

Contributing Authors

Stacy Williams
713-226-1297
swilliams@lockelord.com

Gregory S. Saikin
713-226-1534
gsaikin@lockelord.com

www.lockelord.com

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Recent DOJ Opinion Focuses on the Role of Foreign Corrupt Practices Act Due Diligence in Mergers and Acquisitions

Summary

The Department of Justice (“DOJ”) recently issued Foreign Corrupt Practices Act (“FCPA”) Opinion Procedure Release 08-02 (“Opinion”) permitting Halliburton Company to acquire a UK-based oilfield services company (“Target”) without exposing itself to immediate liability for possible pre-or post-acquisition FCPA offenses by the Target.

The Opinion essentially amounts to a preemptive deferred prosecution agreement between the DOJ and Halliburton, but without a criminal investigation or any current evidence of misconduct. While the Opinion highlights the DOJ’s willingness to take a practical approach in situations where foreign laws limit an acquiring entity’s ability to conduct pre-acquisition FCPA due diligence, the Opinion requires Halliburton (if it acquires the Target) to complete a full-blown investigation to discover and disclose any possible wrongdoing by the Target. Any further requests to the DOJ in similar situations could be judged by the procedures set forth in this Opinion.

Background

Halliburton has been involved in the U.K. bidding process to acquire the Target. Pursuant to the U.K. Takeover Code, Halliburton has no legal ability to require a specified level of anti-corruption due diligence or to insist upon remedial measures until after completion of the proposed acquisition.

To address whether it could be liable for pre-or post-acquisition FCPA offenses by the Target, Halliburton submitted a request for an opinion from the DOJ regarding the extent of Halliburton’s FCPA liability in the event it discovers that the Target committed FCPA violations before or immediately after the proposed acquisition.

Opinion

In general, the DOJ agreed to defer possible action against Halliburton for 180 days after its closing of the proposed acquisition of the Target, provided that Halliburton satisfies, among other things, a post-closing and remediation plan (“Closing Plan”). The Closing Plan includes the following requirements:

- Immediately after closing, Halliburton will disclose to the DOJ any information concerning the Target’s possible FCPA violations which have been made available to Halliburton;
- Within 10 business days after closing, Halliburton will present to the DOJ a comprehensive, risk based FCPA and anti-corruption due diligence work plan. The work plan must address, among other things, the use of agents and any commercial dealings with state-owned customers. Halliburton’s efforts set forth in the work plan will be organized into high, medium, and low risk areas. High risk due diligence must be completed in 90 days, medium risk in 120 days, and low risk in 180 days;
- Halliburton will retain external counsel and third-party consultants, including forensic accountants, to conduct FCPA and anti-corruption due diligence. This process should include, in all appropriate locations, an examination of relevant Target records, including an e-mail and accounting records review, and interviews of key Target personnel;
- All agents of the Target must complete new contracts with anti-corruption provisions;
- Immediately after closing, Halliburton will institute its own Code of Business

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Conduct for the Target with anti-corruption policies and procedures;

- Within 60 days of the closing, Halliburton will provide FCPA and anti-corruption training to all Target officers and all Target employees whose positions or job responsibilities warrant such training;
- Halliburton will disclose to the DOJ all FCPA corruption, and related internal control and accounting issues that it uncovers during the course of its 180-day post-closing due diligence; and
- Halliburton will complete any due diligence and remediation related to Target, including completing its investigation of any issues that are identified within the 180-day period, by no later than one year from the date of closing.

As to pre-acquisition conduct by the Target, the Opinion expressly recognized the restrictions of the U.K. bidding process. Accordingly, the DOJ stated that it does not intend to criminally pursue Halliburton for pre-acquisition conduct by the Target, provided that the conduct is disclosed to the DOJ during the 180-day period and the company meets all other Closing Plan requirements.

As to post-acquisition conduct by the Target, the DOJ again realized the practical impediments to Halliburton discovering and remediating possible corrupt practices occurring immediately after closing. Accordingly, the DOJ agreed to defer a possible enforcement action against Halliburton for potential post-acquisition violations committed by the Target during the 180-day period after closing provided that Halliburton satisfies the Closing Plan. This includes disclosing such post-acquisition conduct to the DOJ within 180 days of closing and remediating any issues uncovered during the 180-day period by no later than one year from the date of closing.

In concluding the Opinion, the DOJ stated that it reserved the right to move criminally against Halliburton with respect to any

material breaches of the Closing Plan or if a Halliburton employee or agent knowingly plays a role in approving or making any improper payment by the Target. In addition, the DOJ stated that the Opinion does not protect Halliburton for any conduct occurring after the 180-day post-closing period and the Target (including subsidiaries and employees) retains liability for any past and future FCPA violations. Furthermore, despite the unique circumstances here, the DOJ reiterated that companies should normally conduct thorough FCPA pre-acquisition due diligence.

To view the Opinion in its entirety, please click on the following link:

<http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html>

ABOUT THE AUTHORS

Stacy Williams is a partner in Locke Lord Bissell & Liddell's Houston office where he concentrates on corporate internal investigations, white collar criminal defense, and antitrust litigation.

Greg Saikin is an associate in Locke Lord Bissell & Liddell's Houston office where he concentrates on white collar criminal defense and internal investigations.