An Overview of the U.S. Foreign Corrupt Practices Act of 1977

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OVERVIEW

1) History of the FCPA

2) Relevant Provisions

3) Enforcement and Recent Trends

1. History of the FCPA

- Became law in 1977, amended in 1988 and 1998
- First statute to prohibit business bribery or bribery efforts (including offer or authorization) concerning another country’s officials
- Watergate Scandal
  - Amnesty Program
  - Lockheed incident
- Purpose of the FCPA
  - Bring a halt to the bribery of foreign officials
  - Restore public confidence in the integrity of the American business system

1. History of the FCPA

- 1988: As part of the amendment, Congress directed Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to enact similar anti-bribery legislation

- 1997: U.S. and 33 other OECD countries signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

- 1998: implemented U.S. adherence to the OECD convention and also expanded scope of coverage

- 2005: The United Nations Convention Against Corruption (UNCAC) entered into force

2. Relevant Provisions

- Anti-Bribery Provisions: Prohibit corrupt payments to foreign officials to obtain or keep business

- Accounting Provisions: Require companies subject to U.S. securities laws to keep records that accurately reflect corporate transactions and maintain an adequate system of internal accounting controls

2. Relevant Provisions

- The Anti-Bribery Provisions:

  - Prohibit providing or offering to provide anything of value to foreign government officials for the purposes of obtaining or retaining business

  - Allow exceptions for “grease payments” to facilitate governmental action routinely performed, e.g., obtaining permits/licenses

  - Allow reasonable and bona fide expenditures related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract with a foreign government or agency

2. Relevant Provisions

- The Anti-Bribery Provisions apply to:
  - U.S. nationals, U.S. domestic companies and companies subject to U.S. securities laws
  - Foreign nationals who are officers, directors, employees and agents of U.S. companies
  - Foreign companies and foreign nationals that commit an act, within the territory of the United States, in furtherance of the bribe of a foreign government official

2. Relevant Provisions

- Foreign government officials include:
  - Foreign government employees
  - Foreign political party candidates and employees
  - Employees of foreign government owned companies and state-owned enterprises
  - Employees of public international organizations
  - Anyone acting in an official capacity for a foreign government

2. Relevant Provisions

- Penalties for violating the Anti-bribery Provisions:
  - $100,000 and/or five years in jail for individuals and $2,000,000 for corporations
  - $10,000 civil penalty for individuals and corporations
  - Fines imposed on individuals may NOT be paid by their employer
  - Debarred from doing business with the U.S. government
  - Loss of export license(s)

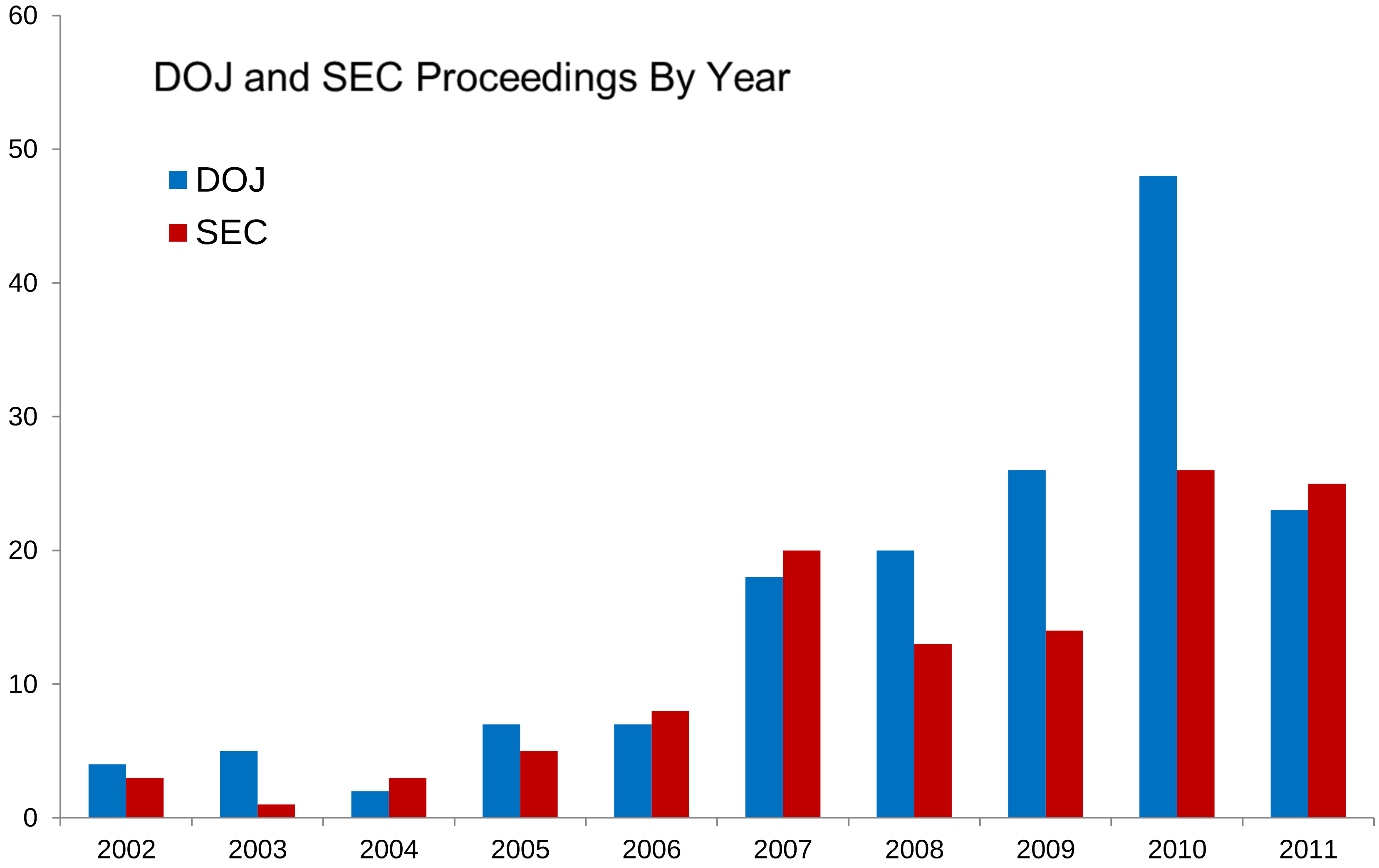
2. Relevant Provisions

- The Accounting Provisions require companies subject to U.S. securities laws to:
  - “Accurately and fairly” record transactions “in reasonable detail”
  - Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are executed in accordance with management's authorization, and access to assets is permitted only in accordance with management's authorization

2. Relevant Provisions

- Penalties for violating the Accounting Provisions:
  - $5 Million and/or 20 years in jail for violations and $25 Million for corporations --- “Knowing” violations
  - Debarred from doing business with the U.S. government
  - Loss of export license(s)

3. Enforcement and Recent Trends



3. Enforcement and Recent Trends

Aggressive Interpretation of the Scope of the FCPA

“The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it takes any act in furtherance of the corrupt payment while within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce. . . .

Although this section has not yet been interpreted by any court, **the Department interprets it as conferring jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company’s or national’s agent**.”

DOJ Criminal Resource Manual § 1018.

3. Enforcement and Recent Trends

- *Magyar Telekom*: The DOJ's sole claim to anti-bribery jurisdiction (but not to books and records jurisdiction) was based on a foreign official's "U.S.-based email address," whereby email was "passed through, stored on, and transmitted from servers located in the U.S."

- *Siemens, TSKJ, JGC:* The DOJ claimed that jurisdiction extended to foreign funds transfers that transited through U.S. banks. According to the DOJ, jurisdiction exists where a transfer is denominated in U.S. dollars and transferred via a "correspondent" bank in the U.S. These correspondent banks are maintained by banks to clear U.S. dollar transactions; their use is not controlled or even apparent to the parties to a funds transfer.

3. Enforcement and Recent Trends

- In 2011, 12 of the 18 individuals charged under the FCPA were non-U.S. citizens.

- *Cristian Sapsizian*: A French citizen, Sapsizian was charged by the DOJ regarding bribes paid by Alcatel-Lucent to secure telecommunications contracts in Costa Rica. Although no actions were taken in the U.S., the DOJ exercised jurisdiction because the funds for the bribes transited through a bank in Miami. Sapsizian pleaded guilty, and was sentenced to 30 months in prison, three years of supervised release, and forfeiture of $261,500.

- *Wojciech Chodan*: A U.K. and Polish citizen and KBR's former commercial vice president at a U.K. subsidiary, Chodan was charged with one count of conspiracy to violate and ten counts of violating the FCPA. After being extradited from the U.K. to the U.S., he pleaded guilty in federal court to one count of conspiracy to violate the FCPA. He was sentenced to a year’s probation, fined $20,000 and agreed to disgorge $726,000.

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