

The Fundamentals of the FCPA

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What is the FCPA?

- The Foreign Corrupt Practices Act (FCPA) prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business

Historical Development of the FCPA

- Mid-1970s, series of SEC investigations uncovers massive, widespread bribery of foreign officials by US companies
- Congress enacted the FCPA in 1977 in an effort to restore public confidence the in business community
- Ten years later in 1997, 34 countries (including US) signed the equivalent of the international FCPA

Official Title: *Organization of Economic and Cooperative Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*

Enforcement Provisions of the FCPA

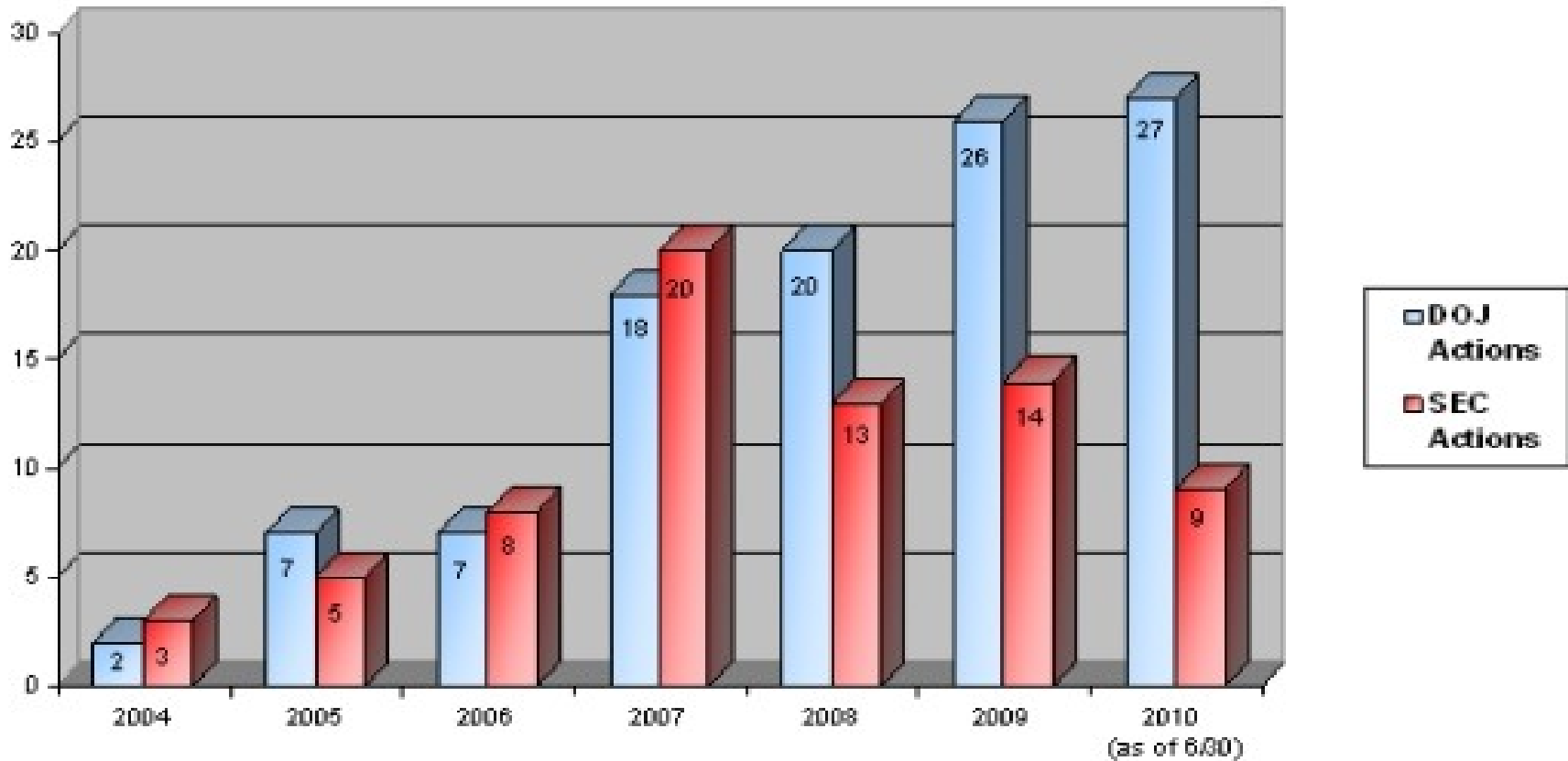
- DOJ is responsible for the FCPA primary enforcement tool, the anti-bribery provisions
- SEC is responsible for the FCPA secondary enforcement tool, the accounting provisions
 - Publicly traded companies must maintain accurate books and sound system of internal controls
 - *“Requiring the disclosure of all bribes paid should foreclose that activity.”* - Judge Stanley Sporkin

How Important is the FCPA?

- **CRITICAL:** DOJ and Congressional focus, high publicity, massive potential exposure
 - Siemens AG \$1.5 billion settlement
 - Halliburton/KBR \$600 million settlement
 - BAE Systems \$400 million settlement
 - Technip S.A. \$338 million settlement
- **ALL SMOKE:** 8-12 FBI Agents; 15-20 DOJ Fraud Attorneys; 36 Corporate Enforcement Actions since 2005; One trial since 2005

“After 3 years supervising this case, it is still not entirely clear to me whether Mr. Bourke is a victim or a crook”

FCPA Enforcement Actions



Who is Subject to the FCPA?

FCPA applies to:

- “Issuers”
 - Any company whose equity or debt is traded on a U.S. exchange, including companies based overseas
- “Domestic Concerns”
 - Any individual who is a citizen, national or resident of the U.S., or any entity that is organized under the laws of the U.S. or that has its principal place of business in the U.S.
- Foreign National or Business
 - Any foreign company or person if it causes an act in furtherance of the corrupt payment to take place in the United States

Who is Not Subject to the FCPA?

FCPA does *Not* apply to Commercial Bribery

- FCPA provisions do not govern or prohibit bribes paid to employees of private entities
- Potential exposure under Conspiracy and/or Travel Act

Anti-Bribery Provisions under FCPA

- Anti-bribery provisions prohibit the direct or indirect offer, promise, authorization or payment of money or anything of value
 1. to an employee or official of a foreign government, public international organization or political party, or
 2. to a political party or candidate for political office, or
 3. to any other person while knowing that the payment or promise to pay will be passed on to one of the above

Agents and Third Party Intermediaries

- No payment can be made to third parties with the “knowledge” that all or a portion of the payment will be passed on to a foreign official, even if act is done through a third party, such as an agent, a contractor, or a distributor
 - Risk based compliance
 - Effective monitoring
 - Legal facilitating payments vs. illegal bribes
 - Chevron “oil for food”

Anti-Bribery Penalties under FCPA

- Individuals – criminal penalties include fines of up to \$100,000 or twice the amount of the gross pecuniary gain resulting from the improper payment, imprisonment of up to 5 years, or both
- Companies – fines up to \$2,000,000 or alternatively, twice their pecuniary gain
- Civil penalties, including injunctions and hefty fines for both individuals and companies
- Companies can be suspended or barred from U.S. government contracts or programs
- Individual fines cannot be paid (directly or indirectly) by corporations
- Companies can be sued in a private cause of action

FCPA Evaluation Criteria

- International Corporation
- High Risk Industry
 - Energy, pharmaceuticals, telecommunication, defense
- High Risk Location
 - Transparency International Corruption Perception Index

BRIC Countries (75, 146, 84, 79)

FCPA Presents Unique Challenges

- Conduct is usually covert by nature
- Conduct is usually at remote location
- Temptations are compelling for both sides
- Rewards for wrongdoers can be lucrative

Compliance Programs

No Law Enforcement Area Places Greater Premium or Penalty on Compliance Program

- Expected to have in place effective compliance and ethics programs
 - Tone at the top
- To be effective, programs must be designed to detect and prevent wrongdoing, and to address wrongdoing if it occurs
- All overseas operations should have an anticorruption component

Compliance Programs (cont'd)

- Companies must have written policies that expressly state what is prohibited
 - Includes translations for all foreign components
- To be effective, programs must include training and testing of management and sales staff
 - Live training critical for most at-risk employees
- Periodic review of contracts, consultants and accounting practices
- *Harshest DOJ and SEC resolutions have involved multinationals with poor compliance program and few internal controls*

“Houston, we have a problem”

- Independent Investigation
 - Upjohn Warnings
 - Legal Advice and Attorney Work Product
- Discipline wrongdoers
- Implement corrective measures
- Ensure no future violations

Voluntary Disclosure – the \$64 million Question

- Nothing in FCPA requires self-reporting of violations
 - Other Statutes may
- Federal Sentencing Guidelines
- Likelihood of Independent Discovery (increase resources, heightened awareness, whistleblower lawsuits)
- Benefits are not clear
- Guarantees SEC and DOJ litigation, loss of control of investigation
- Exposure to related civil litigation
- “Are transgressions egregious and prosecution imminent”

Conclusion

- It is almost certain that FCPA enforcement activities will continue to increase
- Companies need to focus up front on compliance, especially if they are involved in a risk industry or location
- Ultimate goal: comply and be competitive

For More Information



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