



Living with the FCPA in an Era of Enhanced Enforcement

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CHADBOURNE
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DOJ

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SEC



FBI

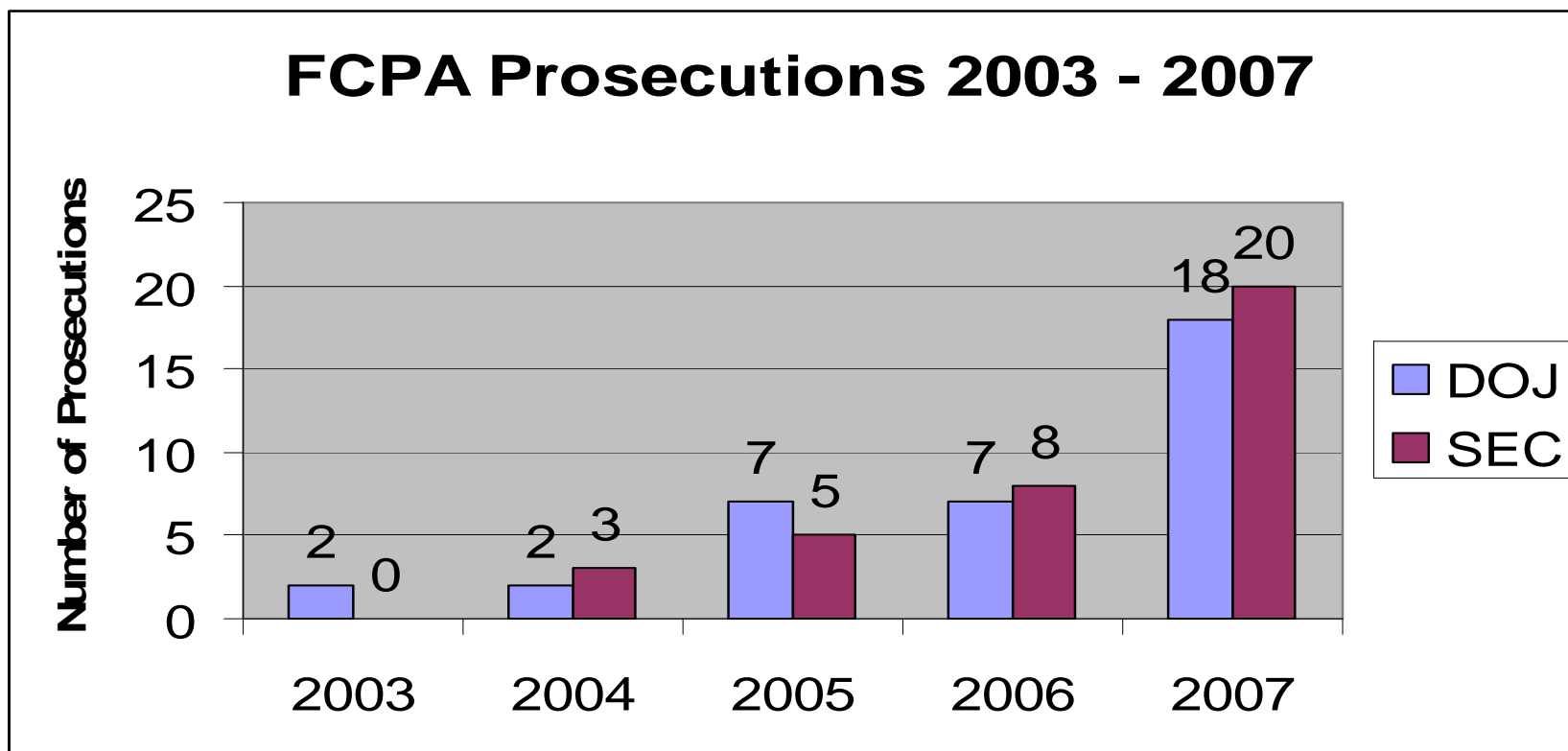


Overview

- Recent Trends in FCPA Enforcement
- The FCPA Statute – the Basics
- Who Is Covered by the FCPA
- The FCPA and Successor Liability

Recent Trends in FCPA Enforcement

- Dramatic increase in government enforcement actions



Recent Trends in FCPA Enforcement

"The number of individual prosecutions has risen – and that's not an accident. That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, **people have to go to jail**. People have to be prosecuted where appropriate. This is a federal crime. **This is not fun and games.**"

Mark Mendelsohn, Deputy Chief of the Fraud Section at the DOJ's Criminal Division, as quoted in Corporate Crime Reporter, **September 16, 2008**

Recent Trends in FCPA Enforcement

Former Alcatel Executive Sentenced to
30 Months for Paying \$2.5 Million in
Bribes to Senior Costa Rican Officials

Department of Justice, **Sept. 24, 2008**

Recent Trends in FCPA Enforcement

"The **dollar amounts** in the cases that will be coming within the next short while **will dwarf the disgorgement and penalty amounts that have been obtained in prior cases**"

Scott Friestad, SEC Deputy Director for the Enforcement Division, as quoted in the National Law Journal, **November 24, 2008**

Recent Trends in FCPA Enforcement

"Siemens pays **\$1.3 billion** to settle corruption probes"

Reuters, **December 15, 2008**

Recent Trends in FCPA Enforcement

- Significant penalties
 - **\$44.1 million** -- Baker Hughes
 - **\$30 million** -- Chevron
 - **\$26 million** -- Vetco
 - Bridgestone executive sentenced to **two years in prison**
 - American Rice executives sentenced to **37 and 63 months**

The FCPA Statute – The Basics

- Two categories of violations
 - Anti-bribery Provisions
 - Accounting Provisions

The FCPA Statute – The Basics

The Anti-Bribery Provisions

- Cannot give:
 - anything of value
 - to a foreign official
 - for the corrupt purpose of
 - obtaining or retaining business

The FCPA Statute – the Basics

- Facilitating Payments
 - Routine government actions
- Affirmative defenses
 - Lawful under the written laws of the foreign county
 - “Reasonable and bona fide” expenses
 - demonstrate product
 - perform contractual obligation

The FCPA Statute – the Basics

The Accounting Provisions (for Issuers)

- Requirements:
 - Keep accurate books and records; and
 - Maintain a system of internal controls
- Intentional misrecording of any payment — even if it is not a bribe — is a violation

Who is covered by the FCPA?

Anti-Bribery Provisions

- Issuers
 - Registered Securities under Section 12 of Exchange Act; or
 - Reporting Requirements under Section 15(d) of Exchange Act;
- Officers, directors, employees, and agents of issuers
- ADRs
- Example: SEC v. ABB Ltd. (2004); U.S. v. Sapsizian (2007)

Who is covered by the FCPA?

- Domestic Concerns
 - U.S. businesses
 - U.S. persons
- Example: U.S. v. Vetco Gray Controls (2007)

Who is covered by the FCPA?

- Foreign Persons
 - All non-U.S. persons; or
 - Agents and employees of non-U.S. persons
 - Acting in the United States
- Example: U.S. v. Syncor Taiwan (2002)

Who is covered by the FCPA?

Accounting Provisions

- Issuers
 - Registered Securities under Section 12 of Exchange Act; or
 - Reporting Requirements under Section 15(d) of Exchange Act;
 - Officers, directors, employees, and agents of issuers
- ADRs
- Examples: SEC v. Statoil (2007); SEC v. Montedison (1996)

Who is covered by the FCPA?

- Controlled Subsidiaries
 - Subsidiaries and Affiliates
 - Affirmative Defense
- Examples: SEC v. Dow Chemical (2007); SEC v. Baker Hughes (2007); In re Diagnostics Products Corp. (2005).

Who is covered by the FCPA?

- Non-Controlled Subsidiaries
 - Indicia of Control
 - Affirmative Defense to Liability
 - Good Faith Efforts to Influence
- No enforcement action

The FCPA and Successor Liability

- Significant possibility of acquiring an FCPA violation in a corporate acquisition or investment
 - Titan Case
 - Omega Advisors Case
 - GE/InVision Case
 - Vetco Case
 - Pacific Consolidated Industries Case

The FCPA and Successor Liability

- Acquisition may even create FCPA liability where none existed
 - Due diligence becomes crucial

The FCPA and Successor Liability

- Options if due diligence uncovers problems
 - Self report (either party)
 - Allocate potential fees and fines in merger agreement
 - Institute appropriate safeguards (if no current FCPA liability)
 - Seek advisory opinion
 - Walk away

The FCPA and Successor Liability

- No matter what, make sure all disclosures in public filings are accurate



THANK YOU

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