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DOJ's Second Opinion Release of 2014: Is DOJ Evolving Away from the Halliburton Opinion Standard?

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The Department of Justice ("DOJ" or the "Department") just issued its most recent FCPA Opinion Release, only the second in 2014.[1] The Requestor, a publicly traded U.S. consumer products company, sought an opinion as to whether DOJ would take enforcement action against the Requestor based on the pre-acquisition conduct of its acquisition target (the "Target Company"). In the brief opinion release, the Department concludes that the acquisition of a company does not create FCPA liability where none existed before. In other words, if conduct was beyond the jurisdictional reach of the FCPA before acquisition, later acquisition by a U.S. company does not retroactively create jurisdiction that covers the past conduct.

This conclusion is both unsurprising and entirely consistent with *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, released in November 2012.[2] But perhaps more interesting than what DOJ does say in Opinion Release 14-02 (the "Opinion") is what DOJ does *not* mention: Opinion Release 08-02 (often referred to as the "Halliburton Opinion").[3] Even when discussing the post-acquisition integration approach of the Requestor, the seminal Halliburton Opinion is not mentioned, nor are the Halliburton Opinion's onerous time limitations familiar to many veteran mergers-and-acquisitions attorneys. In its place are multiple references to "as quickly as practicable" in terms of the timing of integration, and a recognition that each deal is unique and needs a tailored approach. For close observers of this area, this should not be a surprise, but rather a reflection of the continuing evolution of the Department's approach to FCPA compliance when it comes to mergers and acquisitions, and its move away from the strictures of the six-year-old Halliburton Opinion.

THE REQUESTOR'S DUE DILIGENCE FINDINGS

The Requestor found during pre-acquisition diligence that the Target Company had made a number of potentially improper payments to foreign government officials, and that there were substantial weaknesses in the Target Company's accounting and recordkeeping.[4]

Specifically, the Requestor uncovered over $100,000 in apparently improper transactions. The vast majority involved payments to government officials to obtain permits and licenses, while others involved gifts and cash

[1] U.S. DEP'T OF JUSTICE, FCPA Op. Proc. Rel. No. 14-02 (Nov. 7, 2014) [hereinafter Op. Rel. 14-02], *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-02.pdf.

[2] *See* U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012) [hereinafter *FCPA Resource Guide*] at 28, *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

[3] U.S. DEP'T OF JUSTICE, FCPA Op. Proc. Rel. No. 08-02 (June 13, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

[4] Op. Rel. 14-02, *supra* note 1, at 1-2.

donations to government officials, charitable contributions and sponsorships, and payments to members of the state-controlled media to reduce negative publicity.[5]

The due diligence review also revealed significant recordkeeping deficiencies at the Target Company. The vast majority of the gifts and cash donations to government officials, as well as the charitable contributions, were not supported by documentary records; expenses were improperly and inaccurately classified in the Target Company's books; and the accounting firm the Requestor hired to assist with the diligence was unable to physically locate or identify many of the underlying records. Moreover, the Target Company had not developed or implemented a written code of conduct or other compliance policies and procedures.[6]

Notably, however, the Requestor had determined, and represented to DOJ, that none of the potentially improper pre-acquisition payments were subject to the jurisdiction of the United States.[7]

THE OPINION

In the Opinion, DOJ took the position that it would not take enforcement action as to the pre-acquisition conduct of the Target Company where there was no FCPA jurisdiction. As DOJ noted in the Opinion, this position is consistent with the guidance set forth in the *FCPA Resource Guide*, in which both DOJ and the Securities and Exchange Commission explained:

> Successor liability does not [] create liability where none existed before. For example, if an issuer were to acquire a foreign company that was not previously subject to the FCPA's jurisdiction, the mere acquisition of that foreign company would not retroactively create FCPA liability for the acquiring issuer.[8]

Despite the unsurprising outcome of the Opinion, however, there are still lessons to be learned from the Opinion.

DOJ'S EVOLVING EXPECTATIONS IN M&A POST-ACQUISITION INTEGRATION: ADDING FLEXIBILITY TO A PREVIOUSLY INFLEXIBLE STANDARD

Perhaps what is most interesting about the Opinion is that it does not even mention Opinion Release 08-02—the Halliburton Opinion.[9] The Halliburton Opinion involved circumstances in which pre-acquisition diligence was limited. In that context, Halliburton set forth an aggressive schedule for a post-acquisition corruption risk audit and disclosures to the government, with specific timetables for the review, and sought assurances from DOJ that it would not take enforcement action based on pre-acquisition conduct under those circumstances.

In the compliance community, the Halliburton Opinion was embraced as representing DOJ's expectations when it came to anti-corruption due diligence in the M&A context. This remained the prevailing view for several years.

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[5] *Id*. at 2.

[6] *Id*.

[7] *Id*. at 1-2; *see id*. at 3 ("Assuming the accuracy of Requestor's representations, none of the potentially improper pre-acquisition payments by Seller or the Target Company was subject to the jurisdiction of the United States.").

[8] *FCPA Resource Guide*, *supra* note 2, at 28.

[9] *Supra* note 3.

But in the *FCPA Resource Guide*, DOJ underscored that Halliburton's aggressive schedule and reporting requirements were appropriate because Halliburton *was a unique situation*, where thorough pre-acquisition diligence was not an option and yet Halliburton was seeking a non-enforcement commitment from DOJ sight unseen.[10] And thus, in the *FCPA Resource Guide*, as well as in resolution agreements over the past couple of years, DOJ has moved away from the aggressive schedule set forth in the Halliburton Opinion, and toward a more flexible position.[11] Consistent with the recent move away from the strictures of the Halliburton Opinion, in Opinion 14-02, DOJ reiterated the position in the *FCPA Resource Guide*, specifically that:

> [T]he Department encourages companies engaging in mergers and acquisitions to (1) conduct thorough risk-based FCPA and anti-corruption due diligence; (2) implement the acquiring company's code of conduct and anti-corruption policies as quickly as practicable; (3) conduct FCPA and other relevant training for the acquired entity's directors and employees, as well as third-party agents and partners; (4) conduct an FCPA-specific audit of the acquired entity as quickly as practicable; and (5) disclose to the Department any corrupt payments discovered during the due diligence process.[12]

Thus, it is becoming increasingly clear that DOJ's expectations have moved away from a strict, aggressive schedule, and toward an anti-corruption risk audit and compliance program implementation that are conducted "as quickly as practicable."[13] Indeed, while the Department was explicit that it expressed "no view as to the adequacy or reasonableness of the Requestor's integration of the Target Company," nevertheless, the Department recognized that not all M&A transactions are the same.[14] This should be welcome news for transactional lawyers who have struggled to meet the perceived "gold standard" of the Halliburton Opinion in complex, cross-border deals.

Here, DOJ helpfully noted that the circumstances of each deal are "unique and require specifically tailored due diligence and integration processes."[15] Highlighting the Department's recognition that the unique circumstances that gave rise to the Halliburton Opinion and its timeline for integration—which many practitioners have called

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[10] Halliburton and its then-subsidiary, KBR, Inc. (and Kellogg Brown & Root LLC), were also embroiled in a major FCPA investigation by DOJ and SEC, which resulted in the second-largest criminal fine and disgorgement in FCPA enforcement history just eight months later. Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), ***available at*** http://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* https://www.sec.gov/news/press/2009/2009-23.htm.

[11] *FCPA Resource Guide*, *supra* note 2, at 29 (differentiating between M&A Opinion Procedure Release Requests and simple M&A Risk-Based FCPA Due Diligence and Disclosure); *see, e.g.*, *In re Bio-Rad Laboratories, Inc.*, Non-Prosecution Agreement (Nov. 3, 2014) at B-7 ¶¶ 16-17 ("The Company will ensure that the Company's compliance code, policies, and procedures regarding the anti-corruption laws apply *as quickly as is practicable* to newly acquired businesses or entities merged with the Company and will promptly: a. train the directors, officers, employees, agents, and business partners consistent with Paragraph 8 above on the anti-corruption laws and the Company's compliance code, policies, and procedures regarding anti-corruption laws; and b. where warranted, conduct an FCPA-specific audit of all newly acquired or merged businesses *as quickly as practicable*.") (emphasis added); *In re Tyco Int'l, Ltd.*, Non-Prosecution Agreement (Sept. 2012) at B-7 ¶¶ 16-17 (same); *United States v. Data Systems & Solutions LLC*, No. 12-cr-00262 (E.D. Va. June 18, 2012) at C-6 ¶ 13-14 (same).

[12] Op. Rel. 14-02, *supra* note 1, at 3-4.

[13] *Supra* note 11.

[14] Op. Rel. 14-02, *supra* note 1, at 3.

[15] *Id*.

draconian— may not be applicable to other deals, DOJ specifically underscored that the "exact timeline" for integration will depend on the particular aspects of a given transaction.[16] This is the most important takeaway from an otherwise pedestrian opinion release.[17]

While pre-acquisition FCPA due diligence has now become commonplace in M&A transactions, the continuing risk of post-acquisition FCPA violations demands a thoughtful and robust integration plan. DOJ and SEC have been very clear about this for years. Although the Department appears to be embracing greater flexibility depending upon the specific situation, companies need to ensure that, whatever timeline and processes they are pursuing to integrate newly acquired or merged companies, those plans are "specifically tailored" to the particular aspects of the deal. So while there seems to be an increased appreciation by DOJ for the need for flexibility, companies should not misinterpret such flexibility for reduced overall scrutiny. Said differently, even if the Halliburton Opinion is no longer the perceived touchstone it once was, companies must still, as quickly as practicable, properly assess risk, implement codes of conduct and anti-corruption policies, properly train employees (and agents where appropriate), and otherwise implement effective internal accounting controls and compliance programs.

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[16] *Id.*

[17] It is also worth noting the length of time it took the Requestor to get the requested Opinion from DOJ. The request was originally submitted back in April, but the Department requested additional information on three occasions, which delayed the release until November—more than six months after the original request. At first glance, this timeframe would appear to run counter to the implementing regulations that outline the opinion release procedure, which state that the Department must respond to a request by issuing an opinion within 30 days. 28 C.F.R. § 80.8. But those regulations also make clear that the 30-day clock does not begin to run until the submission is complete. *Id.* ("Should the Department request additional information, the Department's response shall be made within 30 days after receipt of such additional information."). As a result, the time from first submission to final opinion is often well beyond the 30-day period. To reduce the amount of delay, potential opinion requestors should consider engaging with the Department in advance of submitting an opinion request to ensure it is as complete as possible at the time it is initially filed. Nevertheless, this potentially lengthy period of back-and-forth with the Department should be part of the calculus of any company considering such an opinion request, particularly in the M&A context.

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