

Proposed Bill to Allow Private Enforcement of the FCPA

We have received several inquiries regarding H.R. 3531, a bill that was recently introduced in the U.S. House of Representatives to amend the Foreign Corrupt Practices Act ("FCPA") to permit private suits against certain foreign companies and individuals. On November 30, 2011, Congressman Ed Perlmutter (D-CO) introduced the bill, entitled the "Foreign Bribery Prohibition Act of 2011." If passed, the bill would represent a significant change in FCPA law and enforcement. Congressman Perlmutter proposed similar versions of this bill in the 110th and 111th Congress, in 2008 and 2009, respectively. Neither of the prior bills made it out of committee.

Background

The FCPA makes it a criminal and civil offense to pay, offer, or give anything of value to a foreign official for the purpose of obtaining or retaining business or obtaining favorable or preferential treatment from the government. The FCPA's antibribery prohibitions apply to three separate groups of private actors: (1) "issuers" – defined as any entity that issues securities registered under United States securities laws, as well as the entity's employees and agents, 15 U.S.C. § 78dd-1; (2) "domestic concerns," defined as any United States citizen, national, or resident, or any business entity that is principally located in the United States or organized under the laws of a State, *id.* § 78dd-2; and (3) any persons or business entities "other than issuers or domestic concerns," provided that such person or entity committed a prohibited act while in the United States and by means of interstate commerce, *id.* § 78dd-3.

Courts have uniformly held that the FCPA does not contain an implied private right of action, see *Lamb v. Phillip Morris Inc.*, 915 F.2d 1024 (6th Cir. 1990), and Congress has amended the FCPA numerous times without adding such a private right. Accordingly, the authority to enforce the FCPA currently rests exclusively with the DOJ and the SEC.

The Proposed Bill

H.R. 3531 would amend § 78dd-3 to permit any issuer, domestic concern, or other United States person to bring suit against a "foreign concern" – defined as any person or entity other than an issuer or a domestic concern – for violations of the FCPA's substantive antibribery provisions. A plaintiff would be required to prove that the defendant's violation prevented the plaintiff from obtaining or retaining business, and that the violation assisted the foreign concern in obtaining or retaining such business. 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. The bill retains the jurisdictional requirement that the violation must be committed in the United States and by means of interstate commerce. In sum, H.R. 3531 would permit United States persons and companies that trade on a United States exchange to (a) bring suit for treble damages (b) against non-U.S. persons or companies that are not organized under U.S. law and do not trade on a United States exchange (c) for violations of the FCPA's antibribery provisions (d) that cause the foreign concern to obtain or retain business at the plaintiff's expense, provided that (e) the violation occurred in the United States and by means of interstate commerce. H.R. 3531 therefore appears to be an attempt to "level the playing field" of FCPA enforcement by giving U.S. companies the opportunity to bring suit against foreign concerns that violate the FCPA's antibribery provisions.

H.R. 3531 would not permit a private right of action against issuers or domestic concerns. Therefore, the bill would not alter the current law prohibiting private actors from bringing FCPA suits against United States persons, companies that trade on a U.S. exchange, or business entities that are organized under the laws of a State.

Potential Impact

Despite its limited scope, H.R. 3531 could potentially lead to a substantial increase in private litigation. The treble damages provision gives domestic parties a strong incentive to bring actions against competing foreign concerns, particularly in situations where the domestic party has been unable to compete in international markets due to uneven enforcement of antibribery prohibitions. In addition, although the requirement that the violation be committed in United States territory might limit the availability of such suits, recent government enforcement actions under § 78dd-3 suggest that minimal acts in United States territory might be sufficient to ground jurisdiction. For example, in *United States v. DaimlerChrysler China Ltd.*, No. 1:10-cr-00066-RJL (D.D.C. 2010), the government predicated jurisdiction on the allegation that a German company had made corrupt payments to Chinese officials by wire-transferring money from German accounts to third-party U.S. bank accounts, "even though no part of the transaction involved the U.S., nor were the entities that nominally controlled the bank accounts parties to any of the transactions." *Id.* Dkt. No. 1 at 6. Thus, H.R. 3531 could conceivably permit suits based on transactions agreed and consummated outside the United States – including in countries where government bribery or payments are far more prevalent – so long as the improper payment originates in or passes through a United States bank account.

Status of the Bill

H.R. 3531 is in the first stage of the legislative process. The bill is currently awaiting consideration in the House Energy and Commerce Committee and the House Judiciary Subcommittee on Courts, Commercial and Administrative Law.

We will continue to monitor the status of the bill. If you would like to discuss this matter further please contact one of the attorneys listed below. ♦

If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

Michael F. Buchanan	212.336.2350	mfbuchanan@pbwt.com
Joshua A. Goldberg	212.336.2441	jgoldberg@pbwt.com
Erik Haas	212.336.2117	ehaas@pbwt.com
Peter C. Harvey	212.336.2810	pcharvey@pbwt.com
Daniel S. Ruzumna	212.336.2034	druzumna@pbwt.com
Harry Sandick	212.336.2723	hsandick@pbwt.com

IRS Circular 230 disclosure: Any tax advice contained in this communication (including any attachments or enclosures) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication. (The foregoing disclaimer has been affixed pursuant to U.S. Treasury regulations governing tax practitioners.)

This alert is for general informational purposes only and should not be construed as specific legal advice.

To subscribe to any of our publications, call us at 212.336.2186, email info@pbwt.com, or sign up on our website, www.pbwt.com/resources/publications. To unsubscribe, please send an email to info@pbwt.com with the subject: unsubscribe.