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Government's new FCPA guidelines leave prosecutors plenty of flexibility, defense lawyers say

White-collar lawyers wanted more guidance in new standards for 1977 act

By Hadley Robinson

Defense attorneys did not get the specifics they were hoping for when the government issued extensive guidelines on the Foreign Corrupt Practices Act earlier this month.

Instead of clarifications on the benefits of self-disclosure, what constitutes a foreign official and what regulators expect of a compliance program, attorneys found a bundle of the government's previously stated positions, opinions and case law in the 120-page document.

"I think the surprising thing about the guidance is how unsurprising it was," said Robb C. Adkins, a San Francisco-based partner at Winston & Strawn LLP, who has both prosecuted and defended FCPA cases.

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- Robb C. Adkins

The Department of Justice and the Securities and Exchange Commission agreed last fall to issue guidance on the FCPA, following pressure from the U.S. Chamber of Commerce and attorneys grappling with how to advise their clients. Enacted in 1977, the act cracks down on companies giving bribes or making other inappropriate payments when doing business in other countries.

With FCPA enforcement efforts increasing in recent years, many companies want more government assistance in determining the requirements for staying in compliance, attorneys say, because there is very little case law to give clarity.

Enforcement spiked in 2010, with 23 companies paying a record \$1.8 billion in fines and penalties, and stayed high in 2011, when 15 companies paid \$506 million, according to Richard L. Cassin of CassinLaw LLC, who writes a blog on the FCPA.

Some attorneys acknowledged the new guidelines show extensive effort from the Department of Justice, and that having a roadmap - even if it's not a new roadmap - is useful.

"I think it's going to be helpful for some companies with some questions," said Pamela R. Davis, a San Francisco-based partner at Orrick, Herrington & Sutcliffe LLP. "The bigger questions are still out there."

The most frustrating vagueness in the guidelines for Davis is the government's position on self-disclosure. The government does not have a detailed policy on incentives to voluntarily cooperate and disclose internal issues, leaving defense attorneys in a tough position to help their clients.

"In advising companies, it is often times the most difficult part of the engagement," Adkins said. "It's difficult because there's not clear guidance on what the benefit is."

"Both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters," the guidelines state.

Davis said that sentence does not help much and just repeats what government officials have already said.

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Tuesday, November 27, 2012

Government

Government's new FCPA guidelines leave prosecutors plenty of flexibility, defense lawyers say

Defense attorneys did not get the specifics they were hoping for when the government issued extensive guidelines on the Foreign Corrupt Practices Act earlier this month.

California Supreme Court

Judges must exclude faulty expert testimony, state Supreme Court rules

The state Supreme Court unanimously ruled Monday that trial court judges must act as "gatekeepers" and exclude expert testimony that is speculative and based on faulty logic.

Litigation

Cooley lawyers help Wikimedia Foundation win court fight

A Los Angeles federal judge dismissed claims last week against two Wikimedia Foundation Inc. users who were accused of violating trademark laws by an El Segundo-based travel website.

Government

Victorville settles with company over failed power plant

The city of Victorville reached a \$54 million settlement with a company that oversaw a failed power plant project the municipality invested in.

Intellectual Property

Patent office director's upcoming departure will leave major void, lawyers say

U.S. Patent and Trademark Office Director David J. Kappos, who won praise during his three-year tenure for implementing reforms at the agency and helping to push a patent reform law through Congress, will step down in January.

Criminal

Retrial of AU Optronics executive accused of participating in price-fixing conspiracy starts

The executive who ran the computer monitor division of AU Optronics Corp. was back in a federal courtroom Monday, being retried by the government after a jury divided on his guilt in a price-fixing conspiracy last spring.

Labor/Employment

Arbitration trumps state public policy again in high court decision

The U.S. Supreme Court ruled unanimously on Monday that the Oklahoma Supreme Court should not have decided the legality of a non-compete agreement because the parties had agreed to arbitrate the matter.

Law Practice

Procopio establishes full-time Silicon Valley presence

Nine months after Procopio, Cory, Hargreaves & Savitch LLP opened in Silicon Valley, the firm has laterally hired an intellectual property group to man the office full-time.

Litigation

"The government will issue statements like, 'because the company cooperated we've given them a reduced penalty,'" Davis said. "How would you know what it would have been had they not self-reported?"

Other ambiguities that remain despite the new paperwork are what exactly the government wants in a company's compliance program and what constitutes a foreign official.

But Latham & Watkins LLP partner Timothy P. Crudo, a former federal prosecutor, was not surprised there weren't specifics on those issues.

"The government is trying to be helpful and provide some guidance, but at the same time they want to leave themselves as much flexibility as possible," he said. "This isn't always black and white. The government is not going to tie its own hands."

Bethany Hengsbach, a Los Angeles-based partner at Sheppard, Mullin, Richter & Hampton LLP, was positive about the guidelines. She noted some of the specific examples and hypotheticals the government gave on what constitutes a gift and what is allowed in terms of hospitality and entertainment in business relationships with foreign officials.

"They really confirm a lot of what we thought over the past couple years and a lot of what we are advising," Hengsbach said. "This is the first time we have concrete comment."

One thing Munger, Tolles & Olson LLP partner John Owens said is clear in the new guidelines is that strict FCPA enforcement is likely to continue.

"It shows me that they certainly are not backing away from these cases," he said. "The SEC and DOJ will show no sympathy to companies going forward who don't set up compliance programs."

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FCC granted en banc hearing in ads case

The 9th U.S. Circuit Court of Appeals last week granted the Federal Communications Commission an en banc rehearing of its decision to overturn a federal ban on political advertising on public TV and radio stations.

Mergers & Acquisitions

Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

Entertainment & Sports

Network asks judge to block ad-skipping service

The fight over Dish Network's "Autohop" feature on its "Primetime Anytime" DVR service, both introduced this spring, continues to carry on in courts on both coasts after the satellite TV provider and networks sued each other in May.

Litigation

Northern District releases e-discovery guidelines

In an effort to smooth the process of sorting through large quantities of potential evidence in a civil trial, a committee today is issuing guidelines regarding electronic discovery for the Northern District of California.

Law Practice

California's unrivaled capacity for innovation

Every few years commentators solemnly pontificate about how fiscal problems, a bad business climate, or too many regulations have broken California's business dynamism and innovative capacity. By **Martin Kenney**

"I want you" ...to help veterans find jobs

Every year on Veterans Day America recognizes and applauds veterans for their service, and this year was no different. Yet, 200,000 veterans cannot find work. Now is the time to help them. By **Adam Garson and Christian Orozco**

Tax

Saying sayonara to California, for tax purposes

Whatever the impetus for thinking about your California tax bill, it can be awfully tempting to tally up the tax savings by leaving. By **Robert Wood**

Intellectual Property

Lessons learned from a trademark infringement trial

One of the most difficult jobs facing general counsel today is how to effectively manage an intellectual property case. A recent trademark infringement case highlights some of these challenges. By **Ben M. Davidson and Heather H. Fan**

Judicial Profile

Joseph Jerome Farris

Senior Circuit Judge 9th U.S. Circuit Court of Appeals

Law Practice

Firms increasingly using unconventional tools to find attorneys

Firms are beginning to consider studies showing that undergraduate and law school grade point averages and LSAT scores and law school pedigree reveal less about an attorney's effectiveness than life experiences and personality.