



FCPA ENFORCEMENT: THE PARADIGM SHIFT OF 2008

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JANUARY 28, 2009

Agenda

- Introduction
- Presentations
 - >F. Joseph Warin, Partner, Gibson, Dunn & Crutcher LLP
 - >Elliott Leary, Partner, KPMG Forensic
- Questions and Answers — (*anonymous*)
- Slides — now available on front page of Securities Docket
 - > www.securitiesdocket.com
- Conclusion



Webcast Series

- Series of webcasts — every other week
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Panel



F. Joseph Warin



Bruce Carton



Elliott Leary

The Paradigm Shift of 2008: Recent Developments in FCPA Enforcement



F. Joseph Warin, Gibson, Dunn & Crutcher LLP

Elliott Leary, KPMG Forensic



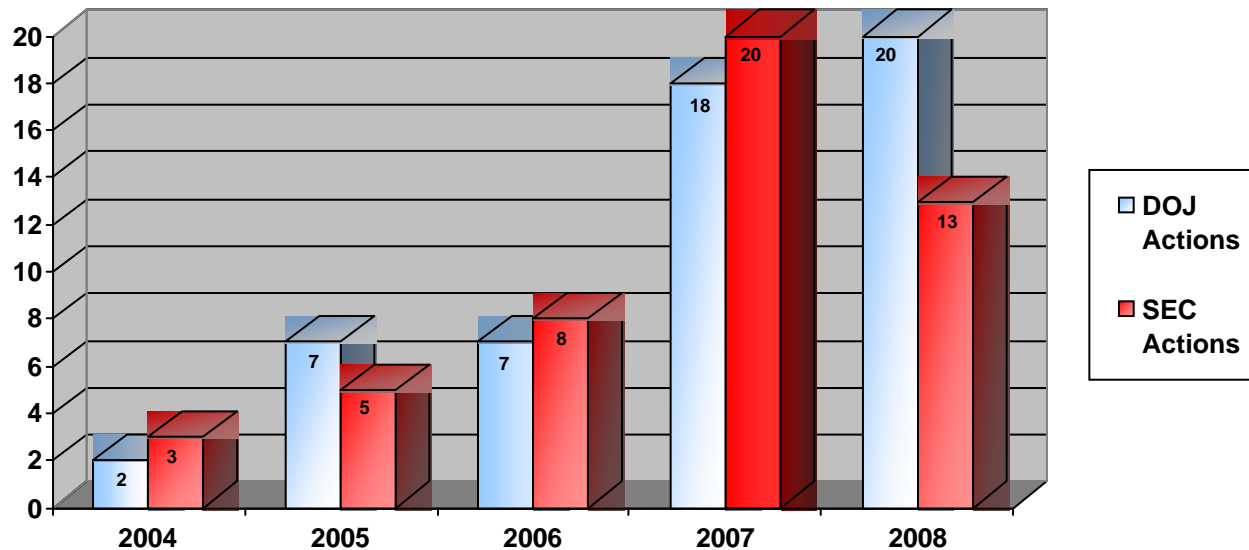
| GIBSON, DUNN & CRUTCHER LLP |

Key Developments in 2008

- Escalating corporate financial penalties
- Increasing focus on individual prosecutions
- Globalization of foreign anti-corruption enforcement
- DOJ's coupling of FCPA prosecutions with other crimes

Recent Enforcement Efforts: 2008 in Review

2008		2007		2006		2005		2004	
<u>DOJ</u>	<u>SEC</u>	<u>DOJ</u>	<u>SEC</u>	<u>DOJ</u>	<u>SEC</u>	<u>DOJ</u>	<u>SEC</u>	<u>DOJ</u>	<u>SEC</u>
20	13	18	20	7	8	7	5	2	3



Escalating corporate financial penalties

Escalating Corporate Financial Penalties

“The dollar amounts in the [FCPA] 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*
Deputy Director of Enforcement
for the SEC
November 24, 2008

Record-Breaking Cases: Siemens AG and Halliburton

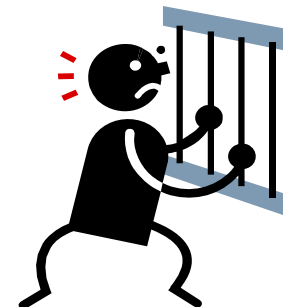
- Siemens:
 - Charges – Siemens pleaded guilty to FCPA books-and-records and internal controls charges brought by DOJ; consented to SEC civil charges of conspiracy to commit anti-bribery violations, books-and-records violations, and internal controls violations
 - Alleged Illicit Conduct – \$1.4 billion in corrupt payments to foreign government officials in 10 countries; systematic effort to circumvent internal controls; failing to keep books and records that accurately and fairly reflect transactions and disposition of company's assets
 - Settlement – \$450 million fine to DOJ, \$350 million disgorged profits to SEC, \$856 million to German officials, totaling \$1.6 billion
- Halliburton:
 - Charges – Pleaded guilty to FCPA violations
 - Alleged Illicit Conduct - \$182 million in bribes to Nigerian government officials in exchange for a contract to build natural gas facilities
 - Settlement - \$559 million to DOJ and SEC; no monitor required

Increasing focus on individual prosecutions

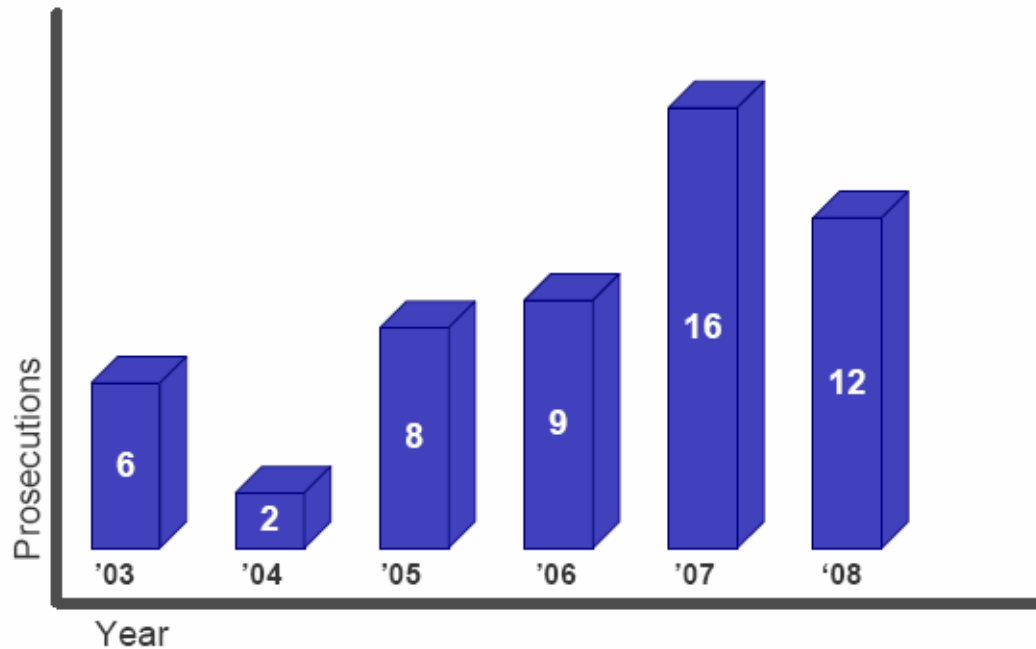
Increasing Focus on Individual Prosecutions

- DOJ has begun targeting corporate executives and other individuals who bribe foreign officials
- “[Prosecution of individuals is] part of a very concerted effort to supplement our prosecution of corporations . . . with our prosecution of natural persons.”

– *Mark Mendelsohn*
Deputy Chief of the Fraud
Section of the DOJ
October 2007

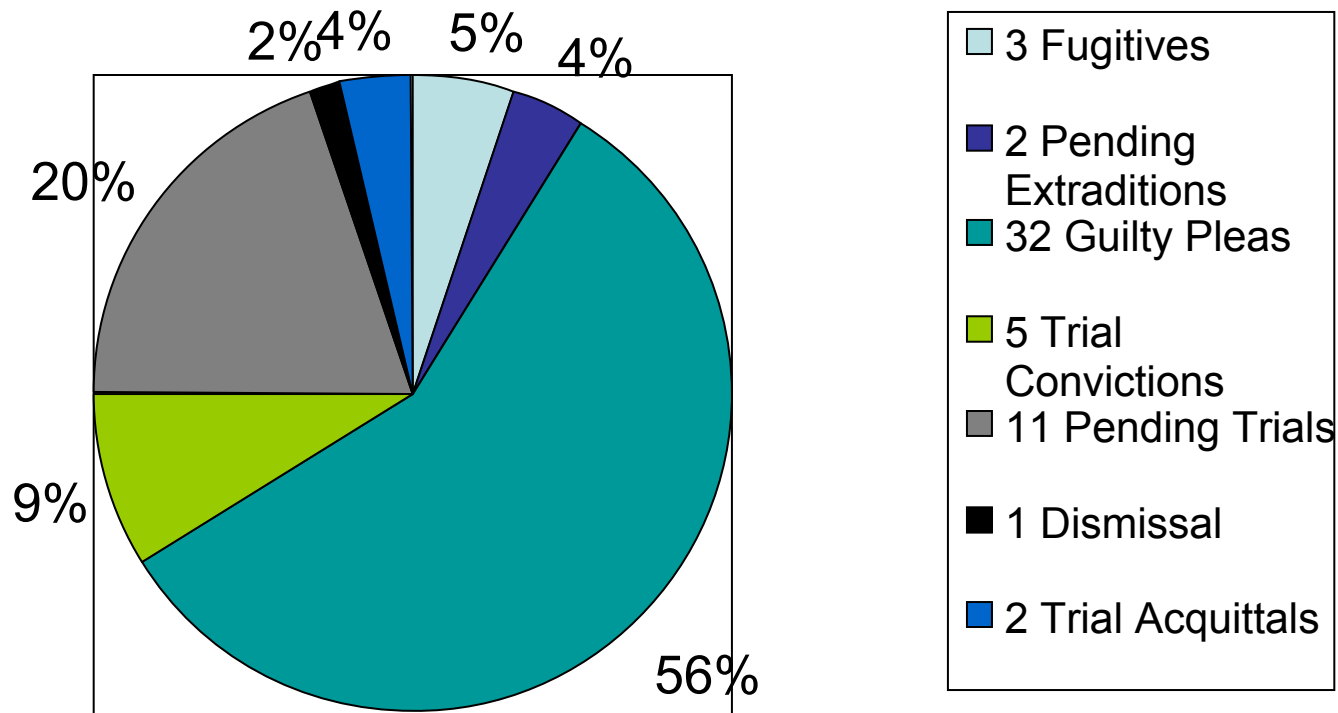


Increasing Rate of FCPA Prosecution of Individuals by the DoJ and SEC



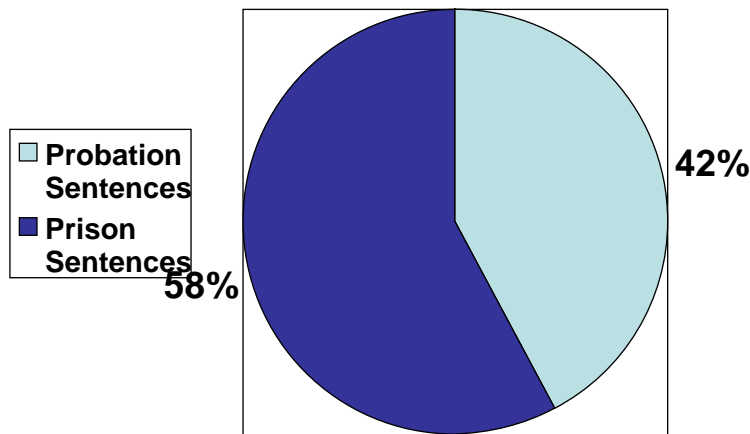
Criminal Enforcement of the FCPA Against Individuals

- 56 individuals have been prosecuted under the FCPA since 1998

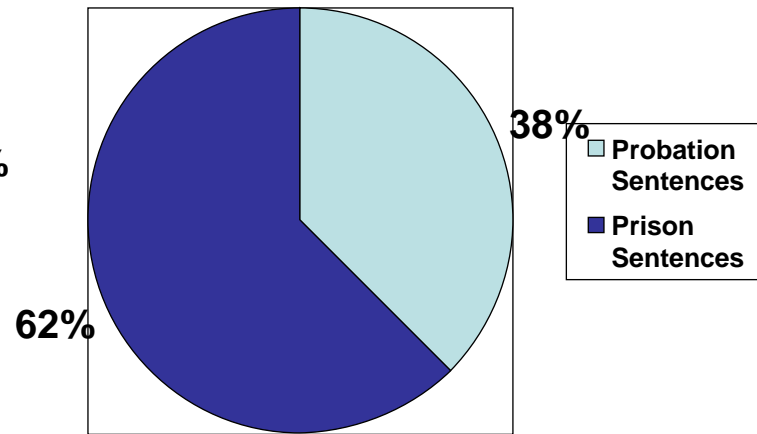


Recent Sentences for Individuals

- 26 of the 37 defendants who have pleaded guilty or been found guilty at trial between 1998 and 2008 have been sentenced



Sentences for Individual Defendants from 1998-2008



Sentences for Individual Defendants from 2003-2008

Notable FCPA Prosecutions of Individuals

- Albert Stanley: former Chairman and CEO of former Halliburton subsidiary Kellogg, Brown & Root
 - not yet sentenced, but has agreed to serve 7 years in prison and pay \$10.9 million in restitution
- James Tillery: former President of Willbros International, Inc.
 - not yet sentenced, arrested at Houston's George Bush Intercontinental Airport after a return flight from South Africa
- Paul Novak: former Willbros International consultant
 - fugitive, warrant outstanding for his arrest

The Federal Sentencing Guidelines in Criminal FCPA Cases

- Sentences for individuals found guilty of violating the anti-bribery provision of the FCPA are determined based on § 2C1.1



- start at base level 12, which allows for up to one year in prison
- offense level may increase by up to 30 points

- § 2C1.1 provides for enhancements if: (1) the benefit of the bribe is > \$70,000; (2) the defendant paid multiple bribes; or (3) the defendant made payments to “an elected public official or any public official in a high-level decision-making or sensitive position”

Mitigating Factors in FCPA Cases

- Under § 3E1.1: defendant may get a 2- or 3-point reduction in the offense level by accepting responsibility and pleading guilty
- Under § 5K1.1: defendant may get a reduced sentence by cooperating with the law enforcement agencies investigating the matter (“substantial assistance motion”)



Globalization of foreign anti-corruption enforcement

Globalization of Foreign Anti-Corruption Enforcement

- 2008 was the year of “foreign coordination” in FCPA enforcement
 - Siemens AP
 - Balfour Beatty PLC
 - Pacific Consultants International
- “We are now working with our foreign law enforcement colleagues in bribery investigations to a degree that we never have previously.”

– *Matthew Friedrich*

DOJ Acting Assistant Attorney General

December 15, 2008



Countries Involved in Anti-Corruption Prosecutions

- China 
- Germany 
- Greece 
- Italy 
- Japan 
- Switzerland 
- United Kingdom 
- United States 

Corruption Prosecutions in Other Countries

- United Kingdom: Aon fined \$7.9 million by UK's Financial Services Authority for failing to maintain systems to counter the risks of bribery and corruption
- Germany: Siemens fined \$856M by German authorities
- China:
 - Zheng Xiaoyu – former director of China's State Food and Drug Admin., executed after being convicted of taking 6.49 million yuan (~\$900,000) in bribes for approving hundreds of medicines, some that proved dangerous
 - Wang Wulong – former deputy chief of the Standing Committee of the Jiangsu Provincial People's of Congress, sentenced to death for soliciting or accepting bribes totaling 6.83 million yuan (~\$940,000)
 - Liu Zhihua – former Vice-Mayor of Beijing, convicted to a death sentence for accepting bribes when overseeing infrastructure projects, which was suspended for two-years pending favorable behavior

DOJ's coupling of FCPA prosecutions with other charges

DOJ's Coupling of FCPA Prosecutions with Other Charges

- September 24, 2008: Virginia physicist Shu Quan-Sheng arrested for violating the FCPA and the Arms Export Control Act for selling space rocket technology to China
- December 10, 2008: DOJ announces it's first ever joint FCPA/antitrust prosecution (against Misao Hioki, former General Manager of Bridgestone Corp., defendant in marine hose conspiracy)

Continuing upswing in FCPA litigation

Continuing Upswing in FCPA Litigation

- FCPA investigations have spurred increasingly collateral civil suits
 - securities fraud actions (e.g. Faro Tech)
 - shareholder derivative suits (e.g. BAE Systems and Chevron Corp.)
 - lawsuits initiated by foreign governments or business partners (e.g. Jack Grynberg suit against BP, Statoil and British Gas; Bahrain suit against Alcoa Corp.)

Other Significant Enforcement Developments

- Oil-for-Food Prosecutions: Four prosecutions in 2008 bring the total to 10
- Revoked Deferred Prosecution Agreement: DOJ revoked Aibel Group's deferred prosecution agreement and filed criminal charges
 - Aibel pled guilty, paid a \$4.2 million fine and will serve a two-year term of organizational probation

Challenges persist despite increase in compliance controls

Increase in FCPA Compliance Controls

- 84% have FCPA or ABC policies and procedures
- 75% have whistleblower mechanisms
- 67% have communications and training programs
- 45% have programs that contain continuous-monitoring protocols
- 37% have a committee responsible for overseeing compliance
- 32% have a dedicated FCPA Compliance Officer

Challenges Remain

- 82% stated that performing effective due diligence on foreign agents and third parties is very challenging or somewhat challenging
- 82% found that dealing with various foreign legal requirements (data privacy, privilege, facilitating payments) was either somewhat or very challenging
- 76% stated that auditing third parties for FCPA compliance is a significant challenge

Presenters

F. Joseph Warin

Partner

Gibson, Dunn & Crutcher LLP

fwarin@gibsondunn.com

T: (202) 887-3609

F: (202) 530-9608

Washington, D.C. Office

1050 Connecticut Avenue, N.W.

Washington, DC 20036

Elliott Leary

Partner

KPMG LLP

eleary@kpmg.com

T: (202) 533-3606

F: (202) 315-2667

Washington, D.C. Office

2001 M Street, N.W.

Washington, DC 20036

Questions?



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