

**ALERT**

# Proposed Amendment Would Automatically Propose for Debarment Any Contractor That Violates the Foreign Corrupt Practices Act

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Rep. Peter Welch (D-VT) has proposed an amendment to H.R. 1540, the House version of the National Defense Authorization Act for Fiscal Year 2012 (NDAA), which would require any person or company that violates the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) to be proposed for debarment from all federal contracts and grant awards. Those individuals and companies would then be prohibited from receiving any federal contracts or grants unless and until they persuade government contracting officials that they are currently responsible contractors despite the FCPA violation. The proposed debarment would occur regardless of whether the FCPA violation occurred in relation to a government contract or grant, or a purely commercial business transaction.

Although the proposed amendment would permit the head of a government agency to waive the proposed debarment for a specific contract or grant, it makes no exception for FCPA violations that a company might voluntarily report and address with government enforcement officials. Because the amendment requires a proposed debarment only after a final (undefined) "judgment" finding an FCPA violation, however, it is unclear whether the amendment would apply to such voluntary disclosures if they result in a Deferred Prosecution Agreement or a Non-Prosecution Agreement from the Department of Justice rather than a formal "judgment" that an FCPA violation has occurred. Nonetheless, the possibility of such a severe penalty as debarment could discourage individuals and companies from voluntarily disclosing FCPA violations and cooperating with enforcement agencies to improve FCPA compliance.

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The FCPA contains two distinct areas of focus and corresponding enforcement schemes: (1) anti-bribery provisions and (2) record-keeping and internal accounting provisions. The anti-bribery provisions prohibit corrupt payments to foreign government officials by U.S. citizens and companies seeking to influence foreign governments and obtain or retain business or secure an advantage in business dealings in the foreign country. The FCPA also contains extensive record-keeping and accounting practices requirements that apply to any company whose securities are listed in the United States. Individuals and companies that violate the FCPA can receive significant civil and criminal fines for each violation, and individuals can also face imprisonment. In addition, agencies already can suspend or debar individuals and companies from government contracting based on an FCPA violation. Rep. Welch's amendment requires a proposed debarment for violations of the FCPA's anti-bribery provisions, but not for violations of the record-keeping and internal accounting provisions.

The proposed amendment is virtually identical to the Overseas Contractor Reform Act of 2010, which Rep. Welch introduced in the previous session of Congress. Although the bill passed the House on September 15, 2010, the Senate did not address it before Congress adjourned for the year. The only substantive difference between the current amendment and the previous legislation is that the Overseas Contractor Reform Act included a statement declaring it "the policy of the United States Government that no Government contracts or grants should be awarded to individuals or companies who violate the Foreign Corrupt Practices Act of 1977."

The House Armed Services Committee approved H.R. 1540 on May 17, 2011. The full House has begun debating H.R. 1540 but has not yet considered Rep. Welch's amendment. Wiley Rein's International Trade and Government Contracts practices will continue to monitor developments related to the proposed amendment, as well as other NDAA provisions affecting government contractors.