

MONDAY TUESDAY WEDNESDAY THURSDAY **TODAY**[Previous](#) [Next](#) [Bookmark](#) [Reprints](#)

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White-collar lawyers await new FCPA guidance

By Gabe Friedman

After years of complaints from pro-business groups that a U.S. statute prohibiting overseas bribery is too vague, the U.S. Department of Justice agreed last fall to issue new guidance to clarify any vagaries in the law.

Since then, there's been radio silence.

That's put defense lawyers on edge about how the forthcoming guidance about the Foreign Corrupt Practices Act - which bars businesses from bribing foreign officials - will affect clients, as well as their practices.

The guidelines could clarify standards for criminal intent and whether corporations can mount a so-called ostrich defense of intentional blindness or deliberate indifference. Another area of concern is successor liability.

Clarification from top prosecutors could answer several important questions, like whether FCPA liability transfers when a company is bought by a larger corporation - known as successor liability. It could also more clearly outline steps companies can take to minimize their liability when they discover a problem internally. A vigorous campaign by the U.S. Chamber of Commerce and other groups to soften the law coincides with prosecutors taking a more aggressive approach to bringing FCPA cases to trial, which has created political controversy surrounding the statute and added uncertainty as to whether the changes by the DOJ will be significant or minor.

"The pushback from the business community is beginning to reach a bit of a fever pitch," said Bethany Hengsbach of Sheppard Mullin Richter & Hampton LLP, who advises companies on FCPA compliance. "So maybe this guidance will be useful, maybe instead of amending the law, [the DOJ] will come out with some very clear guidance."

Hengsbach added that the DOJ has offered few clues about its intentions, not even a hint at when this year the new guidance will be released.

In a speech last fall to white-collar defense lawyers, Assistant Attorney General Lanny Breuer noted global corruption is rampant and said the DOJ is open to clarifying the law's reach and meaning but not "watering down" its impact.

"I don't think we have more to say about it beyond what was said in the fall," DOJ spokeswoman Alisa Finelli said this week.

There's plenty of money at stake for lawyers and companies: In 2010, 23 companies paid a record \$1.8 billion in fines and penalties to settle allegations of FCPA violations, and 15 companies paid \$506 million in 2011, according to an estimate by Richard L. Cassin of CassinLaw LLC and the author of a blog about the statute.

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Friday, March 2, 2012

Litigation

\$167 million jury award may be largest of its kind

A physician assistant who alleged sexual harassment and retaliation against her former hospital, Mercy General in Sacramento, won a \$167 million verdict.

White-collar lawyers await new FCPA guidance

As the Department of Justice prepares to release new "guidance" on the reach and meaning of the Foreign Corrupt Practices Act, lawyers are watching to see whether a policy change creates more litigation and fewer settlements.

Energy Law

Gibson Dunn represents energy company in joint venture

Attorneys with Gibson Dunn & Crutcher's Orange County office are leading an effort by Edison Mission Energy to set up a joint venture with two companies to own and operate wind farms throughout the United States.

Government

Death penalty foes gather enough signatures for ballot initiative

Death penalty foes turned in 800,000 signatures Thursday toward a ballot initiative asking voters to repeal capital punishment.

Litigation

Google hit with suit over web code

A proposed class action has been lodged against Internet behemoth Google Inc., which was accused last month of producing code that allows the company to track the Web history of people who use Apple Inc.'s browser, Safari.

Government

Senate committee approves 9th Circuit nominee

The Senate Judiciary Committee approved a nominee for the 9th U.S. Circuit Court of Appeals on Thursday, despite some lingering Republican resentment over the Obama administration's recess appointments.

Litigation

Central District clerk lawyers up in jury panel challenge

A criminal defendant's challenge to Orange County federal jury panels may turn into protracted civil litigation now that the clerk of the Central District of California has brought in a well-known San Francisco law firm to represent her.

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Robb Adkins of Winston & Strawn LLP said companies operating in an emerging market - such as Brazil, Russia, India and China - have been seeking legal advice on preventative steps to limit their liability should FCPA violations arise. Companies are launching far more multimillion-dollar internal investigations of potential violations, Adkins said.

The guidelines could clarify standards for criminal intent and whether corporations can mount a so-called ostrich defense of intentional blindness or deliberate indifference.

Another area of concern is successor liability. With penalties growing larger, potential liability under the FCPA has emerged as a stumbling block to completing corporate mergers.

Kraft Foods Inc. acquired Cadbury Foods for \$19.1 billion in 2010, only to later learn the Securities and Exchange Commission is investigating payments that Cadbury executives made to Indian government officials. And in 2005, Lockheed Martin Corp. abandoned plans to acquire San Diego-based Titan Corp., which eventually struck a \$28.5 million settlement related to FCPA violations.

Breuer has explicitly opposed eliminating successor liability.

"There are a lot of vagaries, and it puts businesses at a real disadvantage," said Adkins. "Hopefully, DOJ will issue the kind of guidance that will be useful, but I think most white-collar practitioners believe there will probably be a need for further clarification."

Part of the reason for the gray area is there's little case law defining how to interpret the FCPA because the enforcement program historically focused on companies, which often choose to settle rather than litigate, according to Wes Porter, a professor at Golden Gate University School of Law.

"It hasn't been a decision of do we charge or don't charge a company," Porter explained. "There's been all these gradations of how can we strike agreements with these companies."

If the new guidance draws sharp lines around what constitutes a conflict, it could shift the focus of FCPA enforcement toward more litigation.

That could also shift the balance of legal defense work from compliance advice to litigation.

The DOJ expanded its focus beyond companies in 2011 to prosecute more individuals, but the U.S. government hasn't made the strongest impression. Prosecutors suffered a string of embarrassing defeats beginning in December when U.S. District Judge A. Howard Matz in Los Angeles dismissed felony FCPA convictions against two corporate executives whom a jury found paid millions of dollars in bribes to Mexican government officials.

Later that month, a federal judge in Washington, D.C. threw out FCPA conspiracy charges against six executives in the military equipment industry and exonerated one person for lack of evidence. In January, a federal judge in Houston exonerated a Swiss engineering expert convicted of bribing Mexican government officials.

"If you look back a year ago, the landscape was clearly different," said David J. Schindler of Latham & Watkins and a former federal prosecutor. "The [DOJ] looked like it was making good on its promise to pursue individuals. But when you look at the cases, they haven't gone so well."

Those defeats have fueled speculation the DOJ will be reluctant to issue any guidance that limits its FCPA enforcement program. But Schindler pointed out the dismissal occurred for tactical errors, such as discovery violations and evidentiary concerns.

Last month, the U.S. Chamber of Commerce and other groups sent a letter to the U.S. Department of Justice and the Securities and Exchange Commission seeking clarity on some of the questions raised by the litigation. High on the list of questions was the

Entertainment & Sports

Staging of marriage battle play set in Hollywood

This Saturday, actors George Clooney, Brad Pitt, Martin Sheen and Kevin Bacon will lend their talents to a staged reading of "8," a new play based on federal trial court transcripts from the legal battle over California's voter-approved gay marriage ban.

Litigation

SF opposes en banc rehearing of Prop. 8 case

San Francisco City Attorney Dennis Herrera on Thursday filed his opposition to a request that the Prop. 8 case be re-heard in front of an 11-judge panel.

Corporate

A checklist for selling your company in 2012

Take these immediate steps to ensure that the sale will close in 2012 before tax rates increase. By **Jeremy D. Glaser** of Mintz, Levin, Cohn, Ferris, Glovsky, & Popeo LLP

Law Practice

Fee disputes: an ethical review of lawyer billing

In order to justify a billing, the activities of an attorney should be authorized, appropriate and reasonable. By **Alexander S. Polsky** of JAMS

Technology & Science

Takeaways from Obama's new consumer privacy framework

The Obama administration issues guidance on how it will approach - and enforce - online and mobile privacy. By **Dominique R. Shelton** Edwards Wildman Palmer LLP

Law Practice

eDiscovery: New federal protocol for criminal cases

New federal guidelines promote uniform treatment of eDiscovery in criminal proceedings. By **A. Marco Turk** of California State Dominguez Hills

Solo and Small Firms

TechLaw LLP

TechLaw LLP actually benefited from the economic recession when clients were looking to cut legal costs.

Criminal

Insider trading case remains in New York

A federal judge in Manhattan late Wednesday rejected an effort by a Menlo Park hedge fund manager to get his criminal insider trading case transferred to the Northern District of California.

Litigation

Cosmetic firms sued over 'cruelty free' claims

Three major cosmetics companies falsely

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definition of a foreign government official in state-owned countries like China. It also asked how to distinguish a de minimis gift from a bribe.

"We believe that modest legislative revisions and clarifications of the FCPA remain the best option for providing the certainty needed by the regulated community," the letter said.

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Talk about the Law

they could sell the items in China, a federal class action alleges.

How to take an effective deposition

There are four steps to taking a good deposition: preparation, document presentation, the deposition itself, and follow-up. By **Paul D. Beechen**

Letter to the Editor

Kudos to San Francisco for implementing 'civil Gideon'

A reader comments on "SF passes ordinance to explore civil Gideon services."

ADR Provider

Richard J. McAdams

Having started the 6th District Court of Appeal mediation project while a justice, Richard J. McAdams says the transition to work as a mediator at JAMS came easily.

Judicial Profile

Louis Mauro

3rd District Court of Appeal (Sacramento)

Judges and Judiciary

Judicial council survey now asks for judges' sexual orientation

Some California judges prefer a "don't ask, don't tell policy" when it comes to revealing their sexual orientation, a recent survey indicates.

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