# Private Suits Under FCPA — An Ill-Advised Idea

January 31, 2012

Late last year, Rep. Ed Perlmutter (D-Colo.) introduced a bill in the House of Representatives that would amend the Foreign Corrupt Practices Act (FCPA) to permit private suits against certain foreign companies and individuals. The bill, entitled the "Foreign Business Bribery Prohibition Act of 2011," would significantly alter the landscape of FCPA enforcement, and not for the better.

Perlmutter proposed similar versions of the bill twice before, in 2008 and 2009, and the bill did not make it out of committee either time.

The FCPA prohibits bribing foreign government officials. The proposed bill would amend the statute to allow for private lawsuits against foreign concerns for alleged violations of the statute's anti-bribery provisions. These lawsuits could be brought by (1) any issuer, defined as an entity that issues securities under U.S. securities laws and its employees; (2) any domestic concern, defined as any U.S. citizen, national, or resident, or any business that is principally located in the U.S. or incorporated in the U.S.; or (3) any other United States person, defined as any person or business entity other than an issuer or a domestic concern. A foreign concern would be defined as any person or entity other than an issuer or a domestic concern. The bill would not allow for a private right of action against issuers or domestic concerns.

The bill was referred to the House Committee on the Judiciary Subcommittee on Courts, Commercial and Administrative Law and the House Energy and Commerce Committee Subcommittee on Commerce, Manufacturing, and Trade. Thus far, no action has been taken on the bill by the subcommittee.

Under the proposed bill, a plaintiff would be able to recover three times the amount of either the contract that the defendant gained or the contract that the plaintiff lost due to the bribe.

Private rights of action to enforce laws are premised on the assumption that there are so many violations occurring that the government needs the help of private parties to identify them. This assumption is not always correct. In False Claims Act qui tam cases, for example, a private party must submit its case to the government for review. If the government declines to intervene as a plaintiff, the private party may choose to continue with the litigation. However, in 2011, only 5 percent of the money recovered under the False Claims Act was in cases in which the government declined to intervene. This

gives a strong indication of the merits of the claims being brought by private parties under this statute.

If private parties are allowed to bring FCPA actions, there will be even more meritless litigation bogging down the courts. Furthermore, the ability of private parties to bring these actions can lead to harassing litigation.

In FCPA cases, the government now has the sole option of deciding whether a case should be brought, and this should remain the law. Individuals should continue to report suspected wrongdoing to the government and let the government decide whether the case should be pursued. The Department of Justice has significantly increased its FCPA enforcement in recent years. It does not appear that there is a dearth of possible foreign bribery situations known to the government.

*Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.*

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