

## DOJ to Forgo FCPA Action in Exchange for Rigorous Compliance by Corporate Acquirer

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*In response to a request by Halliburton, the U.S. Department of Justice agreed to forgo enforcement action against the company for any Foreign Corrupt Practices Act violation by a potential acquisition target in exchange for implementation of a rigorous system of compliance and due diligence pre- and post-acquisition. The novel agreement may be a welcome option to companies seeking to acquire targets conducting business in areas that are at a high risk for FCPA violations.*

On June 13, 2008, the Department of Justice (“DOJ”) issued Opinions Procedure Release 08-02, in which the DOJ addressed due diligence measures proposed by the Halliburton Company to avoid violations of the U.S. Foreign Corrupt Practices Act (“FCPA”) related to its proposed acquisition of Expro International Group, PLC. Release 08-02 states that if Halliburton implements certain compliance measures, it can avoid liability for violations of the FCPA by Expro both prior to the acquisition and in the first 180 days after the acquisition, during which Halliburton would conduct more complete due diligence on FCPA risk areas.

Halliburton, a U.S. issuer, requested guidance from the DOJ relating to its attempt to acquire Expro, a public UK company that provides well-flow management for the oil and gas industry. Halliburton asserted that because of UK legal restrictions inherent in the bidding process for public UK companies, Halliburton had insufficient time and inadequate access to information to complete FCPA due diligence before the acquisition and that, should Halliburton win the bidding process, Halliburton would need several months to complete the due diligence process. Furthermore, under the terms of a confidentiality agreement between Halliburton and Expro related to the bidding, Halliburton’s ability to provide information to the DOJ regarding FCPA issues was restricted during the bidding. Based on these circumstances, Halliburton sought guidance from the DOJ on whether Halliburton’s proposed FCPA due diligence procedures would be sufficient to avoid prosecution for any conduct committed by Expro before the completion of Halliburton’s due diligence.

## Halliburton's Proposed Due Diligence

Halliburton told the DOJ that it intended to take the following actions after closing if it acquired Expro:

1. Immediately after closing, Halliburton would meet with the DOJ to disclose whether any information in its possession, either obtained during the bidding process or learned from any other source, suggested that any FCPA, corruption, or related internal controls issues existed at Expro, and disclose that information to the DOJ;
2. Within 10 days of closing, Halliburton would present the DOJ with a comprehensive, risk-based FCPA 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 ventures, teaming or consortium arrangements; customs and immigration matters; tax matters; and any government licenses and permits. ... [The] work plan will organize the due diligence efforts into high risk, medium risk, and lowest risk elements”;
3. Within 90, 120 and 180 days after closing, Halliburton would provide the DOJ with results of its high, medium and low risk due diligence efforts, respectively;
4. Retain external counsel and third party consultants, including forensic accountants, and also use Halliburton's internal resources to conduct the FCPA and anticorruption due diligence. The due diligence process would include, under “all appropriate circumstances and in all appropriate locations,” examination of relevant Expro records, “including e-mail review and review of company financial and accounting records as well as interviews of relevant [Expro] personnel and other individuals”;
5. Require any agents and third parties working for Expro with whom Halliburton would continue to work to sign new contracts with Halliburton that include, among other things, FCPA and other anti-corruption representations and warranties, audit rights, and termination clauses;
6. Implement Halliburton's Code of Conduct at Expro and provide FCPA training for all relevant Expro employees; and
7. Maintain Expro as a wholly owned subsidiary as long as the DOJ “is investigating any conduct by Expro or its officers, directors, employees, agents, subsidiaries or affiliates.”

## The DOJ's Response

Based on the representations above, Halliburton requested an opinion regarding the DOJ's intention to take enforcement action concerning: (1) whether the proposed acquisition itself would violate the FCPA; (2) whether Halliburton would assume FCPA liability for pre-acquisition violations by Expro and; (3) whether Halliburton would be criminally liable for post-acquisition unlawful conduct by Expro prior to Halliburton's completion of its FCPA due diligence.

The DOJ determined that completing the acquisition would not, in and of itself, create FCPA liability for Halliburton because any payments Halliburton made would be made to shareholders of Expro and would not, in all likelihood, be used to fund unlawful activities.

The DOJ further stated that it did not plan to take any action with regard to pre-acquisition conduct by Expro disclosed to the DOJ within the 180-day period following the closing, provided Halliburton satisfactorily proceeded in accordance with its proposed due diligence plan.

Regarding post-acquisition conduct, Release 08-02 notes 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.” However, the DOJ recognized that under the circumstances presented there was “insufficient time and inadequate access to complete appropriate pre-acquisition FCPA due diligence and remediation.” Accordingly, the DOJ stated that it did not intend to take any enforcement action against Halliburton for any post-acquisition violations of the antibribery provisions of the FCPA committed by Expro during the 180-day period after closing, “provided that Halliburton: (a) discloses such conduct to the Department within 180 days of closing, (b) stops and remediates such conduct within 180 days of closing, or, if the alleged conduct, in the judgment of the Department, cannot be fully investigated within the 180-day period, stops and remediates such conduct as soon as it can reasonably be stopped; and (c) completes its due diligence and remediation, including completing its investigation of any issues that are identified within the 180-day period, by no later than one year from the date of closing.”

### Analysis

Companies considering acquisition of a target conducting business in an area in which the risk of FCPA violations is high may consider Release 08-02 a welcome development. The DOJ agreed to a framework by which the acquirer may avoid inheriting FCPA liability in situations in which the company cannot perform sufficient due diligence prior to closing. In those situations, companies requesting such an agreement should be prepared to make substantial commitments to compliance before and after the acquisition in order to obtain the benefits of avoiding FCPA liability.

Release 08-02, however, does not offer substantial guidance as to whether the DOJ may be willing to forgo enforcement actions based on rigorous compliance efforts where due diligence **could** adequately be completed prior to closing. The Release repeatedly notes Halliburton’s assertion that UK law prevented Halliburton from completing its due diligence prior to the acquisition. It is thus unclear to what other situations DOJ might extend this type of agreement.

Companies should also note that DOJ took issue with the fact that Halliburton could not provide DOJ with complete information on FCPA issues. After noting that, for commercial reasons, Halliburton had entered into a confidentiality agreement with Expro, the Release specifically noted that the DOJ “discourages companies wishing to receive an FCPA Opinion Release in the future from entering into agreements which limit the information that may be provided to the Department.”

DOJ’s FCPA Opinion Letters provide binding application only for the company that requested the opinion.

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