



CORPORATE WAVELENGTH

The Corporate Governance, Risk, and Compliance Web Series

Brought to you by Corporate Secretary and Foley & Lardner LLP

The Halliburton FCPA Opinion: U.S. Department of Justice Guidance on M&A Due Diligence

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Today's Speakers

David Simon

- Partner of Foley & Lardner and is the Vice Chair of the Firm's Litigation Department
- Member of Foley's Securities Enforcement & Litigation and White Collar Defense practice
- Devotes the majority of his practice to the defense of government enforcement actions and to corporate internal investigations
- Represented clients in a variety of Foreign Corrupt Practices Act matters, including compliance counseling, development of compliance programs, global compliance reviews, and voluntary disclosures to the Department of Justice and the Securities and Exchange Commission



Today's Speakers

David Snively

Senior Vice President, Secretary and General Counsel with Monsanto

- Leads Monsanto's legal organization and serves as Secretary to the Board
- Successfully directed novel patent and antitrust litigation involving intellectual property in the field of genetic biotechnology and participated in a number of important cases for Monsanto
- Has held an array of positions in Monsanto's Law Department, including litigation, environmental and intellectual property law



Today's Moderator

Brendan Sheehan

Executive Editor, *Corporate Secretary*

- Editorial mission: To provide innovative and insightful analysis for corporate secretaries, general counsel and compliance officers
- *Corporate Secretary* is the leading source of information on matters relating to the SEC, Sarbanes-Oxley, D&O insurance, shareholder communications, proxy solicitation and voting, director education and compensation, listing requirements and entity management



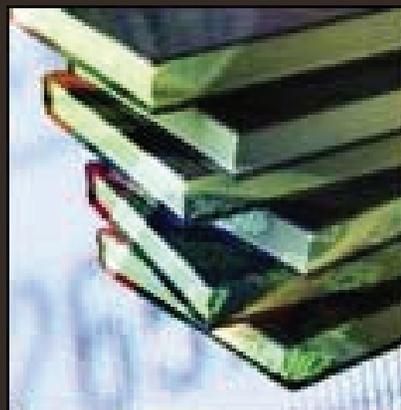
Agenda

- FCPA Overview
- FCPA Issues That Arise in M&A Transactions
- The Halliburton DOJ Advisory Opinion
- FCPA Due Diligence – Best Practices
- Strategies for Dealing With FCPA Issues Discovered Through Due Diligence



FCPA Overview

- Antibribery Provisions
- Books and Records and Internal Control Provisions





FCPA Overview

- **Antibribery Provisions**
 - Criminalizes the payment or offering of a payment of money or anything of value to a foreign official anywhere in the world where the purpose of the payment is to influence an official decision or secure an improper advantage in order to obtain or retain business
 - Broad Elements
 - Anything of Value
 - Foreign Official
 - Obtain or Retain Business
 - Third-Party Payment Provisions
 - Jurisdiction



FCPA Overview

- **Books and Records and Internal Control Provisions**
 - Requires a company with stock traded on a U.S. exchange to meet certain standards regarding accounting practices, books and records, and internal controls



FCPA and M&A Transactions

- York International Corp. / Johnson Controls, Inc.
 - FCPA antibribery and books and records enforcement action concerning conduct in the Middle East, including illegal kickback payments under the U.N. Oil for Food Program
 - Johnson Controls, Inc. was a party to the deferred prosecution agreement with compliance obligations
- ABB Entities
 - Pre-sale due diligence uncovered improper payments in several countries
 - Joint voluntary disclosure and commitment to conduct broader due diligence delayed divestiture one year
 - No enforcement against buyer group for pre-acquisition conduct based on compliance representations (DOJ FCPA Opinion Procedure Release No. 04-02 (July 12, 2004))



FCPA and M&A Transactions

- General Electric / InVision
 - Pre-merger due diligence revealed possible FCPA issues
 - Voluntary disclosure and joint internal investigation caused the acquisition to be delayed
 - Separate DOJ agreement with GE imposing compliance obligations
- Lockheed Martin Corp. / Titan Corp.
 - Buyer abandoned the deal after target missed a buyer imposed deadline to resolve FCPA issues



FCPA and M&A Transactions

- Deloitte Survey on International Business Transactions:
 - 87% always or frequently conduct background checks before international M&A activity; 67% always do so
 - 67% always or frequently conduct background checks before international joint venture activity; 49% always do so
 - 57% have restructured or renegotiated potential deals based on information uncovered during background checks; 70% have pulled out of a deal

Source: "Look Before You Leap: Investigative Due Diligence in International Business Relationships." (available at <http://www.deloitte.com/dtt/whitepaper/0,1017,sid%253D2007%2526cid%253D150086,00.html>)



Polling Question

Does your company conduct specific FCPA due diligence before any international M&A activity or equity investment?

- (A) Always
- (B) Usually
- (C) Sometimes
- (D) Never



Polling Question

Has your company's FCPA due diligence resulted in the renegotiation, restructuring or termination of an international transaction?

(A) Yes

(B) No



Halliburton Advisory Opinion

- DOJ FCPA Opinion Procedure Release 08-02 (June 13, 2008)
 - (available at <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html>)
- Context:
 - Halliburton contemplating making a bid for a UK public company (one which operated in over fifty countries, including FCPA high-risk countries)
 - Key factor: Under UK law, the target was not allowed to provide certain information to Halliburton
 - Thus, Halliburton could not conduct thorough pre-closing FCPA due diligence
 - Also, under the terms of a confidentiality agreement entered into with the target, Halliburton could not disclose to DOJ pre-closing any problematic conduct



Halliburton Advisory Opinion

- Halliburton's Post-Closing Plan
 - Meet with DOJ to disclose whether information made available to it during negotiations suggests any FCPA issues
 - Within 10 business days of closing, present to DOJ a comprehensive, risk-based FCPA due diligence work plan (i.e., agents and other third parties, SOE customers, government licenses and permits, etc.)
 - Report to DOJ results of
 - high-risk due diligence within 90 days of closing
 - medium-risk due diligence within 120 days of closing
 - low-risk due diligence within 180 days of closing
 - Retain external counsel and third-party consultants to conduct FCPA due diligence



Halliburton Advisory Opinion

- Halliburton Post-Closing Plan
 - Sign new contracts with target's agents and other third-parties incorporating FCPA representations and warranties and audit rights / terminate unwilling agents and other third-parties
 - Impose and implement at target its own Code of Business Conduct and FCPA policies and procedures and train all target employees within 60-90 days of closing (depending on position)
 - Disclose to DOJ all FCPA issues uncovered during the due diligence
 - Agree to hold target as a wholly-owned subsidiary for so long as DOJ investigates target and its employees/agents, etc.



Halliburton Advisory Opinion

- DOJ's Opinion
 - No enforcement action against Halliburton based on:
 - acquisition of the target in and of itself
 - any pre-acquisition conduct by target disclosed to DOJ within 180 days of closing
 - any post-acquisition conduct by target disclosed to DOJ within 180 days of closing
 - Reserved the right to take enforcement action against Halliburton with respect to:
 - Any FCPA violations committed by target during the 180 day period that are not disclosed to DOJ
 - Any FCPA violations committed by target where any Halliburton employee or agent knowingly participates in the conduct
 - Any issues identified within the 180 day period which are not investigated to conclusion within one year of closing



Halliburton Advisory Opinion

- Note: Proposed Halliburton transaction never went through
- Lessons:
 - Successor liability issues are best managed with transparent, comprehensive due diligence plans
 - Comments from Mark Mendelsohn
 - DOJ expects that companies will do what they can pre-closing – expectation of “significant, focused, risk-based efforts to identify corruption issues”
 - Halliburton opinion was driven by legitimate legal limitations on pre-closing due diligence and Halliburton’s aggressive post-closing plan to “scrub” target company



FCPA Due Diligence – Best Practices

- DOJ FCPA Opinion Procedure Release No. 08-01 (January 15, 2008)
 - (available at <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html>)
 - U.S. issuer requested opinion with respect to its intended majority investment in a target owned by an individual deemed to be a “foreign official”
 - Issuer disclosed extensive due diligence steps taken, including:
 - background investigative reports of individual
 - engagement of consultant in foreign country to advise on local due diligence capabilities
 - engagement of outside counsel and a forensic accounting firm
 - disclosure of relevant facts to foreign government agencies



FCPA Due Diligence – Best Practices

- DOJ opinion:
 - No enforcement action with respect to the proposed transaction given the reported due diligence procedures, and
 - representations and warranties from the individual regarding past and future anti-corruption compliance
 - contractual termination rights



FCPA Due Diligence – Best Practices

1. Consider Target's FCPA Risk Profile:

- Is it located in/does it do business in high-risk countries?
- Is it in an industry that deals extensively with foreign governments? Is it highly regulated?

2. Evaluate the Target:

- Determine whether it has special FCPA risk because of its ownership/reputation.
 - Commission a report on the Target/prospective partner by a reputable investigative firm
 - Consult with U.S. Commerce Department / State Department / Embassy
 - Research names of all relevant persons entities involved with Target or related to Target



FCPA Due Diligence – Best Practices

2. Evaluate the Target (con't):

- Determine whether Target's operations enhance FCPA risk:
 - Review Target's relationships with third parties (agents, vendors, distributors, etc.)
 - Review dealings with any foreign government customers or commercial dealings with state-owned customers
 - Review tax, customs, immigration matters / government licenses, permits
 - Review political activity/community development programs/charitable activities
 - Determine whether Target has anti-corruption compliance program and how implemented
 - Evaluate Target's financial and accounting controls



FCPA Due Diligence – Best Practices

3. Further investigation of FCPA “red flags”
 - Consider engaging counsel or other investigative consultant to conduct interviews and to review relevant documents

4. Document FCPA due diligence efforts
 - Consider having counsel or consultant review due diligence program in high-risk transactions



FCPA – M&A Transactions “Take-Aways”

- Can impact timing and successful completion of transaction
- Can impact final purchase price
- Compliance obligations will be imposed on buyer
- Something of concern not just to buyers – future targets can better position itself for a transaction with pre-deal FCPA compliance policies and procedures



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Thank you for your participation

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