

DOJ Issues Opinion on Post-acquisition Due Diligence Requirements

BY TIMOTHY L. DICKINSON AND ROBERTO F. FACUNDUS

On June 13, 2008, the Department of Justice (“**DOJ**”) issued a Foreign Corrupt Practices Act (“**FCPA**”) opinion procedure release concerning the possible acquisition of a publicly traded United Kingdom corporation by Halliburton Company (“Halliburton”). Due to U.K. laws preventing extensive pre-acquisition due diligence and the presence of other competitive bidders, Halliburton stated to the DOJ that it did not have enough time or access to information necessary to complete full FCPA due diligence. Accordingly, Halliburton requested a DOJ opinion to minimize the possibility of prosecution should it be successful in acquiring the target company.

Under the opinion procedure, companies and individuals request the DOJ’s opinion regarding proposed business conduct or a proposed transaction before taking action. It can be a useful guide to businesses to avoid FCPA violations in advance of any improper activity. Despite its utility, the opinion program is infrequently used with only a few opinion requests per year. To promote the program, the DOJ encourages companies to request an opinion when faced with issues that may create FCPA liability.

This Halliburton opinion is significant because it gives a detailed account of an adequate post-acquisition due diligence work plan and it effectively allows a 180 day post-acquisition grace period for improper conduct disclosed to the DOJ. However, despite the grace period for the acquirer,

it does not exempt the target from any pre- or post- acquisition liability. It is also significant because there have been very few DOJ opinions related to a potential acquisition since 1980 and none with this much detail.¹

Circumstances Surrounding the Request

Halliburton was involved in a bidding contest to acquire a U.K. based oil and gas well management company with over 4,000 employees operating in over fifty countries, including the United States. A competitor consortium had already submitted an unconditional bid for the target. U.K. laws prevented Halliburton from bidding anything other than a higher valued, unconditional bid. Therefore, Halliburton was prohibited from conditioning its bid on the successful completion of FCPA due diligence or remediation. Furthermore, Halliburton had entered into a confidentiality agreement that prevented it from disclosing to the DOJ whether or not it had discovered any FCPA issues during its pre-acquisition due diligence.²

In its request to the DOJ, Halliburton sought answers to the following three questions: (1) whether the proposed transaction itself would violate the FCPA; (2) whether it would inherit FCPA liability for pre-acquisition conduct of the target; and (3) whether it would be held liable for post-acquisition conduct of the target disclosed to the DOJ within 180 days of closing.

Post-Closing Plan

Halliburton offered the following post-closing plan, which was largely accepted by the DOJ:

- Immediately following closing, Halliburton will disclose any pre-closing FCPA issues already identified.
- Within 10 business days of closing, Halliburton will present an FCPA due diligence work plan addressing third parties, state-owned customers, joint ventures, customs and immigration matters, tax matters, and any governmental licenses or permits.
- This work plan will organize the due diligence into high, medium, and low risk areas. Halliburton will report the results of its high risk issues within 90 days after closing, medium risk issues within 120 days after closing, and low risk issues within 180 days after closing.
- Halliburton will have one year from the date of closing to complete due diligence and remediation of any issues discovered within 180 days after closing.
- Halliburton will retain external counsel and consultants to conduct the due diligence which shall include the examination of all relevant records, e-mail messages, financial and accounting records, and interviews of relevant individuals.
- All third parties of the target who will continue to work for the target are required to sign new contracts with Halliburton. Third parties who will not continue to work for the target will be terminated as expeditiously as possible.
- Upon closing, Halliburton will immediately impose its Code of Business Conduct and specific FCPA policies and procedures on the target. It will train all high level and high risk personnel on the FCPA within 60 days after closing, and all other personnel within 90 days after closing.
- Halliburton will complete any additional steps the DOJ deems necessary.

DOJ Opinion

Based on the facts as presented and assuming Halliburton completes the steps detailed in its post-closing work plan, the DOJ stated that it would not take any enforcement action for: (1) the acquisition of the target; (2) any pre-acquisition conduct of the target disclosed within 180 days after closing; and (3) any post-acquisition conduct disclosed within 180 days after closing, that does not continue beyond the 180 day period and is fully investigated and remediated within one year from the date of closing.

The DOJ did, however, reserve the right to take enforcement action with respect to (a) any FCPA violations that are not disclosed; (b) any FCPA violations where any Halliburton employee or agent knowingly participated in the unlawful conduct; and (c) any issues identified within 180 days after closing, but not investigated to a conclusion within one year of closing. The DOJ further reserved the right to take enforcement action against the target, its subsidiaries, and affiliates for any FCPA violations, before or after the acquisition. The DOJ also acknowledged that any unlawful conduct of the target disclosed to the DOJ would qualify as a “voluntary disclosure” and may be considered by the DOJ when deciding whether or not to investigate the target.

Conclusion

While the DOJ takes great effort to limit the application of this opinion to the facts of the Halliburton acquisition bid, this post-closing due diligence plan should be a key consideration for any company considering or involved in the acquisition of a non-U.S. based company. It also shows that the DOJ is willing to consider practical implications to support the competitiveness of U.S. businesses forced to operate under foreign guidelines that may impact compliance with U.S. regulations.

[Click here to view DOJ Opinion Procedure Release 2008-02 \(June 13, 2008\).](#)



If you have any questions regarding these developing issues, please contact any of the following Paul Hastings lawyers:

Washington, DC

Timothy L. Dickinson
202-551-1858
timothydickinson@paulhastings.com

Roberto F. Facundus
202-551-1832
robertofacundus@paulhastings.com

¹ Other DOJ opinions related to acquisitions include: 2008-01 (January 15, 2008), 2004-02 (July 12, 2004), and 2003-01 (January 15, 2003).

² In a footnote, the DOJ discourages companies that wish to receive an opinion release from entering into a confidentiality agreement limiting information that can be provided to the DOJ.