

The Royal Wedding and the End of the ‘Halliburton’ Opinion Release

Today is a Royal wedding in England and in honor of the happy couple and the English House of Windsor we will take a look at the Foreign Corrupt Practices Act (FCPA) in the context of a merger and acquisition (M&A) of a British company.

Until recently, many FCPA practitioners had based decisions in the M&A context on Department of Justice’s (DOJ) Opinion Release, 08-02 (08-02), which related to Halliburton’s proposed acquisition of the UK entity, Expro. However, the recently released Deferred Prosecution Agreement (DPA) of Johnson & Johnson (J&J) may have changed the perception of practitioners regarding what is required of a company in the M&A arena related to FCPA due diligence, both pre and post-acquisition. In this post we will review the genesis of 08-02, the risk based approach that it advocated and the vigorous time frames, which it set forth, to accomplish the agreed to compliance investigations and opine on how these may have changed.

08-02 began as a request from Halliburton to the DOJ from issues that arose in the pre-acquisition due diligence of the target company Expro. Halliburton had submitted the following request to the DOJ specifically posing these three questions: (1) whether the proposed acquisition transaction itself would violate the FCPA; (2) whether through the proposed acquisition of Target, Halliburton would "inherit" any FCPA liabilities of Target for pre-acquisition unlawful conduct; and (3) whether Halliburton would be held criminally liable for any post-acquisition unlawful conduct by Target prior to Halliburton's completion of its FCPA and anti-corruption due diligence, where such conduct is identified and disclosed to the Department within 180 days of closing.

I. 08-02 Conditions

Halliburton committed to the following conditions, if it was the successful bidder in the acquisition:

1. **Within ten business days of the closing.** Halliburton would present to the DOJ a comprehensive, risk-based FCPA and anti-corruption due diligence work plan which would address, among other things, the use of agents and other third parties; commercial dealings with state-owned customers; any joint venture, teaming or consortium arrangements; customs and immigration matters; tax matters; and any government licenses and permits. The Halliburton work plan committed to organizing the due diligence effort into *high risk*, *medium risk*, and *lowest risk* elements.

- a) **Within 90 days of Closing.** Halliburton would report to the DOJ the results of its high risk due diligence.
- b) **Within 120 days of Closing.** Halliburton would report to the DOJ the results to date of its medium risk due diligence.
- c) **Within 180 days of Closing.** Halliburton would report to the DOJ the results to date of its lowest risk due diligence.

- d) Within One Year of Closing.** Halliburton committed full remediation of any issues which it discovered within one year of the closing of the transaction.

Many lawyers were heard to exclaim, “What an order, we cannot go through with it.” However, we advised our clients not to be discouraged because 08-02 laid out a clear road map for dealing with some of the difficulties inherent in conducting sufficient pre-acquisition due diligence in the FCPA context. Indeed the DOJ concluded 08-02 by noting, “Assuming that Halliburton, in the judgment of the Department, satisfactorily implements the post-closing plan and remediation detailed above... the Department does not presently intend to take any enforcement action against Halliburton.”

II. Johnson & Johnson “Enhanced Compliance Obligations”

In the recently released J&J DPA, there is an Attachment D, which is entitled, “Enhanced Compliance Obligations.” This is a list of compliance obligations in which J&J agreed to undertake certain enhanced compliance obligations for at least the duration of its DPA. With regard to the acquisition context, Johnson and Johnson agreed to:

7. J&J will ensure that new business entities are only acquired after thorough FCPA and anticorruption due diligence by legal, accounting, and compliance personnel. Where such anticorruption due diligence is not practicable prior to acquisition of a new business for reasons beyond J&J’s control, or due to any applicable law, rule, or regulation, J&J will conduct FCPA and anticorruption due diligence subsequent to the acquisition and report to the Department any corrupt payments, falsified books and records, or inadequate internal controls as required by ... the Deferred Prosecution Agreement.

8. J&J will ensure that J&J’s policies and procedures regarding the anticorruption laws and regulations apply as quickly as is practicable, but in any event no less than one year post-closing, to newly-acquired businesses, and will promptly: For those operating companies that are determined not to pose corruption risk, J&J will conduct periodic FCPA Audits, or will incorporate FCPA components into financial audits.

a. Train directors, officers, employees, agents, consultants, representatives, distributors, joint venture partners, and relevant employees thereof, who present corruption risk to J&J, on the anticorruption laws and regulations and J&J’s related policies and procedures; and

b. Conduct an FCPA-specific audit of all newly-acquired businesses within 18 months of acquisition.

These enhanced obligations agreed to by J&J in the M&A context would seem to be less time sensitive than those agreed to by Halliburton in 08-02. In the J&J DPA, the company agreed to following time frames:

- A. 18 Month-**conduct a full FCPA audit of the acquired company.

B. 12 Month-introduce full anti-corruption compliance policies and procedures into the acquired company and train those persons and business representatives which “present corruption risk to J&J.”

So there is no longer a risk based approach as set out in 08-02 and the tight time frames are also relaxed. Once again we applaud the DOJ for setting out specific information for the compliance practitioner through the release of the J&J DPA. As many have decried 08-02 is a standard too difficult to satisfy in the real world of time constraints and budget cuts, the “Acquisition” component of the J&J DPA should provide those who have made this claim with some relief.

For a copy of Opinion Release 08-02, [click here](#).

For a copy of the Johnson & Johnson Deferred Prosecution Agreement, [click here](#).

We would be remiss if we did not wish Prince William and his bride, Kate, best wishes in their new journey together. No one puts on pomp and circumstance like the Brits so sit back, relax and enjoy the nuptials with a nice cup of tea.

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