

# LAW WEEK

## COLORADO

## Denver Attorney Debates Top FCPA Prosecutor

By **Matt Masich**  
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DENVER—The American Bar Association is considering a draft resolution seeking to clarify the Foreign Corrupt Practices Act, or FCPA.

T. Markus Funk, a white-collar defense and investigations partner with law firm Perkins Coie specializing in FCPA compliance and internal investigations, was tasked by the ABA with creating the proposed resolution. He presented the draft last week in Washington, D.C., at a council meeting of the ABA's Criminal Law Section. The draft, supported by the current and incoming Criminal Law Section chairs, asks Congress to define more precisely what the FCPA means, how it should be applied and whether businesses' compliance programs can be mitigating factors if bribery-related problems emerge.

Funk, a former federal prosecutor who taught criminal law at Oxford University, Northwestern, and the University of Chicago, is co-chair of the ABA's Global Anti-Corruption Task Force. He describes the draft resolution as a "modest proposal addressing some very real and understandable concerns."

"I am honored to have been asked to move the debate forward on behalf of the U.S. and global business community, and am happy to advocate for the sort of transparency and predictability in the law that companies and their employees for good reason expect," Funk said. "After all, clear notice of what the government will consider illegal, and the requirement of a guilty mind, are the basic elements distinguishing the criminal law from public welfare and regulatory offenses."

Charles Duross, deputy chief of the U.S. Department of Justice's Criminal Division and FCPA Unit chief, appeared at the ABA's open forum to debate the resolution with Funk.

The ABA's criminal law council tabled the resolution until April and asked Duross and Funk to work to give the council more information and report further.

"What we are involved in is an honest, good-natured disagreement on policy and drafting, and I look forward to working with U.S. DOJ, Chuck [Duross] and his office to continue the constructive dialogue," said Funk, who is based in Perkins Coie's Denver office. "I am certain that [together]



T. MARKUS FUNK

we will provide the ABA council members with the information and arguments needed to render a full and informed decision on this important issue of concern to our business community."

The timing of the resolution is no coincidence. The number of FCPA enforcement actions in 2010 dwarfed any previous year, and 2011 is expected to set a new high mark.

The FCPA, a federal law that makes it illegal to bribe foreign officials, has been on the books since 1977, but the U.S. Department of Justice has dramatically ramped up enforcement in recent years. Several years ago, German company Siemens was assessed more than \$800 million in FCPA penalties, and Johnson & Johnson this year had to pay \$70 million in penalties.

In 2004, the justice department brought just two FCPA charges and netted \$11 million in criminal penalties; in record-setting 2010, the department resolved 50 FCPA

cases and had 35 more cases pending, with well over a \$1 billion in penalties and disgorgements.

Criminal charges under FCPA against individuals have risen sharply, and those charged can face serious jail time. A man convicted in the Southern District of Florida of bribing officials at a state-owned Haitian telecom company, for example, was sentenced last month to 15 years in prison — a record in an FCPA case. And all indications are that the government's enforcement efforts will increase in the years to come.

Increased prosecutions of companies and individuals accused of bribing foreign officials has the U.S. business community worried about ambiguity in the law. While companies laud the anti-graft goals of the FCPA, uncertainty about the law's meaning and reach can leave even the most law-abiding members of the business community feeling under siege.

Corporate leaders worry about the

possibility that the government will hold them and their companies liable for difficult-to-control acts of rogue employees or foreign third-party intermediaries. There have been calls for greater predictability and transparency in FCPA enforcement. Companies may be hesitant to do business overseas without greater certainty of how the law will be applied.

The government has emphasized that the FCPA helps the U.S. lead global anti-corruption efforts. Of the anti-corruption cases brought worldwide in the last year, the U.S. accounted for about three-quarters.

Funk declined to elaborate on the substantive merits of the pending resolution. While praising the DOJ for "so vigorously blazing the anti-corruption trail," he said "there is no reason to think that other countries will somehow let off the anti-corruption gas pedal just because the U.S. Congress provides additional clarity as to the FCPA's reach." •

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