, they remain subject to prosecution if they fail to satisfy those obligations by their settlement's expiration.¹⁵⁶

Criminal M&A is least vexing in the case of probationers because substantial information is available about their criminal exposure. As a result, there is also greater certainty around risks and costs. In contrast with the two prior markets, the facts of a probationer's offense are well known. Information gathered through internal investigations is available for diligence. Of course, uncertainty remains. After all, even the probationer market is a market for unknown offenders: the discovery of one offense does not preclude others from being hidden still. Yet adequate investigation into known offenses reduces the chances that there remain unknown offenses, at least to the extent that the known and unknown offenses share some underlying cause. Distinct offenses are often adjacent. For example, a firm with a poor compliance culture in its overseas salesforce might find that it made corrupt payments in jurisdictions abroad and that its domestic salesforce engaged in practices that inflated financial metrics.¹⁵⁷ Those offenses would be committed in parallel by different employees unaware

155. Terms are typically for one to five years. *See* Jennings, *supra* note 23, at 1616 & n.196 (finding that across 2,318 DOJ corporate cases involving some form of probation, 28% had terms of five years, 6.9% terms of four years, 27.5% terms of three years, 18.4% terms of two years, and 15.8% terms of one year). This point suggests that there could be a fourth criminal M&A market: former corporate probationers. *See supra* note 27. It would provide similar compliance-quality signaling as the probationer market does, although that signaling power would degrade as time passes from the investigation. Further, an acquisition could increase the cost of future offenses if the target's prior offenses are imputed to the buyer's criminal history.

156. This is an in terrorem enforcement mechanism given that firms will have been made both to admit facts sufficient to secure a trial conviction and to waive defenses like speedy-trial rights and statutes of limitations. *See, e.g.*, Deferred Prosecution Agreement at 1-10, *United States v. Chipotle Mexican Grill*, No. 20-CR-00188 (C.D. Cal. Apr. 21, 2020), <https://www.courthousenews.com/wp-content/uploads/2020/04/Chipotle-DPA.pdf> [<https://perma.cc/LT8S-SPFP>].

157. *See* Interview with R&W Product-Line Executive #2, *supra* note 111 (observing that investigations sometimes reveal issues beyond their initial or anticipated scope).

of their colleagues' actions.¹⁵⁸ Parallel misconduct could occur because employees who engage in misconduct respond to similar corrupting incentive structures and inadequate controls.¹⁵⁹ In that case, if one offense is brought to light, an investigation will likely stumble upon others. Indeed, learning that an investigation is happening might prompt employees to identify previously unknown issues.¹⁶⁰

This process offers no guarantee that offenses do not continue to lurk, revealing themselves only after closing. But all else being equal, a post-investigation firm is less likely to contain undiscovered offenses. This result is an advantage in M&A because a purely diagnostic investigation into potential criminal liability would be prohibitively expensive and untimely for transactional diligence. But when this exercise is compelled by an enforcement process, the resulting reduction in information gaps should make a probationer comparatively desirable to buyers.¹⁶¹ Further, as Part II explains, the economic sanctions previously borne by the probationer might have been reduced by an unearned discount representing a compromise between its just deserts and its ability to pay. Such a discount would be granted based on an unstated assumption that the probationer would remain a standalone concern. Because an acquisition runs counter to that assumption, buyers and selling shareholders would split that ability-to-pay discount as a windfall.

The second reason the probationer market is attractive—at least compared to the known-criminal market—is greater certainty around economic, stigmatic, and collateral costs. Economic costs—such as restitution, disgorgement, penalties, and investigative costs—will have already been paid or can otherwise be accounted for in the purchase price. Any stigmatic effects can be observed and appraised and, to the extent that they are not indelible reputational stains, might already be fading by the time a deal is signed.¹⁶² And it can be known that the worst collateral consequences—which make criminal liability qualitatively

158. For example, the Wells Fargo sales-practices scandal involved parallel misconduct by thousands of retail-level employees scattered throughout the United States. Employees did not knowingly act in concert or in response to direct orders by senior company officials. Instead, sales pressure applied by various levels of bank management prompted employees who were strangers to each other to engage in similar misconduct. See Indep. Dirs. of the Bd. of Wells Fargo & Co., *Sales Practices Investigation Report*, WELLS FARGO & CO. 10 (2017), <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf> [<https://perma.cc/28FQ-FJPD>].

159. See Earl D. Honeycutt, Jr., Myron Glassman, Michael T. Zugelder & Kiran Karande, *Determinants of Ethical Behavior: A Study of Autosalespeople*, 32 J. BUS. ETHICS 69, 73 (2001) (investigating the influence of commission-only compensation on ethical behavior).

160. See Andre' Caldwell & Monique Gougisha Doucette, *The Pandemic Changed How Companies Handle Internal Investigations*, BLOOMBERG LAW (Oct. 25, 2021), <https://news.bloomberglaw.com/daily-labor-report/the-pandemic-changed-how-companies-handle-internal-investigations> [<https://perma.cc/37J2-6FFU>] (“[E]mployers should know that an investigation is not always the final step because investigative results will sometimes determine that a single complaint actually stems from an ongoing, large-scale institutional issue left unaddressed.”).

161. Cf. Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANT. ANALYSIS 581, 592 (2008) (observing that stock prices go up after companies announce that they have settled enforcement actions and hypothesizing that price increases are driven by reductions in uncertainty around liability).

162. See *supra* note 98.

distinct from and more threatening than private liability—have been avoided through settlement.¹⁶³

These advantages might, at the margin, motivate buyers to enter the probationer market. In this market, ongoing criminal-M&A costs, to the extent there are any, are largely predictable. They resemble the sort of private-successor costs that can be managed through standard risk-allocation technologies. But potential opportunity costs in this market are still present. That is because probationers have ongoing reporting, compliance, or monitoring obligations centered on reforming the root causes of their compliance failures, which are intended in turn to prevent recidivism.¹⁶⁴ Settlements expressly incorporate successor liability through provisions that require an acquirer to acknowledge that it succeeds to the target's post-settlement obligations (although a deal's financial terms might attempt to compensate for this undertaking).¹⁶⁵ These provisions are sensible to the extent that mergers could undermine the interests that prosecutors bargained for in settlements. Yet they do impose opportunity costs on buyers. An acquirer might have its own preferences for integrating the target, which it hopes will lead to greater performance for the combined concern. As part of that plan, if it is a high-compliance firm, it would want to ensure that acquired assets have been or will be cleaned up. Its methods for doing so might be more efficient than what the predecessor and prosecutors agreed to, yet it must nevertheless comply with legacy obligations.¹⁶⁶

A reluctance to succeed to such obligations could drive some of the same effects anticipated in the known- and unknown-criminal markets. Some acquirers, especially those with high compliance quality, might balk at entering the market. Not only would they refuse to bear the present opportunity costs of complying with settlements' successor provisions, but they might worry, as noted in Section I.B, about the opportunity cost of having an acquired business's criminal history imputed to its own.¹⁶⁷ A related risk is that if buyers later commit

163. By settling a criminal matter, an offender might avoid offensive collateral estoppel in subsequent private litigation. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (permitting the offensive use of adverse adjudications when a plaintiff could not have participated in earlier litigation but the defendant had a full opportunity to do so). Admissions contained in a settlement's statement of facts would undermine this purpose if they help prove private claims. *See* Jason E. Siegel, Note, *Admit It! Corporate Admissions of Wrongdoing in SEC Settlements: Evaluating Collateral Estoppel Effects*, 103 GEO. L.J. 433 (2015).

164. *See generally* Jennings, *supra* note 23 (explaining the costs and challenges of corporate enforcement's post-settlement remediation objectives).

165. The Bankrate NPA provides a typical M&A clause providing that any M&A activity involving Red Ventures' Bankrate subsidiary will require notice to DOJ and the acquirer's acceptance of the NPA terms as a successor in interest. The M&A provision further provides that M&A activity that would undermine the purposes of the NPA will breach the agreement. *See supra* note 8 and accompanying text.

166. *See supra* note 8; *see also* Jennings, *supra* note 23, at 1539 (“Remedial rigidity [] may push firms to follow through with initial plans, even if subsequent experience shows need for adjustment.”).

167. *See* Memorandum from Lisa O. Monaco, Dep. Att’y Gen., U.S. Dep’t of Just. to Asst. Att’y Gens., U.S. Dep’t of Just., (Oct. 28, 2021), <https://www.justice.gov/dag/page/file/1445106/download> [<https://perma.cc/D867-9SF8>] [hereinafter Monaco 2021 Memorandum] (requiring prosecutors to consider “all misconduct by the corporation discovered during any prior domestic or foreign criminal,

their own offenses, then they could be deemed to have violated the non-recidivism provisions of acquired settlements. The worst-case scenario then would be a conviction for a new organic offense, plus the revocation of a predecessor's settlement followed by conviction for the acquired offense.¹⁶⁸ Even if this worst-case scenario is avoided (as is likely), buyers could find themselves ensnared in costly new rounds of investigation and settlement.

As in the case of the known-criminal market, these problems could cause a target to have no buyers or only buyers interested in a socially undesirable deal. For example, buyers with low-quality compliance might recognize that a target's ongoing obligations serve to reduce its price. Such a buyer would expect that prosecutors might be disinclined to fully enforce those obligations—including non-recidivism—via revocation out of fear of social costs or litigation risks.¹⁶⁹ It can thus acquire the probationer at the discount implied by its ongoing obligations, reduce expenditures related to complying with those obligations, and reap the windfall.

II. Criminal M&A and the Prosecutor's Dilemma

The last Part analyzed successor criminal liability from the perspectives of M&A buyers and sellers. The analysis touched on, at a high level, the public's interest in corporate compliance and enforcement. This Part considers criminal M&A's link to the prosecutor's dilemma in corporate enforcement—how to sanction corporate offenders appropriately but not so severely as to cause unintended collateral costs. The stylized model below shows two scenarios of a corporate criminal case, one involving an M&A transaction and the other not. The precise offense does not matter, but assume it's a serious one.

civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family").

168. Cf. Jennings, *supra* note 23, at 1575 ("The clawback authority afforded by many settlements is to revoke that benefit and proceed to litigation . . .").

169. See BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 166 (2014) (reviewing corporate-crime cases and concluding that "[i]t is not at all clear that prosecutors take corporate recidivism seriously").

Table 1. Hypothetical Corporate Enforcement with and without M&A

	<i>Enforcement without M&A</i>	<i>Enforcement with M&A</i>
Firm Value (A)	\$3B	\$3B
Statutory Maximum Penalty (B)	\$1B	\$1B
Appropriate Penalty (C)	\$500M	\$500M
Enforcement-Related Credit (D)	\$100M	\$100M
Full Penalty (C-D)	\$400M	\$400M
Ability to Pay (E)	\$100M	\$400M
Ability-to-Pay Penalty Gap (F)	\$300M	\$0
Penalty Imposed (G)	\$100M	\$400M
Post-Enforcement Costs (H)	\$50M	\$50M
Shareholders' Net Equity (I)	\$2.85B	\$2.55B

In both scenarios, a company with a firm value (A) of \$3 billion—defined here as simply the purchase price (including assumed debt) the company would fetch in an all-cash deal—has committed an offense subject to a \$1 billion maximum statutory penalty (B). The prosecutor assesses that the appropriate penalty (C) is \$500 million, say, based on an Organizational Sentencing Guidelines calculation.¹⁷⁰ Because the firm has done some combination of self-reporting, cooperation, or remediation, it receives \$100 million in enforcement-related credit (D), for a \$400 million full penalty (C-D). In either scenario, the firm will bear \$50 million in post-enforcement costs, such as the costs attributable to new compliance measures, compliance monitors or consultants, legal fees, and so on.¹⁷¹

Now the two scenarios diverge. In the no-M&A scenario, the firm lacks the ability to pay \$400 million.¹⁷² It has the ability to pay (E) \$100 million, \$300 million less than the full penalty. There are several reasons why it would be unable to pay the full penalty. It might lack adequate cash, for instance. Although there are payment options other than having free cash, those options could be

170. See generally U.S. SENT'G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT'G COMM'N 2004) (establishing methods for calculating organizational sentences). The Fraud Section of DOJ's Criminal Division has started presenting a public guidelines calculation in settlements. See, e.g., Deferred Prosecution Agreement at 10, United States and JPMorgan Chase & Co., No. 20-CR-00175 (D. Conn. Sept. 29, 2020), <https://www.justice.gov/opa/press-release/file/1320576/download> [<https://perma.cc/HF5G-EW4B>] (demonstrating the government's Guidelines calculation).

171. See, e.g., Steven M. Davidoff Solomon, *In Corporate Monitor, a Well-Paying Job but Unknown Results*, N.Y. TIMES (Apr. 15, 2014), <https://nyti.ms/2kKaQNd> [<https://perma.cc/P223-YKYA>] (reporting that a former federal prosecutor appointed to serve as monitor of a pharmaceutical company following an investigation into physician kickbacks received \$52 million in fees during his tenure).

172. Management and prosecutors talk to each other, creating opportunities for management to discuss the firm's ability to pay. Prosecutors might also follow their own observations—such as through reviewing the company's financial statements and otherwise becoming aware of its various contractual, financial, and operational constraints—to consider ability to pay.

unavailable or undesirable. For example, the firm could borrow the balance or issue equity, but that fundraising might be prohibited by existing debt covenants¹⁷³ or might be on financial terms (such as at high interest rates) that would put the firm's future viability into question.¹⁷⁴

In any case, insisting on full penalties from firms that can ill afford them risks creating social costs. This risk lurks even if a firm *does* have the cash or financing capacity to pay a full penalty. The burden on the firm's cash flows from making penalty payments (or servicing the debt it took to fund the penalty) might force it to forgo socially beneficial activities, like research and development or expansion. Paying a full penalty could result in customer harm or comparatively less technological innovation or employment.¹⁷⁵ In other words, forcing a firm to pay a full penalty it cannot afford could set it on the path to ruin. If there is redeeming value in its activities, then society would bear that cost. But even insisting on a full penalty from a firm that *has* the ability to pay requires welfare tradeoffs.¹⁷⁶

173. For an examination of how debt covenants constrain corporate decision making, see Charles K. Whitehead, *The Evolution of Debt: Covenants, the Credit Market, and Corporate Governance*, 34 J. CORP. L. 641 (2009).

174. See Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 278 (2008) ("Firms convicted of crimes could unravel simply because they lack the assets necessary to pay the fines."). *But see* U.S. SENT'G GUIDELINES MANUAL § 8C3.3(b) (U.S. SENT'G COMM'N 2004) (permitting a court to reduce a fine or disgorgement so long as "the reduction . . . shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization").

175. See Memorandum from Eric Holder, Dep. Att'y Gen., U.S. Dep't of Just., to All Component Heads and U.S. Att'ys 9 (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/E4SV-SDA9>] ("In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders . . ."); U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.1100 (2020) ("Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases."); *see also, e.g.*, Deferred Prosecution Agreement at 6, United States v. Genzyme Corp., No. 15-CR-00352 (M.D. Fla. Aug. 31, 2015), <https://www.justice.gov/opa/file/767286/download> [<https://perma.cc/TSK2-5GWF>] (listing "potential collateral consequences of proceeding with a prosecution, which may cause undue harm to innocent individuals including current Genzyme employees and shareholders" among the reasons for giving the company a DPA in connection with adulterated medications); Deferred Prosecution Agreement at 2, United States v. Unico, Inc., No. 13-CR-0355 (S.D. Cal. Jan. 30, 2013), https://www.gibsondunn.com/wp-content/uploads/documents/publications/Unico_Inc_DPA.pdf [<https://perma.cc/7FN8-JPWR>] (stating that "a guilty plea and criminal conviction of Unico [for filing false information with the SEC] would have caused negative collateral consequences to Unico's current Board of Directors, shareholders and employees incommensurate with their roles in the offense"); U.S. Dep't of Just., D.N.H., Letter to Maria A. Barton, Benton J. Campbell & Barry M. Sabin, Partners, Latham & Watkins LLP, at 1 (Apr. 30, 2012), <https://www.sec.gov/Archives/edgar/data/1494448/000119312512193743/d344352dex101.htm> [<https://perma.cc/2THB-WJFY>] (offering an NPA in part based on "the negative impact and collateral consequences that charging the Company would have on the Company's employees and shareholders and other business activities that are not part of the [U.S. Attorney's Office's] investigation"); Deferred Prosecution Agreement at 2-3, United States v. CommunityOne Bank, N.A., No. 11-CR-122 (W.D.N.C. Apr. 26, 2011), <https://storage.courtlistener.com/recap/gov.uscourts.ncwd.62966/gov.uscourts.ncwd.62966.2.0.pdf> [<https://perma.cc/7JDE-TUDF>] (considering the "negative collateral consequences to hundreds of employees not involved in the [defendant's] BSA/AML program, its shareholders and the communities it serves" as reasons for not prosecuting a bank).

176. See Stigler, *supra* note 30, at 531-32 (concluding that enforcers must consider social costs so as to avoid results in which society "spend[s] two dollars to save itself one dollar of damage").

A prosecutor must choose, then, how much of the full penalty—in this case, \$400 million—to allocate to the government and how much to allocate to the firm. That is, how much, if any, of the full penalty will the firm retain in the form of an unearned discount?¹⁷⁷ Although the firm bears responsibility for wrongdoing, a prosecutor might shy from the social cost associated with extracting a full penalty—even if the full penalty is justified on penological grounds.¹⁷⁸ In this example, a prosecutor must ask herself: “Will society be better off if this \$400 million is in the hands of the government, or in the hands of the firm?” This welfare calculation will necessarily be based on incomplete information and speculative assumptions. Perhaps the government can put an incremental \$400 million in revenue to efficient use that will produce social gains. Perhaps those gains will be greater than if the same sum were left in the offender’s hands. Those gains, however, will be aggregated with other government revenue and used in ways that the prosecutor cannot predict or observe. Thus, she cannot assess how much welfare will derive from allocating the full penalty to the government, whereas she has greater ability to predict the costs of forgoing the *firm’s* plans for the money. That is partly because she has spent considerable time learning about the firm during the course of her investigation. Moreover, the firm’s management or counsel might have warned her about the implications of a full penalty for the firm’s future.¹⁷⁹

The prosecutor is, of course, more than a social-welfare maximizer. She also worries over herself.¹⁸⁰ Extracting penalties from firms that can ill-afford them risks backlash against her or her agency.¹⁸¹ Imagine, for example, news coverage of employees facing layoffs because their employer must liquidate in the face of criminal penalties. Such third-party harm could lead to public and political resentment against the agency or those who worked the case. A conscientious prosecutor—a human being with empathy—would also presumably abhor being an agent of significant and concrete social harms.¹⁸² At the same time—whether motivated by retribution, victim voice, the need for deterrence, or some other penological consideration—members of the public and

177. The discount is unearned in the sense that the firm did not give any consideration to get it—it merely couldn’t pay a full penalty and so was allowed not to do so. In contrast, discounts for self-reporting, cooperation, and remediation are earned. That is, the firm undertook costly efforts to subsidize the government’s investigation and so earned the penalty credits it received.

178. See 18 U.S.C. § 3553(a)(2) (2018) (outlining the purposes of criminal sentencing); see also Diamantis, *supra* note 25 (arguing for criminal victims’ right to voice).

179. See U.S. Dep’t of Just. S.D. Tex., Letter to Ryan McConnell, Att’y for ACSI, at 1 (Dec. 5, 2011) [<https://perma.cc/J7XX-E2DY>] (including “the collateral consequences upon ACSI, as stated during several presentations that you made to Assistant United States Attorneys [redacted] and [redacted] resulting from a criminal conviction” among the reasons the company received an NPA for immigration-law violations) (emphasis added); see also Julie O’Sullivan, *Is the Corporate Criminal Enforcement Ecosystem Defensible?*, 48 J. CORP. L. 1047, 1059 (2022) (criticizing the fact that corporate offenders receive opportunities to advocate for themselves via presentations to prosecutors).

180. See Johnson, *supra* note 103, at 627.

181. Cf. Buell, *supra* note 103, at 840-47 (reviewing prosecutors’ desire to maintain political support among the public, political actors, and industry).

182. See sources cited *supra* note 175 (offering these rationales for not prosecuting a corporate offender).

political actors will expect *some* penalty to be paid.¹⁸³ The prosecutor's welfare calculation might result in her not allocating the value of the full penalty to the government, but she also cannot allocate all that value (i.e., impose no penalty) to the firm. Thus, she will set the penalty to be imposed (G) at the firm's ability to pay (E). Here, that is \$100 million. Or, in the case of a firm that *could* pay the full penalty, that amount could be reframed as the *prosecutor's* willingness to accept. In either frame, giving the corporate offender an unearned penalty discount might be an undesirable policy outcome. It is, of course, a consideration an individual defendant—whose full punishment might impose substantial collateral harms on innocent third parties, like children—would not receive.¹⁸⁴ Nevertheless, the prosecutor could view this path as her least-bad option. The decision to give the offender an unearned discount would be made for the indirect benefit of its stakeholders, like employees or customers.¹⁸⁵ Critically, however, its benefits would directly inure to the offender's shareholders.¹⁸⁶ Indeed, prosecutors might affirmatively wish to protect the shareholder constituency because among its ranks are sympathetic investors like pension funds or charitable endowments.¹⁸⁷ But imposing a less-than-full penalty spares shareholders from realizing a risk that they previously accepted: to bear the consequences of corporate criminality in the form of penalties and other costs that serve to reduce their equity.¹⁸⁸

Up to this point, the hypothetical concerns a case when there is no M&A transaction. But what if enforcement happens in parallel with an acquisition of

183. See Justin Wise, *Frustration, Hot Job Market Drive Some Senior Exits At SEC*, LAW360 (June 8, 2022), <https://www.law360.com/articles/1500034> [<https://perma.cc/JF46-RM56>] (reporting frustration among some SEC enforcement attorneys around agency leadership pushing for more aggressive settlements and being less averse to litigation risk); Johnson, *supra* note 103, at 672-73 (noting that prosecutors face “popular sentiment to act in response to market factors and scandals”); see also Daron Acemoglu & Alexander Wolitzky, *Sustaining Cooperation: Community Enforcement Versus Specialized Enforcement*, 18 J. EURO. ECON. ASS'N 1078, 1080 (2020) (“Enforcers’ incentives come from the fact that they themselves benefit from societal cooperation (either directly or, in an extension, because the revenues that pay their salaries are generated by such cooperation), and societal cooperation depends on citizens’ trust in the integrity of the law enforcement apparatus.”); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639 (2010) (noting that enforcers are incented to bring high-salience cases even if those cases are of limited enforcement value); Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901 (2016) (cautioning that enforcement statistics might impress the public or political constituencies but mask the overall significance of enforcement activity).

184. See U.S. SENT'G GUIDELINES MANUAL § 5H1.6 & cmt. 1(B)(iii) (U.S. SENT'G COMM'N 2004) (strictly curtailing sentencing decisions from considering family needs or effects on children); see also Rachel Barkow, *Using the Corporate Prosecution and Sentencing Model for Individuals: The Case for a Unified Federal Approach*, 83 L. & CONTEMP. PROBS. 159 (2020) (proposing that individual offenders be treated similarly to corporate offenders).

185. See *supra* note 175 and accompanying text (offering these rationales for not prosecuting a corporate offender).

186. For the sake of simplicity, “shareholders” refers to common shareholders. This analysis would also follow for holders of convertible securities.

187. See *supra* note 175 (acknowledging the importance of protecting these stakeholders).

188. See Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 91 (1985) (“The residual claimants [] have incentives to invest in the amount of monitoring likely to produce these gains (or avoid the losses), net of the costs of monitoring.”).

the offender?¹⁸⁹ In that scenario, firm value (A) would be held constant at \$3 billion. The statutory maximum penalty (B), the appropriate penalty (C), the enforcement-related credit (D), and the post-enforcement costs (H) would also remain unchanged.¹⁹⁰ The difference, though, is the firm's ability to pay (E). In the no-M&A scenario, the firm's \$3 billion value easily exceeds the \$400 million full penalty. But if it lacks liquidity to satisfy the full penalty, bearing the full penalty could destabilize its business and so risk social costs. The prosecutor will avoid that risk.

M&A, however, represents a brief moment when a firm's value is liquid, especially in an all-cash deal. Firm value is the expected price a going concern could fetch if it were to be sold today, and the price of the firm's shares reflects that net-present value. But until the firm is sold, that value is locked up. As an analog, owning a plot of land *valued at* a million dollars is not the same thing as *having* a million dollars. In that sense, the firm is a store of value, but that aggregate value is illiquid. Being a firm *valued at* \$3 billion—as in the example—is not the same as being a firm that has \$3 billion *available* to it to pay penalties. But in M&A's brief liquid moment, the firm can easily pay the full penalty because its entire cash value—here, \$3 billion—is on the table. That is, the \$400 million full penalty could be paid from the \$3 billion purchase price, with shareholders receiving the balance.¹⁹¹ Thus, the penalty would be paid not by a business that needs to worry about cash flow as a going concern but rather by its residual claimants.¹⁹² This liquid moment offers a brief opening for the prosecutor to isolate the consequences of criminal liability to selling shareholders, whose role in the corporation includes bearing such risks.

In the hypothetical, the penalty imposed (G) in the no-M&A scenario is \$100 million, the same as the firm's ability to pay. In the M&A scenario, the penalty imposed is \$400 million, the same as the full penalty. These scenarios diverge in shareholder net equity (I). In the no-M&A scenario, shareholders' net equity is \$2.85 billion, whereas in the M&A scenario, it is \$300 million less. In

189. In a variation on this hypothetical, the analysis could be done at the level of an offending business unit or division. For example, a diversified financial institution might have a business unit that generates violations. The parent might decide to divest itself of that unit.

190. It is the same company that has committed the same offense under the same circumstances and that has offered the same level of self-reporting, cooperation, or remediation.

191. The \$3 billion purchase price is net of the firm's known, unknown, and contingent liabilities. It is net of those liabilities because the acquirer will assume them, either in an accounting sense (i.e., if it owns the acquired firm as a subsidiary, then the subsidiary's liabilities will be part of its consolidated financial statements) or in a legal sense (i.e., if it becomes the acquired firm's successor through a statutory merger or if it contractually assumes liabilities). Selling shareholders still bear those liabilities: they pay in the form of a purchase price from which the assumed liabilities have been subtracted. In other words, if the total assumed liabilities on a \$3 billion deal are \$1 billion, then the pro forma purchase price for a liability-free firm would be \$4 billion.

192. In that light, the full penalty is not unlike a private liability that arises or is discovered during diligence. But unlike private creditors, the government as creditor must consider the public interest. Imposing a full penalty is more likely to be consistent with the public interest when the cost can be imposed directly on the residual claimants—the shareholders—rather than on stakeholders like employees or customers. Social cost is apt to be avoided in this scenario because the acquirer has plans to put the purchased assets to some use that it, presumably, expects to produce net social benefit.

the first scenario, the prosecutor effectively allocates three fourths of the full penalty to the offender's shareholders. In the second scenario, the entire \$400 million is allocated to the government and the cost of corporate crime is borne by shareholders, not third-party stakeholders.¹⁹³

III. The Public Interest and the Market for Corporate Criminals

The first two Parts of this Article considered criminal successor liability, the problems it creates for M&A markets and participants, and the connection between criminal successor liability and corporate enforcement. This Part identifies the promise of criminal M&A in furthering the public interest in corporate compliance and the promise of corporate-enforcement policy to address the problems criminal successor liability creates for M&A markets. In doing so, it offers three policy solutions—M&A-contingent penalties, buyer amnesties, and forced sales—as means of achieving these promises.

A. *Ex-Ante Compliance and Deterrence*

The hypothetical above demonstrates how criminal M&A can further the public interest in corporate compliance. First, it allows prosecutors to impose full penalties on shareholders while avoiding, or at least mitigating, collateral costs. More importantly, it can enhance deterrence. If prosecutors no longer need to engage in welfare calculation when deciding how to allocate full penalties between the government and offender firms, then appropriate, if hefty, penalties become a more credible risk for shareholders. This risk appears as an agency cost.¹⁹⁴ Executives and employees might have private incentives to skirt the law or skimp on compliance.¹⁹⁵ Rogue employees, for example, might seek private benefits from on-the-job criminal activity.¹⁹⁶ Even well-meaning executives and boards might skimp on compliance efforts that could prevent lawbreaking.¹⁹⁷ That is partly because compliance's costs hit net income and other metrics on which executive performance is evaluated.¹⁹⁸ Compliance's benefits, like

193. It is possible that even this targeted sanction could result in social costs in that selling shareholders might have put those additional proceeds to better use than would the government. This possibility is speculative, however, and it is partly countered by the ex-ante compliance benefits discussed below in Section III.A.

194. Cf. Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984) (“[T]here is no guarantee that the agent, once hired, will in fact choose to pursue the principal’s best interests or to do so efficiently. The agent has his own interests at heart . . .”).

195. John C. Coffee, Jr., *Crime and the Corporation: Making the Punishment Fit the Corporation*, 48 J. CORP. L. 963, 969 (2022) (“If the crime is highly profitable, senior managers are not only motivated to overlook signs of misconduct, but possibly even to pressure junior officers to cut legal corners and avoid being ‘excessively’ law compliant.”).

196. See *supra* notes 106 & 128.

197. See John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. ON REGUL. 1, 23-25 (2020) (theorizing management’s myopia around compliance expenditures).

198. See *2021 Top 250 Report*, FW COOK 7 (Dec. 2021), https://www.fwcook.com/content/documents/Publications/12-29-21_FWC_2021_Top_250_Final.pdf [<https://perma.cc/3H8Q-PM9N>] (reporting on financial metrics used by large companies to calculate executive compensation).

avoiding the costs associated with violations, are speculative and attenuated for managers focused on quarterly performance.¹⁹⁹ But if shareholders recognize that the government can use the M&A process to extract full penalties—that is, full penalties that will be borne by *them*—then they will be better incented to monitor management’s compliance efforts through shareholder-governance levers.²⁰⁰ Such an alignment of shareholders’ interest with the public’s interest in corporate compliance would motivate shareholders to value compliance more highly.

Criminal M&A can contribute to ex-ante compliance and deterrence and an attendant reduction in corporate criminality by making full penalties a credible threat. But this point runs into a temporal problem. It’s not typical that a company negotiates a settlement with the government over criminal liability in parallel with negotiating its acquisition by another firm. In other words, there is usually not a metaphorical table at which the government, target, and buyer iron out a deal that both resolves the target’s criminal liability *and* sells the target. That is a problem because harnessing criminal M&A to further enforcement and compliance will rarely work if it relies on both enforcement and M&A stars to align. There is an aspect of enforcement practice that already incorporates M&A, however, and it suggests a solution to this temporal problem. As noted in Section I.B.3, settlements typically include contingent provisions related to future acquisitions of offenders, including de facto power for prosecutors to veto deals involving probationers.²⁰¹ This practice establishes a precedent for M&A’s role in enforcement, and here I propose a new practice of contingent penalties. If a prosecutor’s welfare calculation does not permit imposing a full penalty on a going concern, and if no acquisition is in the offing, then the prosecutor could instead impose a current penalty at the offender’s ability to pay and an M&A-contingent penalty to cover the balance of the full penalty. The contingent penalty would be owed only in the event that the offender is acquired (i.e., in the sort of transaction that already triggers settlements’ M&A provisions) and the government would accept priority for the contingent penalty behind all non-shareholder claimants.²⁰²

As shown in the hypothetical scenario in Part II, an M&A-contingent penalty would ensure that going concerns do not lose cash flows that would otherwise be used to operate or invest in new projects, thus avoiding the social

199. See David Millon, *Why Is Corporate Management Obsessed with Quarterly Earnings and What Should Be Done About It*, 70 GEO. WASH. L. REV. 890, 890 (2002) (analyzing managers’ “obsession with quarter-to-quarter earnings”).

200. See *infra* note 208 for examples of these levers.

201. See, e.g., Bankrate NDA, *supra* note 8 (“If at any time during the Term the Company engages in a transaction(s) that has the effect of circumventing or frustrating the enforcement purposes of this Agreement, the Fraud Section may deem it a breach of this Agreement pursuant to the breach provisions of this Agreement.”). See generally *supra* Section I.B.3.

202. This type of penalty is comparable to John C. Coffee, Jr.’s proposed “equity fine” in which offender firms issue new shares to victim-compensation funds. Both, for instance, recognize that a firm’s equity is an unrecognized source of potential sanction. Moreover, both M&A-contingent penalties and equity fines allocate the costs of wrongdoing to current shareholders while avoiding externalities on third parties. See Coffee, *supra* note 195, at 981-82.

cost of a full penalty.²⁰³ As a second-to-last priority, the M&A-contingent penalty would also avoid disrupting other creditors' interests.²⁰⁴ If the company were ever sold, the M&A-contingent penalty would be paid after all other debts and before common shareholders receive any proceeds.²⁰⁵ An M&A-contingent penalty would reduce—as a function of the amount of the penalty and the probability that the firm will ever be acquired—shareholders' equity, causing the price of the company's stock to fall.²⁰⁶ That would be so even if no acquisition were in the offing because the market price would reflect that the contingent penalty reduces residual value.²⁰⁷ M&A-contingent penalties would thus impose immediate and approximately full penalties on shareholders—motivating them to better monitor compliance²⁰⁸—while avoiding the social costs that drive the prosecutor's dilemma.

Using contingent penalties to impose full penalties could also reduce managerial agency costs. If there were no ability-to-pay discounts on corporate penalties, managers would be forced to internalize more of the costs of underinvesting in, or making decisions that undermine, compliance. That is because higher penalties would hit performance metrics tied to managers' compensation, including stock price and net income.²⁰⁹ Beyond these costs

203. The firm has a value of \$3 billion in both of Part II's scenarios. In the first scenario—with no M&A-contingent penalty—the firm is sold for \$3 billion and the shareholders collectively receive \$3 billion, minus the firm's outstanding debts, \$X, in cash. In the scenario with an M&A-contingent penalty, the firm is again sold for \$3 billion, only the shareholders receive \$3 billion minus both \$X and the amount of the contingent penalty.

204. There is an order of priority for claims against insolvent companies. See 11 U.S.C. § 507 (2018) (establishing the order of priority in bankruptcy proceedings). Even if an M&A-contingent penalty should default to a higher priority than some other creditor claim, the government should nevertheless only take priority over common shareholders. The point of such a penalty, after all, is to allocate the cost of corporate crime to shareholders. Taking a higher than second-to-last priority, however, would allocate that cost to creditors.

205. *Id.*

206. An interest rate could be applied that would keep the reduction in equity a constant. If no interest rate were imposed, the reduction in equity would decrease in line with the firm's discount rate. The first approach would keep the penalty constant so that in an acquisition it would be irrelevant to shareholders when the firm is acquired. The second approach would reduce the cost of the penalty over time, which could incentivize rehabilitation or distant-in-time acquisitions.

207. Carrying this contingent liability would have a scarlet-letter effect in financial statements. See Jennings, *supra* note 23, at 1623–24 (noting the potential for enforcement-related contingent liabilities to shape corporate-governance decisions); see also W. Robert Thomas & Mihailis E. Diamantis, *Branding Corporate Criminals*, 92 FORDHAM L. REV. (forthcoming 2023) (exploring the punitive potential for corporate scarlet-letter sanctions). An offender might want to reserve an option to pay the penalty outside the M&A context. If, for instance, it found itself flush with cash and lacking good investment opportunities, paying off the M&A-contingent liability might have a positive effect on its stock price.

208. This policing could be achieved through a number of channels, including shareholder activism and proxy campaigns, informal shareholder pressure, attracting hostile bidders that believe they have superior ability to effect high-quality compliance programs, or increased incentives to bring derivative litigation under *Caremark* and its progeny. See Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 373 (Del. 2006) (quoting *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996)) (holding that the fiduciary duty of good faith can be implicated “by the directors’ actions ‘to assure a reasonable information and reporting system exists’”).

209. In a 2021 survey of 250 of the largest public companies that compensate executives through long-term incentive plans, 69% of those companies' compensation plans incorporated total shareholder return (TSR) as a payout metric. TSR, which incorporates stock price, would be reduced by an M&A-contingent penalty, reducing executive compensation in turn. See *supra* note 198, at 7.

hitting shareholders, they would also target executive compensation without reducing the cash the company has available for operations and future plans.²¹⁰

Despite their potential to efficiently deter and sanction corporate misconduct, one might worry that M&A-contingent penalties could serve as a tax on M&A transactions. Would such a penalty lead shareholders of a selling firm to set a higher reserve price before they are willing to approve a sale?²¹¹ If so, there would be the unintended effect of chilling the criminal-M&A market. This effect would not be expected, however, because shareholders cannot credibly set reservation prices that ignore debts owed by the firm or other already realized reductions in its value. A firm's value would be reduced instantly when it agrees to a contingent penalty, a cost borne directly by current shareholders. The price future shareholders could expect to receive in a future sale of their equity would start from that new baseline, plus any premium an acquirer might pay.²¹² A contingent penalty, in other words, is not a tax on M&A transactions but is rather a debt that reduces the residual value shareholders would expect to receive from a sale of a firm. And it is a fairly easygoing debt as it is contingent on a sale happening.²¹³ With such a penalty, the cash flows of the going-concern firm—including its ability to pay dividends to shareholders—go unencumbered.

B. Post-Enforcement Reform

Preventing recidivism is a perennial challenge in corporate enforcement.²¹⁴ Once violations have been discovered and investigated, how can their resolutions be structured to reform the root causes of compliance failures? I have examined this problem, and its potential solutions, in prior work.²¹⁵ The basic bulwark against recidivism is the threat of clawing back a settlement's benefits if an anti-recidivism covenant is breached.²¹⁶ This threat is rendered non-credible, however, in light of due process constraints and prosecutors' motivation to avoid social costs.²¹⁷ A prosecutor who was unwilling to press a case to conviction out

210. See Coffee, *supra* note 195, at 977-79 (observing that executive incentive compensation can be criminogenic in that it encourages risk-taking and, consequently, reduced investment in compliance).

211. See, e.g., DEL. CODE ANN. tit. 8, §§ 251, 271 (2022) (requiring shareholder approval for mergers or the sale of all, or substantially all, of a corporation's assets).

212. In a publicly traded firm, the imposition of an M&A-contingent penalty would cause the price of the company's stock to fall. If current shareholders sell their shares in that scenario, they will be priced comparatively lower than if there were no such penalty. For their part, purchasers of the shares will pay a lower price that reflects the effects of the contingent penalty on the firm's residual value.

213. The contingent penalty could be designed in a way to allow an offender firm to pay it off early and might perhaps have an interest-rate structure that incents it to do so. If the acquisition occurs relatively soon after the offender firm settles a criminal case, then the premium the buyer is willing to pay might be positively affected by the comparatively reduced risk associated with acquiring a corporate probationer. See *supra* notes 161-163 and accompanying text.

214. See Jennings, *supra* note 23, at 1570-71.

215. See generally Jennings, *supra* note 23 (noting that settlements rely on clawback provisions that are non-credible and proposing an alternative approach in which offenders receive remediation credit only for demonstrated recidivism prevention).

216. *Id.* at 1574.

217. *Id.* at 1575.

of concern for harm to non-culpable employees or other stakeholders would have those same concerns about revocation if the company violates its settlement.²¹⁸ To compensate for prosecutors' limited ability to actively monitor and police probationers, external compliance monitors can be imposed.²¹⁹ Recent research suggests, however, that although monitors reduce recidivism during their tenures, they are not associated with persistent reductions in corporate recidivism.²²⁰

This Article opened by considering failures in the criminal M&A market and how to address them on their own terms. Fixes to that problem, however, could also produce desirable downstream effects by fostering corporate reform. The market for corporate control is a powerful means for addressing business deficiencies, which can include low-quality compliance. In this view, firms with high-quality compliance could reform those with low-quality compliance. They could do so, for example, through fostering new workplace cultures, changing performance incentives, and improving internal controls.²²¹ In this light, if compliance monitors have positive anti-recidivism effects during their tenures, then acquisition by a compliant buyer could be viewed as effectively a *permanent* monitorship.²²²

This promising possibility is countered by the risk that a target with low-quality compliance could have contagion effects within buyers.²²³ Imagine, for example, an upstart firm that bests larger rivals in terms of customer-acquisition costs, business-win rate, or other metrics. It might be an attractive target for acquisition because its superior metrics suggest that it has a better model, technology, or management that could be scaled at the larger competitor. But if its superior performance is due to methods that violate the law or its tolerance of employees who do, then bringing its “special sauce” to the buyer would simply

218. See *supra* notes 39 & 175 and accompanying text.

219. See Veronica Root Martinez, *Public Reporting of Monitorship Outcomes*, 136 HARV. L. REV. 757, 775 (2023) (identifying the outsourcing of prosecutorial monitoring as one function of contemporary corporate monitorships).

220. See Lindsey A. Gallo, Kendall V. Lynch & Rimmy E. Tomy, *Out of Site, Out of Mind? The Role of the Government-Appointed Corporate Monitor* 28 (Univ. of Chi. Booth Sch. of Bus. Rsch. Paper No. 22-07, 2022), https://papers.ssrn.com/abstract_id=4027017 [<https://perma.cc/2L48-EDSZ>] (reporting results that “although Corporate Monitors are effective while present at the firm, they are not incrementally more effective (compared to NPA/DPA firms that do not require a Monitor) in reducing violations after their tenure ends”). *But see* Rebecca L. Files, Gerald S. Martin & Yan (Tricia) Sun, *Forced Remediation: The Use of Corporate Monitors in Sanctions for Misconduct* (Apr. 2022) (unpublished manuscript), https://papers.ssrn.com/abstract_id=4067889 [<https://perma.cc/C8T2-DDD3>] (finding improved financial-reporting quality at firms that once had corporate monitors).

221. See *supra* note 147.

222. See *supra* notes 219-220 and accompanying text.

223. See Stephen G. Dimmock, William C. Gerken & Nathaniel P. Graham, *Is Fraud Contagious? Coworker Influence on Misconduct by Financial Advisors*, 73 J. FIN. 1417, 1420 (2018) (finding that employee misconduct has spillover effects on other employees but not finding a similar spillover effect from good behavior); Dain C. Donelson, Matthew Ege, Andy Imdieke & Eldar Maksymov, *The Revival of Large Consulting Practices at the Big 4 and Audit Quality*, 87 ACCT. ORGS. & SOC. 101, 157 (2020) (theorizing cultural effects acquired businesses can have on acquirers).

lead to violations at greater scale.²²⁴ Problems beyond compliance contagion could also emerge. A buyer's compliance function might be overwhelmed by the challenges of integrating the low-compliance firm, risking compliance failures in the buyer's legacy operations.²²⁵ Restructurings might create opportunities for concealment of past wrongdoing or create new performance pressures that incent misconduct.²²⁶ Or the two cultures may be irreconcilable, preventing the formation of a cohesive environment promotive of high compliance.²²⁷ These are distinct risks within M&A's broader integration risk.²²⁸ In other words, by acquiring a corporate criminal, a law-abiding firm puts *itself* at risk of compliance failures, which must be carefully assessed and managed to be successfully avoided. Although the buyer agrees to an acquisition because it expects some positive return from doing so, taking this task on could also be framed as public service: the buyer accepts private risk in order to fix the target's compliance, the benefits of which inure to the public. This public-service point helps justify the amnesty policies called for in Part III.

Keeping integration risk in mind, promoting criminal M&A could be one approach for prosecutors worried about corporate recidivism. This approach would come in the form of giving a buyer amnesty for a target's pre-closing offenses and offering a cooperative approach around ensuring that the acquired business does not lead to future offenses. That could be good anti-recidivism medicine.²²⁹ Its usefulness in enforcement will be limited however, because, as Section III.A notes, it will not often be the case that an offender is both in the midst of an enforcement action *and* being acquired. That point raises the possibility of stronger medicine. A prosecutor need not wait for concurrent enforcement/M&A to occur naturally. She can also use her leverage to insist on a sale as a condition of settlement. That is, a prosecutor could insist that a firm put itself (or a troublesome business unit) up for sale if she believes that new control would prevent recidivism. This potent remedy would be most proper in the case of recidivist, or especially serious first-time, offenses. As Section III.C explains, this power could be prone to abuse and so should follow strict policy

224. See Donelson, Ege, Imdieke & Maksymov, *supra* note 223; see also Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 398 (2017) (observing that startups' business models are sometimes of contestable legality).

225. See CREATE Compliance, *The Top 10 Reasons Compliance Programs Fail*, NAVEX <https://www.navexglobal.com/compliancnext/media/doc/Top-10-reasons-compliance-programs-fail.pdf> [<https://perma.cc/KNM4-YRF6>] (identifying reasons for compliance-program failure, including lack of adequate resources and competing priorities in the compliance function).

226. Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 947 (2017) (“Cultural and situational pressures cause bad behavior even among good people.”).

227. *But see id.* (“[S]elf-interest hides, not disappears, and internal loyalty and bonding can palpably increase the level of aggression directed at outsiders (e.g., customers, competitors), even as it greases internal trust and cohesion.”).

228. For a fulsome review of the scholarly literature on M&A integration risk, see Norbert Steigenberger, *The Challenge of Integration: A Review of the M&A Integration Literature*, 19 INT'L J. MGMT. REVS. 408 (2017).

229. *Cf.* Choi, *supra* note 28, at 412 (proposing that a regime of selectively adjusted tort damages would “punish[] the seller for nondisclosure” and by “lowering the damages against the buyer not only make[] the acquisition more attractive for the buyer but also give[] the seller less incentive to lie”).

guardrails. Yet, in the case of firms that reoffend, prosecutor-initiated criminal M&A could be a pragmatic and effective approach short of clawing back settlement benefits.²³⁰

C. Toward Criminal M&A in Corporate Enforcement

Criminal successor liability, like its private tort and contract analogs, can be justified by the need to prevent firms from evading liability through restructurings or other maneuvers.²³¹ Ill-gotten gains ought to be disgorged and restitution to those harmed by wrongful acts ought to be paid. But criminal successor liability acts not just as a doctrine for effecting disgorgement and victim compensation but also as one of tainted assets. The normative bases for punishing firms for the wrongful acts of their employees and agents are contested.²³² But, pragmatically, this effect can reduce the efficiency of M&A markets and undermine a key purpose—policing corporate criminality—that it could otherwise be justified as promoting. Enforcement is largely driven by prosecutorial discretion, and this Section urges that prosecutors use their discretion to make criminal successor liability function more like private successor liability. Such a move would make the problems of criminal M&A more akin to those of private liabilities, thus taking off the table some of the unique collateral consequences of criminal status.²³³

This Article has talked about corporate “crime” and the agency exercised by “prosecutors.” But its analysis is not just about criminal offenses or prosecutors per se. Most of what has been said about corporate criminality could also be said of serious civil offenses that fall under the jurisdiction of regulatory agencies.²³⁴ For example, DOJ and SEC both enforce the FCPA, and they have

230. See *supra* notes 215-217 and accompanying text.

231. 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) (“Allowing a company to escape its debts and liabilities by merging with another entity is considered to lead to an unjust result.”).

232. See *supra* note 23.

233. See *supra* Part II.

234. Corporate criminal misconduct is also typically a serious regulatory offense. DOJ and SEC’s joint enforcement of the FCPA is a prime example, but others abound. For example, fraud involving healthcare programs is enforced by both DOJ and the Department of Health and Human Services; violations of tax laws or economic sanctions are enforced by both DOJ and the Department of the Treasury; violations of environmental laws are enforced by both DOJ and the Environmental Protection Agency; and so on. Criminal enforcement is not always in effect, but the effects identified in this Article can also be seen for firms facing serious regulatory offenses. For example, Activision Blizzard, a video-game company, agreed to be purchased by Microsoft. In an interview, Activision Blizzard’s CEO suggested that the acquisition was partly prompted by investigations by the U.S. Equal Opportunity Employment Commission and the California Department of Fair Employment and Housing into the company’s culture of sexual harassment and discrimination. Dean Takahashi, *Bobby Kotick Interview: Why Activision Blizzard Did the Deal with Microsoft*, VENTUREBEAT (Jan. 18, 2022), <https://venturebeat.com/2022/01/18/bobby-kotick-interview-why-activision-blizzard-did-the-deal-with-microsoft> [https://perma.cc/FJD7-RXPX].

issued joint guidance explaining how they do so.²³⁵ This guidance pre-commits the agencies to exercise prosecutorial discretion in predictable ways, which in turn encourages firms to cooperate with them and to adhere their own conduct to the guidance. This prosecutorial policy offers considerable clarity, and relief, in criminal M&A. FCPA violations are especially troublesome for M&A buyers because the act is heavily enforced,²³⁶ and the conduct is difficult to detect due to its being committed overseas—that is, in locales less visible to senior management—by individuals with private incentives to violate the law and to conceal that they did so.²³⁷ DOJ and SEC coordination on FCPA enforcement shows that prosecutors are not unaware of or insensitive to the problems inherent in criminal M&A. In the FCPA context, the two agencies address these problems so as to avoid punishing nonculpable successors—or, at least, to incent them to self-report and cooperate—and to foster M&A markets by providing greater certainty to market actors. This approach both avoids undermining M&A markets and is consistent with the public interest in preventing, detecting, and remedying FCPA violations. The agencies’ guidance first encourages extensive FCPA-specific due diligence before an acquisition.²³⁸ Even if adequate diligence cannot be completed given timing or other limitations, the agencies generally take action against predecessors (to the extent that they survive closing) only and pursue successors only “in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition.”²³⁹

This approach recommends a similar amnesty policy as the most obvious prosecutorial approach to criminal M&A. A company that realizes that it has bought a compliance lemon should be allowed to deal with that discovery as with any other unhappy post-acquisition surprise: spending resources and management attention to fix the problem but not being subjected to punitive sanctions. As with the joint DOJ/SEC guidance, DOJ’s own FCPA Corporate Enforcement Policy reveals a sophisticated understanding of the intersection between M&A and compliance and the uncertainties that confront buyers in the market for corporate criminals. It provides a ready template that DOJ should follow for other corporate criminal offenses and that other regulators should apply to the offenses they police:

M&A Due Diligence and Remediation: The Department recognizes the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as

235. U.S. Dep’t of Just. Crim. Div. & Enforcement Div., Secs. & Exch. Comm’n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act Second Edition*, U.S. DEP’T OF JUST & SECS. & EXCH. COMM’N (2020), <https://www.justice.gov/criminal-fraud/file/1292051/download> [<https://perma.cc/NVM7-9ZS8>].

236. See *Key Statistics*, STAN. L. SCH. FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, <https://fcpa.stanford.edu/statistics-keys.html> [<https://perma.cc/4NS3-CUCS>].

237. See *supra* notes 124-129 and accompanying text.

238. *Supra* note 235, at 29.

239. *Id.* at 30.

quickly as practicable at the merged or acquired entity. Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct through thorough and timely due diligence or, in appropriate instances, through post acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with this Policy (including, among other requirements, the timely implementation of an effective compliance program at the merged or acquired entity), *there will be a presumption of a declination . . .*²⁴⁰

This approach separates buyers with high compliance quality from those without. Under an amnesty approach, high-compliance buyers would be incented to self-report, even if doing so would lead to investigative costs, because a declination would avoid many, if not all, the problems associated with criminal M&A.²⁴¹ Because it requires a buyer to actively address and remediate its compliance lemon, DOJ's FCPA policy also reduces the risk that the acquired company's culture of noncompliance contaminates the combined culture. By incenting self-reporting, culpable individuals—who prosecutors prefer to pursue versus corporations that have “no soul to damn nor body to kick”²⁴²—are more likely to be identified. And finally, the policy's privileging of buyers that have high compliance quality reduces the potential for misconduct synergies to be achieved by low-compliance firms acquiring other low-compliance firms. As a result, compliance-enhancing M&A bids can play on a more even field with compliance-reducing bids.²⁴³

This policy contemplates the unknown-criminal market. But it also suggests that in the case of the known-criminal market, prosecutors ought to *facilitate* the deal-making process—and thus encourage the market for corporate control to address compliance deficiencies—by offering amnesties to buyers for targets' pre-closing criminal liabilities. By offering pre-closing amnesties and tolerable terms for post-closing violations that stem from inherited compliance deficiencies, prosecutors can also limit the risk that low-compliance firms—which would not play a suitably reformatory role—will acquire other low-compliance firms. It would do so by reducing gaps between prices offered by high-compliance firms (which cannot obtain misconduct synergies from a deal) and by low-compliance firms (which can).²⁴⁴

240. See U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-47.120 (2019) (emphasis added); *accord* Diamantis, *supra* note 5, at 36 (“The successor identity approach would punish successors for predecessor crimes only when the former inherit whatever organizational trait was originally responsible for the crime. It would outperform the current law of successor liability—which invariably holds successors liable for predecessor crimes by encouraging corporate reform . . .”).

241. See Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 L. & CONTEMP. PROBS. 47, 54 (2020) (“Individual companies . . . have incentives not to share information about compliance failures, lest they risk liability.”).

242. See John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981).

243. This policy would further incent ex-ante compliance because it would make having an effective compliance program more valuable to a firm that might make acquisitions in the future.

244. See *supra* notes 151-154 and accompanying text.

This approach does demand something from prosecutors. Although requiring thorough investigation of a predecessor's compliance failures and, if applicable, disgorgement and restitution, could serve important public interests, *punishing* successors for predecessors' acts would not. Punishment in this context should be viewed more broadly than those sanctions that are formally punitive. For example, although the imposition of compliance monitors or specific remediation programs are not supposed to have punitive motivation,²⁴⁵ firms would still experience them as punishments, especially in the case of a predecessor that has not shown itself to be likely to commit future offenses. Not only are such remediation mandates financially costly, but they would also impose considerable disruption to a predecessor's day-to-day operations. Further, in the case of a high-compliance buyer, its existing compliance program might suit the reformatory task. If it does not, then the predecessor has ample incentive to do what is needed to effect reform. Otherwise, it will be liable for post-acquisition offenses. This point applies most obviously in the case of de novo settlements stemming from known- or unknown-criminal acquisitions. It also works in the probationer market and could be effected through releasing acquirers from settlements' M&A provisions or accepting scaled-down undertakings. It would also include prosecutors agreeing not to impute the target's criminal history to the buyer.²⁴⁶ In any case, amnesty would be consistent with giving ability-to-pay discounts due to the need to avoid the sort of hefty penalties that would result in social cost: assessing the balance of a full penalty as an M&A-contingent penalty would allocate sanctions to selling shareholders while allowing a buyer to acquire untainted assets. Settlements could also be structured so as to allow a firm to "earn" back all or part of a penalty through verifiably improved compliance, which would directly incent recidivism prevention.²⁴⁷

Amnesty in criminal M&A is already practiced as a matter of case-by-case discretion.²⁴⁸ And for some kinds of corporate offenses, agencies have already announced generally applicable policies.²⁴⁹ The problems associated with

245. See Memorandum from Craig S. Morford, Acting Dep. Att'y Gen., U.S. Dep't of Just., to the Heads of Dep't Components and U.S. Att'ys 2 (Mar. 7, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf> [<https://perma.cc/Y9TK-EW7L>] ("A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals.")

246. But see Monaco 2021 Memorandum, *supra* note 167.

247. See generally Jennings, *supra* note 23, for an explanation of how corporate settlements can be structured in a forward-looking way to incent incremental compliance improvements.

248. See *supra* note 240 and accompanying text.

249. See, e.g., FCPA Corporate Enforcement Policy, *supra* note 105; U.S. Dep't of Just. Antitrust Div., *Criminal Enforcement*, U.S. DEP'T OF JUST., <https://www.justice.gov/atr/criminal-enforcement> [<https://perma.cc/9VMK-5HEX>] (publishing policies (including a corporate-leniency policy), manuals, guidelines, FAQs, and model documents regarding criminal antitrust enforcement); U.S. Dep't of Just. Tax Div., *Joint Statement Between the U.S. Department of Justice and the Swiss Federal Department of Finance*, U.S. DEP'T OF JUST. (Aug. 29, 2013), <https://www.justice.gov/tax/file/631356> [<https://perma.cc/3DCB-VRSA>] (offering a one-time leniency program for Swiss banks' U.S. tax-related criminal liabilities).

criminal M&A are most likely to be addressed, however, through a general policy covering successor liability. Such a policy would give market participants predictability and clarity about how criminal M&A will be handled by prosecutors and how agencies will constrain or empower line enforcers. With greater certainty on what is needed to receive amnesty, the market for corporate criminals would be less likely to suffer the problems identified in Part I. Because corporate criminal offenses often have regulatory analogs—the “quasi-crimes” mentioned in the Introduction²⁵⁰—a universal approach to criminal M&A would require that DOJ and its fellow enforcement agencies develop an interagency successor-liability policy.²⁵¹

Section III.B also raised the possibility of stronger medicine. As part of its resolution of corporate offenses, the government could insist that a firm sell either itself or a problematic business unit.²⁵² The sale could happen prior to a resolution of the liability or—to ensure a smooth and competitive sales process—within a period after settlement.²⁵³ Such a move would render M&A a three-party transaction between a willing buyer, a willing seller, and an approving prosecutor.²⁵⁴ This remedy would be justified when facts suggest that a company’s current management cannot be trusted to reform it, or its shareholders cannot be trusted to police its compliance by adequately monitoring management. Just as the M&A-contingent penalties introduced in Part II allow the imposition of tougher penalties with less risk of collateral harm to stakeholders, enforcement-driven M&A could incapacitate corporate offenders while avoiding the dreaded prospect of a “corporate death penalty.”²⁵⁵ The availability of this approach could also promote ex-ante compliance and a reduction in agency costs tied to poor compliance. If management knows that it

250. See *supra* note 4 and accompanying text.

251. However, even if DOJ cannot achieve a consensus policy among federal enforcement agencies, a policy that covers all corporate offenses under that agency’s jurisdiction would achieve a large part of these salutary effects.

252. Although a forced-M&A approach for resolving corporate criminality or addressing corporate recidivism might be criticized as overly aggressive, M&A as an enforcement remedy is not novel. To prevent competitive harm, the antitrust agencies already condition approval of some mergers on divestments by the acquirer. See generally U.S. Dep’t of Just. Antitrust Div., *Merger Remedies Manual*, U.S. DEP’T OF JUST., (Sept. 2020), <https://www.justice.gov/atr/page/file/1312416/download> [<https://perma.cc/KD55-XYR3>] (cataloging approaches to forced divestments in the merger-approval context). Even after a merger has closed and two companies have become integrated, antitrust agencies on occasion still remedy resulting competitive harm with forced breakups. See Menesh S. Patel, *Merger Breakups*, 2020 WIS. L. REV. 975, 990-93 (providing examples of the post-merger breakup remedy).

253. Antitrust regulators might consider extending the “failing assets” justification for horizontal mergers when a low-compliance corporate offender is acquired by a high-compliance competitor. See U.S. Dep’t of Just. & U.S. Fed. Trade Comm’n, *Horizontal Merger Guidelines*, U.S. DEP’T OF JUST. (Aug. 19, 2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> [<https://perma.cc/6M9X-ZPTF>] (outlining when antitrust agencies will credit “failing assets” justifications for mergers between competitors).

254. Under typical settlement-agreement terms, the prosecutor is already an implicit party in M&A involving probationers. See *supra* note 201 and accompanying text.

255. Cf. W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 946-53 (2019) (examining potential approaches to the incapacitation of corporate offenders).

could be displaced—either by shareholders or by the government²⁵⁶—as a result of compliance failure, individual executives at the margin would be expected to be more mindful about the effectiveness of their compliance programs. That is especially so because the reputational harm of being on the management team at a forced-sale firm could limit future employment prospects.²⁵⁷

Forced M&A is an established enforcement method, including in the banking²⁵⁸ and antitrust contexts.²⁵⁹ This path should not be taken lightly, however, lest it be abused.²⁶⁰ Its availability would give individual prosecutors career incentives to force sales to resolve corporate liability by allowing for “taking down” a corporate offender without causing immediate social harms. It is also at risk of politicized or inequitable application.²⁶¹ Given this potential for abuse, as well as the potential for economic disruption, the interagency successor-liability policy this Article calls for should treat forced sales with particular sensitivity.²⁶² Safeguards might include sign-offs by senior agency officials, engaging M&A and financial experts to assess potential unintended consequences,²⁶³ giving the offender firm an opportunity to advocate a less dramatic remedy, and, if the remedy is to be imposed, permitting ample time for a deal to be marketed, signed, and closed per market norms.

256. In some contexts, the federal government already asserts power over who may serve as a corporate officer or director. *See* 12 U.S.C. § 1818(e) (2018) (permitting bank supervisors to remove a financial institution’s officers, directors, or employees); 15 U.S.C. § 77h-1(f) (2018) (permitting SEC to bar individuals who commit securities fraud from serving as officers or directors of public companies).

257. *Cf.* Xin Dai, Feng Gao, Ling Lei Lisic & Ivy Xiyang Zhang, *Corporate Social Performance and the Managerial Labor Market*, 28 REV. ACCT. STUDS. 307 (2021) (finding a positive association between firms’ social performance and their CEOs’ subsequent ability to obtain similar or better employment opportunities).

258. For example, under the Federal Deposit Insurance Act’s prompt-corrective-action authority, banking regulators may force divestitures of undercapitalized banks. 12 U.S.C. § 1831o(f)(2)(I) (2018).

259. *See* U.S. Dep’t of Just. Antitrust Div., *Merger Remedies Manual*, *supra* note 252, pt. III (outlining principles for forced divestitures).

260. *See* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 206-09 (2016) (raising concerns over the exercise of prosecutorial discretion); Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 261-267 (1998) (framing the potential for prosecutors to engage in rent-seeking behavior as a function of the breadth of their discretion).

261. *See* sources cited *supra* note 260. *But see* Urska Velikonja, *Politics in Securities Enforcement*, 50 GA. L. REV. 17, 19 (2015) (“[Although] politics is largely irrelevant at the individual case level, political influences do shape [SEC’s] enforcement choices at the aggregate level.”). *But see also generally* Miriam H. Baer, *Corporate Compliance’s Achilles Heel*, 79 BUS. LAW. (forthcoming 2023) (on file with author) (considering the potential for politics and political polarization to affect corporate enforcement).

262. DOJ has traditionally issued guidance to prevent its components from taking actions, like opening investigations or announcing charges, that could influence upcoming elections or could be seen as doing so. *See, e.g.*, Memorandum from Loretta E. Lynch, Att’y Gen., Dep’t of Just. to all Dep’t of Just. Emps. (Apr. 11, 2016), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-election-year-sensitivities.pdf> [<https://perma.cc/5544-LLRS>]. More, DOJ requires heightened supervision around public-integrity cases. *See* U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-85.000 (2022). Similar policies would be sensible in the case of forced M&A.

263. *Cf. In re* IBP, Inc. S’holders Litig., 789 A.2d 14, 82 (Del. Ch. 2001) (ordering an unwilling M&A buyer to complete an acquisition) (“The impact of a forced merger on constituencies beyond the stockholders and top managers . . . weighs heavily on my mind. . . . I therefore approach this remedial issue quite cautiously and mindful of the interests of those who will be affected by my decision.”).

This Article introduces new practices that could promote the public interest in compliance. It is worth closing with their potential salutary effects on markets. Apart from disinhibiting criminal M&A by offering buyers the clarity of a generally applicable amnesty policy, on the buy side there could be greater demand for offenders as a form of distressed investment. Perhaps specialists would focus on turning around corporate criminals, just as other turnaround specialists focus on operational or other deficiencies.²⁶⁴ This Article has been framed around public companies with large shareholder bases, but it applies, perhaps even more so, to private companies. Private companies are unlikely to have the sorts of compliance programs and internal controls that their public peers have.²⁶⁵ In the case of private-company deals, the effects of the policies I advocate on buy-side demand might be even greater for private firms. That is because risk-allocation technologies like escrow, R&W insurance, and indemnification can be more effectively deployed in the case of concentrated, non-anonymous selling shareholders, giving buyers further protection.²⁶⁶

Conclusion

The market for used businesses has a problem: criminal successor liability serves to undermine both M&A and the public interest in compliance. There is social cost in otherwise-sound deals not happening, and especially in compliance-enhancing M&A not happening. This Article proposes several prosecutorial practices that would go a long way toward addressing these problems. These practices include imposing M&A-contingent penalties on corporate offenders, providing clear and generally applicable amnesty policies for nonculpable buyers, and, in certain cases, forcing M&A for corporate recidivists or especially serious first-time offenders. Under these approaches, criminal M&A would no longer be inhibited by the threat of prosecutors holding buyers criminally responsible for sellers' misdeeds. Indeed, the new policy would be to promote criminal M&A given its potential to effect deterrence and reform. This new direction would require pragmatic policy carveouts—including amnesties—from the doctrines underlying criminal successor liability. Together, these reforms would serve compelling public interests: fostering M&A while deterring, punishing, and reforming corporate criminals.

264. See Charles J. Cuny & Eli Talmor, *A Theory of Private Equity Turnarounds*, 13 J. CORP. FIN. 629 (2007) (theorizing the role of turnaround specialists in take-private scenarios).

265. See Jeff J. Marwil & Jerry J. Burgdoerfer, *Compliance Programs for Private Companies*, 3 CORP. COMPLIANCE & REG. NEWSLETTER 16 (Aug. 2006) (“[T]he public company has come to serve as a mentor of sorts to the private company in the arena of corporate compliance programs, offering certain ‘best practices’ that may also be useful to the privately held company, its management, and its shareholders or owners.”).

266. See *supra* note 74 and accompanying text.