United States Commercial Law Seminar

Masaryk University

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Lecture Two:
The U.S. Foreign Corrupt Practices Act

Joseph D. Lee

Munger, Tolles & Olson LLP

Readings

United States v. Kay & Murphy, 359 F. 3d 738 (5th Cir. 2004)

U.S. Department of Justice, Opinion Procedure Release No. 10-01 (April 19, 2010)

In re Gore, SEC Exchange Act Release No. 38343 (Feb. 27, 1997)

Complying with The Foreign Corrupt Practices Act: A Practical Guide

Munger, Tolles & Olson LLP
Joseph Lee

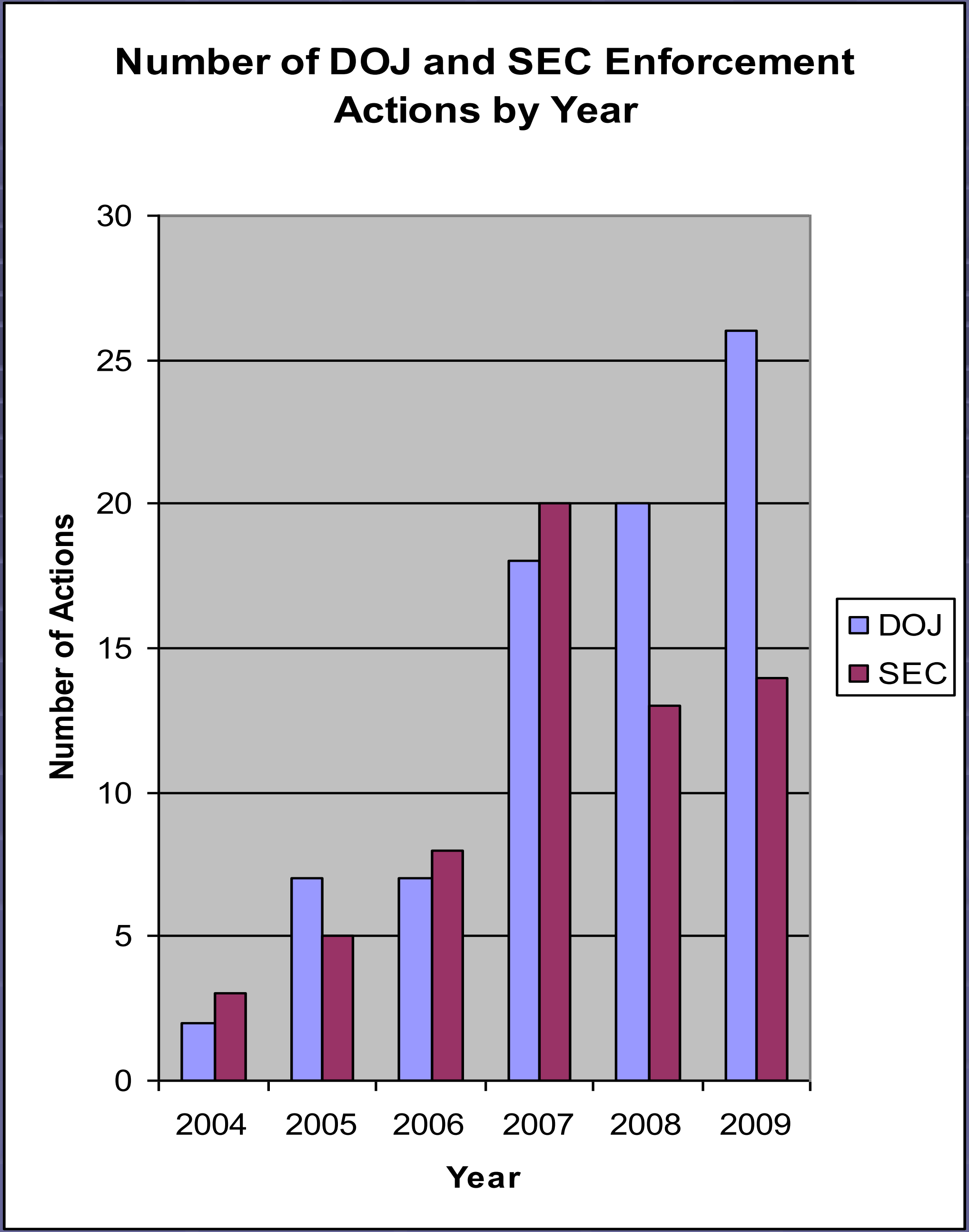
Agenda

- Overview of FCPA
- Elements of an FCPA violation
  - Foreign payments provisions
  - Recordkeeping and internal controls provisions
- Key FCPA issues
- FCPA compliance programs

Overview of FCPA

- Adopted in 1977 following overseas and domestic bribery scandals involving 400 major corporations
- **Foreign Payments**
  - Prohibits corrupt payments to foreign officials to assist in obtaining or retaining business
  - Enforced by DOJ – criminal violations
- **Recordkeeping and Internal Controls**
  - Requires publicly traded companies
    - To maintain accurate books and records
    - To maintain effective internal controls
  - Enforced by SEC – civil violation absent willful conduct

Increased Enforcement by SEC and DOJ over time



Foreign Payments Provisions
15 U.S.C. § 78dd-1 *et seq.*

- Applicable to:
  - Any "issuer" of securities on a U.S. exchange
  - Any "domestic concern"
    - any U.S. citizen, resident or national
    - any corporation, partnership, sole proprietorship or other association organized under U.S. law or that has a principal place of business in the U.S.
  - Any officer, employee, agent, stockholder or principal acting on behalf of any U.S. issuer or domestic concern, or
  - Any person other than an issuer or domestic concern, while in the territory of the U.S.

Foreign Payments Provisions – Elements

- Payment or offer or payment
- Anything of value
- To a foreign government official or other prohibited recipient
- For the purpose of:
  - influencing a decision
  - inducing the official to act, or
  - securing any improper advantage
- "Corruptly"
- In order to
  - Obtain or retain business or
  - Direct business to any person

Prohibited Recipients

- Foreign officials
- Foreign political party
- Candidate for foreign office
- Official of a public international organization (*e.g.*, Olympic Organizing Committee)
- Any other person knowing that the payment will be passed on to one of the above

Areas of Potential Interaction with Government Officials

- Sales of products or services to government agencies
- Bidding for government contracts
- Governmental approvals
  - Permits and licenses
  - Real estate sales
  - Patents and trademark registrations
- Tax authorities
- Import/export: Customs and other agencies
- Governmental inspections (*e.g.*, health and safety authorities)
- Lobbying activities
- Charitable and political contributions
- Hiring a foreign official
- Putting foreign official on board of directors
- Hiring a third party with a connection to a foreign official

Foreign Subsidiaries and Joint Ventures

- Parent company liable if its employees authorized, directed or controlled the payments
- Parent company may also be liable if its employees have knowledge of the payments
  - Actual knowledge
  - Awareness of a high probability of the existence of a circumstance
  - Willful blindness (consciously disregarding facts)

Sales Representatives, Agents and Third Parties

- Knowledge standard may impose an affirmative duty to investigate
- Pre-hiring protective measures
  - Due diligence
    - Embassy check
    - Public records check
    - Due diligence questionnaire
  - FCPA contract provisions and certifications
  - Training
- Post-hiring oversight of third parties
  - Audit rights
  - Investigation into “red flags”

“Red Flags”

- Country in question has a reputation for bribery
- Unusual or excessive payment requests
  - Upfront payments
  - Payments to third country account
  - Payments to a third party
  - Cash payments
  - Large bonuses
- Agent refuses to promise in writing to abide by anti-bribery laws
- Agent is related to a foreign official
- Agent is “close” to foreign officials but performs no actual services
- Agent is recommended by a foreign official

Key Foreign Payments Issues

- **State owned enterprises**
  - Are employees all government officials?
- **Government end users**
  - Can trigger FCPA issues even if the direct customer is not a government entity
- **"Anything of value"**
  - Entertainment
  - Travel
  - Benefit to official's family members
- **"Corruptly" – *quid pro quo***
  - Merely building goodwill is lawful
- **Obtain or retain element** – *U.S. v. Kay* decision

“Facilitating Payments” Exception

- Payments “to expedite or to secure the performance of a routine governmental action by a foreign official”
- Purpose: to avoid liability when
  - small sums are paid
  - to facilitate routine, non-discretionary government actions
- Examples:
  - Processing of permits, licenses, visas, and work orders
  - Payments to Customs officials to expedite import/export of goods
  - Providing power and water supply
- Recent OECD position would eliminate this exception

Affirmative Defenses

- Payments permitted by the written laws of the foreign official's country
  - Impractical exception because no country authorizes bribery
- "Reasonable and bona fide" expenditures related to
  - Promotion, demonstration, or explanation of products or services
  - Execution of a government contract

Largest FCPA Cases

1. Siemens (Germany): $800 million in 2008
2. KBR / Halliburton (USA): $579 million in 2009
3. BAE (UK): $400 million in 2010
4. Snamprogetti Netherlands B.V. / ENI S.p.A (Holland/Italy): $365 million in 2010
5. Technip S.A. (France): $338 million in 2010
6. Daimler AG (Germany): $185 million in 2010
7. Alcatel-Lucent (France): $137 million in 2010
8. Panalpina (Switzerland): $81.8 million in 2010
9. ABB Ltd (Switzerland): $58.3 million in 2010
10. Pride (USA): $56.1 million in 2010

New additions to the Top 10

- “Current trends in FCPA enforcement are evident in the latest settlement with **<u>Johnson & Johnson</u>**. *U.S. v. Depuy, Inc*. (D.D.C. filed April 8, 2011):
  - “To resolve the case with DOJ and the SEC the company agreed to pay a total of $77 million, making it number ten on the list of the largest amounts paid by a company to resolve FCPA charges. This is the second addition to the top ten this year …”

New additions to the Top 10

"A Japanese company will pay more than $218 million to settle federal charges that it bribed officials in Nigeria as part of a decade-long conspiracy involving defense contractor Kellogg Brown & Root that has netted the government $1.5 billion in fines to date. Prosecutors say the Yokohama, Japan-based **JGC Corp**. was the fourth member of a joint venture called TSKJ that violated the U.S. Foreign Corrupt Practices Act in a decade-long bribery scheme." (April 11, 2011)

Other Criminal Provisions

- Mail and wire fraud
- Money laundering
- RICO
- Travel Act
- Local laws of the foreign country

DOJ Opinion Procedure

- Any U.S. company or national may apply
- Whether specified prospective (but not hypothetical) conduct conforms with DOJ's present enforcement policy
- Opinion must be issued within 30 days of receiving all required information
- Creates ***rebuttable presumption*** of conformity with FCPA in any subsequent enforcement action
- DOJ only issued one opinion in 2009

Recordkeeping Provisions
15 U.S.C. § 78m(b)(2)

- Require publicly traded companies to “make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets” of the company
- The negative pregnant
  - If U.S. public company owns 50% or less of foreign firm, must merely exercise good faith to ensure compliance
  - If U.S. company owns *more than* 50%, must ensure compliance

Internal Controls Provisions

- Go hand-in-hand with recordkeeping provisions; often charged together
- Corporations must "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances" that:
  - Transactions are executed as authorized by management
  - Transactions are recorded to permit preparation of financial statements that comply with GAAP
  - Access to assets is permitted only as authorized by management
  - Recorded accountability for assets is compared at reasonable intervals with existing assets, and appropriate action is taken re any differences

Key Issues: Accounting and Recordkeeping

- **No scienter requirement**
  - Company subject to penalties even if its officers do not know about the inaccuracies
  - Potential strict liability when inaccurate books of foreign subsidiaries “roll up” into U.S. company’s records
- **No materiality requirement**
- **Willful violations are criminal**
- **How to correct erroneous entries**
  - Inadvertent errors not punishable
  - Reclassification of entries

Penalties

	Anti-Bribery Criminal	Anti-Bribery Civil	B&R Criminal	B&R Civil
Companies	$2 million per violation	$10,000 per violation	$25 million	$500,000 per violation
Individuals	$100,000 5 years	$10,000	$5 million 20 years	$100,000 per violation

- Disgorgement of Profits
- Prejudgment Interest

FCPA Compliance Programs: Key Elements

- Written policies
  - Gifts and entertainment
  - Third parties (*e.g.*, sales reps)
  - FCPA training
- FCPA Compliance Officer or Committee
- Due diligence procedures
- Standard contract provisions
  - Compliance with law
  - Audit rights

Hypothetical #1: Third Party Sales Agent

- Your company has a foreign subsidiary in a high risk country
- The sub uses a third party sales agent to market its services
- In January 2008, the sales agent secures a long-term service contract from a governmental agency
  - Total payments are $30 million (U.S.) over three years
  - Sales agent is paid a commission of 10% ($3 million)
  - Sales agent also receives $20k per month retainer
- Routine audit is conducted in June 2010
  - Contract price is 5% higher than other comparable sales ($1.5 million)
  - $1 million has been paid to third party suppliers who were not approved
- As of June 2010, $20 million has been paid by government
  - $18 million has been repatriated to U.S. parent
  - $2 million remains in account of foreign subsidiary

Simpler FCPA Hypotheticals

- In order to bid on a foreign government contract, your company must first be licensed to transact business in the country.
  - The application has been pending for several months
  - The company's foreign country manager seeks your approval to pay $500 to a government clerk to "jump the licensing queue."
- Your company is introducing a new product
  - Product managers want to organize a conference in Las Vegas to demonstrate product's use
  - They propose to pay travel and lodging for three officials of a key customer, which is partly owned by a foreign government
  - The officials will be accompanied by their spouses