DOJ RELEASES OPINION ADDRESSING ACQUIRERS' FCPA LIABILITY FOR CONDUCT OF ACQUIREE WHERE THE ABILITY TO CONDUCT PRE-CLOSING DUE DILIGENCE IS RESTRICTED

The United States Department of Justice (the "DOJ") recently issued an opinion procedure release regarding the liability of acquirers for the conduct of acquired companies under the Foreign Corrupt Practices Act (the "FCPA" or the "Act").

Under the DOJ's advisory opinion procedures, companies are permitted to obtain an opinion from the department as to whether a proposed transaction or course of conduct would "for purposes of the Department of Justice's present enforcement policy, violate [the anti-bribery provisions of the FCPA]." An opinion issued by the DOJ confirming that the proposed conduct conforms with the DOJ's enforcement policies creates a rebuttable presumption that the requestor's conduct is in compliance with the FCPA.

In Opinion Procedure Release No. 08-02,[1] issued on June 13, 2008, the DOJ considered a request by Halliburton, a U.S. issuer, as to its potential FCPA liability in connection with a proposed acquisition of Target, a publicly traded company based in the United Kingdom. Halliburton represented that due to legal restrictions in effect in the United Kingdom, Halliburton would not have sufficient time or sufficient access to information to enable it to conduct a full FCPA due diligence investigation of Target prior to closing. In this case, Target's Board of Directors had already recommended that its shareholders accept an unconditional bid submitted by Halliburton's competitor. Under U.K. bidding laws, Target was required to provide Halliburton with the same information that was given to Halliburton's competitor, but it was not required to provide any additional information or agree to any additional conditions. Therefore, if Halliburton were to condition its bid on the completion of an FCPA compliance investigation or on the remediation of any FCPA concerns prior to closing, Target would be permitted to accept the unconditional bid of Halliburton's competitor even if Halliburton offered a significantly higher price.

Additionally, Halliburton represented to the DOJ that in order to be a viable candidate for the bid, it was required to sign a confidentiality agreement with Target that effectively prevented Halliburton from disclosing information it obtained during the bidding process to the DOJ.[2]

Halliburton sought an opinion from the DOJ as to (1) whether the proposed acquisition of Target would in itself violate the FCPA, (2) whether Halliburton would be held responsible for the FCPA liabilities of Target with regard to conduct occurring prior to the acquisition, and (3)

[1] Available at http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html.

[2] In a footnote to the release, the DOJ noted that in the future companies wishing to take advantage of the opinion release process should refrain from entering into any agreement that might limit the information that could be provided to the DOJ.

whether Halliburton would be held liable for the post-acquisition conduct of Target to the extent that this conduct occurred prior to Halliburton's completion of its FCPA due diligence investigation and was disclosed to the DOJ within 180 days after closing.

In connection with seeking an opinion from the DOJ, Halliburton represented that, if successful in the acquisition, it would meet with DOJ officials immediately after the closing to disclose any information it had learned pre-closing that supported any FCPA, compliance, or related internal controls and accounting issues. Halliburton also represented that it would conduct an extensive post-closing FCPA due diligence investigation subject to significant review and oversight by the DOJ. Specifically, Halliburton represented that within ten days of the closing, it would present to the DOJ a "comprehensive, risk-based FCPA and anti-corruption due diligence work plan," covering a wide range of potential FCPA problem areas, and prioritized according to high, medium, and low level risks. Halliburton stated that it would report to the DOJ the results of its high, medium, and low risk investigations within 90, 120, and 180 days, respectively. Halliburton also agreed to provide periodic progress reports throughout this period, to disclose all FCPA, corruption, and internal controls and accounting issues uncovered during its investigation, and to take "any additional steps the Department deems necessary to complete the due diligence and remediation plan" subsequent to the 180-day period. Halliburton further represented that any matters remaining open after the 180-day period would be reported to the DOJ and undertaken on an expedited basis, and that in any event the investigation and remediation would be complete within one year from the date of closing. Halliburton stated that it would retain external counsel and third-party agents, including forensic accountants, to conduct the investigation and that the investigation would include records review, e-mail review, and employee interviews.

In addition to providing a timeline for disclosure, Halliburton stated that it would require all of Target's third-party agents to sign contracts containing FCPA provisions, and would provide FCPA training to all sales, management, and finance department employees within 60 days of closing, and to all other appropriate employees within 90 days. Halliburton advised that Target would remain a wholly owned subsidiary of Halliburton until the conclusion of any investigation by the DOJ.

The DOJ advised first that Halliburton's acquisition of Target would not in and of itself create FCPA liability for Halliburton. The DOJ emphasized that because Target is a public company, any amount paid by Halliburton in the acquisition would go to Target's shareholders, and not to Target itself. According to the DOJ, this reduced or eliminated the chance that the amount paid by Halliburton in the acquisition could be used to make payments under any of Target's pre-existing unlawful contracts or agreements. The DOJ further noted the unlikelihood that any of Target's shareholders had obtained their shares corruptly, and the impracticality, in any event, of determining the identity of public shareholders and how they acquired their shares.

Second, the DOJ advised that in light of the particular restrictions of the U.K. bidding process, and provided that Halliburton proceed in accordance with the plan described above, it did not

intend to take enforcement action with respect to any pre-acquisition conduct by Target that is disclosed to the DOJ within 180 days of closing.

Third, with regard to the post-acquisition conduct of Target, the DOJ emphasized that “an acquiring company may be held liable as a matter of law for any unlawful payments made by an acquired company or its personnel after the date of acquisition.” The DOJ recognized, however, that in this case the bidding restrictions of the U.K. would significantly impede Halliburton’s ability to prevent unlawful conduct from occurring in the period immediately following the acquisition. Therefore, the DOJ stated that it did not intend to take enforcement action against Halliburton for Target’s violations of the anti-bribery provisions of the FCPA during a period of 180 days from the date of closing, provided Halliburton (1) discloses the conduct to the DOJ during the 180-day period, (2) stops and remediates the conduct either within the 180-day period or, if the DOJ determines that this is not practical, as soon as reasonably possible thereafter, and (3) completes its due diligence and remediation efforts, including its investigation of all issues identified during the 180-day period, within one year of the date of closing. The DOJ reserved the right to take action with regard to any conduct not disclosed to the DOJ within 180 days of the date of closing, any issues identified within this period but not investigated to conclusion within one year, and any FCPA violations committed by Target at any time “where any Halliburton employee or agent knowingly participates in the unlawful conduct.”

Although the DOJ’s opinion release appears limited to a specific set of facts in which, as a result of foreign legal restrictions on the bidding process, the acquirer’s ability to conduct FCPA due diligence prior to closing is limited, the release has broader implications insofar as it sets forth what would be, in the DOJ’s view, a baseline model for FCPA due diligence in the context of an acquisition. Key elements of a due diligence investigation sufficient to protect an acquirer from successor liability for FCPA violations should include: (1) a comprehensive, risk-based due diligence investigation utilizing external counsel and forensic accountants, (2) a review of key employee e-mails as well as relevant financial and accounting records and employee interviews, and (3) “real time” disclosure to the DOJ as to the results of the due diligence investigation.

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If you have any questions concerning the foregoing or would like additional information, please contact Martin J. Weinstein (202-303-1122, mweinstein@willkie.com), Robert J. Meyer (202-303-1123, rmeyer@willkie.com) or James C. Dugan (212-728-8654, jdugan@willkie.com) of Willkie Farr & Gallagher LLP's Compliance and Enforcement Practice Group, or the attorney with whom you regularly work.

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June 27, 2008.

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