Practice Tips: World Bank Anti-Corruption and Fraud Enforcement

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With billions of dollars flowing from the World Bank to development projects around the world every year, companies are understandably attracted to the prospect of receiving World Bank-financed contracts. These companies should keep in mind that the World Bank’s sanctions system operates at the cutting edge of international anti-corruption enforcement and creates real risk that companies working on Bank-financed contracts, as well as their affiliates and subsidiaries, may be suspended and debarred by the Bank and thereby excluded from all World Bank-financed contracts. In light of the World Bank investigators’ observations that many of its investigations involve misconduct by small, local offices of widely known multinational corporations, the risk that unsupervised or even rogue activities of a distant affiliate could result in the debarment of an entire corporate family are too high to ignore.¹

Data published by the World Bank Office of Suspension and Debarment (OSD) reveal that the vast majority of sanctions are the result of fraudulent practice, primarily forged third-party documents.²

Possibly signaling a shift towards more aggressive and diverse enforcement, the latest annual update from the Bank’s investigators indicates that the overall number of investigations being sent to the sanctions system rose by 15% in the fiscal year ending in 2014, with allegations of corruption up 18% and collusion up 9%.³

Sophisticated companies accustomed to contracting with the US government and working overseas with foreign officials should already be familiar with the need to implement compliance systems to minimize the risk of fraud and corruption, the importance of meaningful engagement during settlement negotiations, and strategies to take advantage of various procedural protections. For other entities looking to compete for Bank-financed contracts, taking time to understand the risks associated with doing so and the available risk-mitigation techniques is vital. This client alert aims to identify the risks created by the World Bank sanctions system for businesses seeking World Bank-financed contracting opportunities and to provide several practice tips to help mitigate those risks.

The World Bank’s Sanctions System

The World Bank’s sanctions process begins with the Bank’s investigators in the Integrity Vice Presidency (INT), who receive and investigate allegations of sanctionable conduct in connection with Bank-financed contracts. Sanctionable conduct includes corruption, fraud, collusion, coercion, and obstruction.⁴ Allegations come from varied sources—in Fiscal Year 2014, 31% of the complaints INT received came

³ INT 2014 Report at, supra note 1, at 18.

⁴ These sanctionable practices are defined by the Bank as follows, but note that the definitions have been revised several times, and previous versions may apply to older contracts:

- **Corrupt Practice**: the offering, giving, receiving, or soliciting, directly or indirectly, or anything of value to influence improperly the actions of another party.
- **Fraudulent Practice**: any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.
- **Collusive Practice**: an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party.
- **Coercive Practice**: impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.
- **Obstructive Practice**: (a) deliberately destroying, falsifying, altering or concealing evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive, or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation; or (b) acts intended to materially impede the exercise of the Bank’s contractual rights of audit or access to information.

OSD, Lessons Learned, supra note 2, at 12.
from Bank staff, the other 69% came from contractors, concerned citizens, government officials, employees of NGO’s, and other multilateral development banks.\(^5\)

If evidence of misconduct is found, liability can extend to affiliates and individuals in control of the alleged wrongdoer (referred to as a Respondent).\(^6\) Like the suspension and debarment system in US government contracting, the Bank extends sanctions to affiliated entities, and both the US and the Bank generally define two entities as affiliates when either has control over or the ability to control the other, or a third party controls or has the ability to control both.\(^7\) The Bank broadly defines control as "the ability to direct or cause the direction of the policies or operations of another entity, whether through the ownership of voting securities, by contract or otherwise."\(^8\) The definition of control also includes several non-exclusive indicia of control, including interlocking equity ownership or management, overlapping employees, sharing of facilities, etc.\(^9\) The Bank applies four rebuttable presumptions when applying sanctions to corporate groups:\(^10\)

1. Sanctions apply to the entire corporate entity unless the Respondent can show that the sanctionable practice was limited to a particular unit or division;
2. Sanctions are applied to all subsidiaries (i.e., entities controlled by the Respondent) unless the Respondent can show that application would be disproportionate and not reasonably necessary to avoid circumvention;
3. Sanctions are not applied to parents (entities controlling the Respondent) and ‘sister’ firms (entities under common control with the Respondent), unless INT can show some degree of either culpability (i.e., direct involvement in the wrongdoing) or responsibility (i.e., failure to


\(^6\) Pascale Hélène Dubois, *Domestic and International Administrative Tools to Combat Corruption: A comparison of US Suspension and Debarment with the World Bank’s Sanctions System*, UNIVERSITY OF CHICAGO LEGAL FORUM 229-30 (2012). INT will issue a separate Statement of Accusations and Evidence (SAE) for each individual and entity potentially subject to sanction, OSD will give each entity an individual Notice of Sanctions Proceedings, and each entity will be given an opportunity to defend itself throughout the process. *Id.* at 230.

\(^7\) *Id.* at 229-30.

\(^8\) *Id.* at 230. The Bank and the FAR rely on similar indicia of ownership. *Id.* at 230-231.


\(^10\) *Id.* at 17-18.
supervise or maintain adequate controls)\textsuperscript{11} or that extension of responsibility is necessary to avoid circumvention of the sanction; and

4. When INT has made a prima facie case that a firm is the successor or assign of a sanctioned entity, the sanction will apply to the putative successor or assign unless it can rebut INT’s case or otherwise show that such application would be inconsistent with the spirit of the guiding principles of the sanctions system.

INT has several options once it concludes its investigation. INT has discretion to either: a) enter settlement negotiations with any entity under investigation to resolve the matter or b) submit a Statement of Accusations and Evidence (SAE) to the Office of Suspension and Debarment (OSD) for review and further action.\textsuperscript{12} INT can initiate settlement at any time, even after the case is submitted to OSD, but INT is the only actor in the system with the discretion to do so. Note here an important distinction between the World Bank sanctions system and the US suspension and debarment system. In the US suspension and debarment system, any suspension or debarment requires an affirmative determination that such action is in the best interests of the United States. A contractor will not be suspended or debarred conduct if the contractor can show that it is presently responsible despite past misconduct, and Suspension and Debarment Officers have discretion to enter into administrative agreements (similar to settlements) in lieu of suspension or debarment even if a contractor cannot demonstrate its present responsibility.\textsuperscript{13} In contrast, the World Bank does not permit decision makers in OSD or the Sanctions Board, which hears appeals from OSD decisions, to consider a Respondent’s present responsibility or the overall benefit of sanctioning the Respondent compared to the cost of losing the Respondent’s value as a supplier. Instead, the Bank has a zero tolerance policy: If OSD or the Sanctions Board find sufficient evidence of sanctionable conduct, a sanction will result—although mitigating and aggravating factors are taken into account when determining the severity of that sanction.\textsuperscript{14}

Given INT’s exclusive ability to negotiate settlement, if INT initiates investigation, suppliers should engage with INT’s investigators before an SAE is submitted to OSD. This could involve providing investigators

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\item Absent a showing of willful blindness, responsibility, in the sense of failure to supervise or maintain adequate internal control or ethical culture within the firm, does not normally lead to debarment, but rather conditional non-debarment when there are systemic issues or a letter of reprimand when there is an isolated incident of a failure to supervise. \textit{Id.} at 18.
\item INT 2014 Report at, \textit{supra} note 1, at 34-35.
\item Dubois, \textit{Domestic and International Administrative Tools to Combat Corruption}, \textit{supra} note 6, at 208, 210, 215.
\item \textit{Id.} at 233-34.
\end{itemize}
with evidence sufficient to completely alleviate the need for further investigation or entering into a settlement agreement. Even though the possibility of negotiating a settlement does not terminate when a case is submitted to OSD, the best way to avoid sanction is to complete negotiations before the case is submitted to OSD.

If INT does submit an SAE to OSD, OSD will review the evidence to determine whether it is sufficient, i.e., whether it is more likely than not that sanctionable conduct occurred in connection with a Bank-financed contract. If evidence in the SAE is insufficient, OSD will send the SAE back to INT and allow INT to submit more evidence in the future. This occurs in approximately 38% of the cases submitted to OSD.

If evidence in the SAE is sufficient, OSD will first consider evidence of mitigating and aggravating factors and then recommend an initial sanction. OSD will send a Notice of Sanctions Proceedings to the Respondent. If a period of debarment for at least six months is recommended, the Respondent is temporarily suspended from receiving any Bank-financed contracts upon receipt of the Notice. Because the default sanction is Debarment with Conditional Release for three years, Respondents are often temporarily suspended upon receipt of the Notice. The Respondent has thirty days after receipt of the Notice to seek reconsideration from OSD by submitting an Explanation. Regardless of whether an Explanation is submitted, the Respondent has ninety days to appeal OSD’s decision to the Sanctions Board—an independent body that conducts a final and de novo review of contested sanctions cases. In the cases where OSD issues a Notice of Sanctions proceedings, approximately 40% are appealed to the Sanctions Board.

If the Respondent fails to appeal OSD’s recommendation, or if the Sanctions Board determines that debarment is appropriate, debarment is finalized and the Respondent’s name is listed on a public website. Any unchallenged determination by OSD or decision by the Sanctions Board will be

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15 OSD, Lessons Learned, supra note 2, at 12.
16 Id.
17 Id. at 30.
18 Id. at 11-13.
19 Id. at 15.
20 Id. at 19.
21 Id. at 15-17.
22 Id. at 31.
23 Id.
published,\(^24\) and although the Respondent’s name is redacted, it is often possible to identify the Respondent by comparing the timing of the publication with the listing of the Respondent’s name on the public database. No individual or entity on the Bank’s list of debarred suppliers can receive any Bank-financed contract, and under a cross-debarment agreement entered in 2010 with four other multi-lateral development banks, debarment is almost always extended to contracts financed those institutions.\(^25\)

It is important to understand that the default sanction of Debarment with Conditional Release requires a mandatory minimum period of debarment (usually three years) and that regaining eligibility is conditioned upon receiving a determination of responsibility by the Bank’s Integrity Compliance Officer (ICO).\(^26\) This generally requires, among other things, implementing a compliance system.\(^27\)

**Practice Tips to Mitigate the Risk of the World Bank Sanctions**

Given the potentially immense consequences, companies working on Bank-financed contracts should take steps to mitigate the risk of suspension and debarment. A primary takeaway from the description of the sanctions process above is that while INT may decide to negotiate a settlement even when there is sufficient evidence that sanctionable conduct occurred, OSD and the Sanctions Board take a zero tolerance approach: Remediating actions taken after-the-fact will not constitute a complete defense to avoid sanctions. This may seem particularly odd to those familiar with the US suspension and debarment system, where a contractor’s showing of present responsibility precludes suspension or debarment for past misdeeds.

If a settlement cannot be reached and INT submits sufficient evidence of sanctionable conduct to OSD, the Respondent will likely be temporarily suspended and only able to avoid debarment by seeking reconsideration from OSD and appealing to the Sanctions Board. This can be a costly, time consuming, and uncertain process, which can often be avoided with effective compliance systems, timely voluntary disclosure, and negotiated settlement. If allegations of sanctionable conduct are submitted to OSD,


\(^{25}\) *Id.* at 17.


\(^{27}\) *Id.*
Respondents and their counsel should be sure to understand and take advantage of the procedural protections available to them at OSD and the Sanctions Board.

1) Implementing a Compliance Program

Given the zero tolerance approach, the best way to avoid being sanctioned by the Bank is to implement a compliance system that prevents sanctionable conduct from occurring. Designing these systems may be similar to designing compliance protocols to mitigate US False Claims Act (FCA) and US Foreign Corrupt Practices Act (FCPA) liability. For example, given the high number of sanctions cases involving fraudulent documentation, a company may implement independent review of all documents before they are distributed externally. While every compliance program should be tailored to individual circumstances, the basic principles of compliance are relatively universal, and The World Bank Integrity Compliance Office has issued guidance that may suggest what the investigators and compliance officers are looking for.

2) The Voluntary Disclosure Program (VDP)

If a supplier learns of sanctionable conduct in connection with a Bank-financed contract before INT initiates investigation, the supplier may be able to avoid the investigation and sanctioning processes entirely by voluntarily disclosing that information. This is a notable departure from US FCPA enforcement, where voluntary disclosure does not provide a safe harbor. If a supplier’s request to join VDP is accepted, it is under an obligation to disclose all sanctionable misconduct that may have occurred during all previous and ongoing Bank-financed contracts. The supplier must conduct an internal investigation and submit the results to the Bank, and then it must adopt a compliance program and secure independent monitoring. In exchange for the required information and compliance measures, the Bank will agree to


31 Id. ¶¶ 10-27.
not sanction the supplier and will keep the supplier’s participation confidential. Any breach of the conditions of the VDP agreement is grounds for mandatory, ten-year debarment.

3) Procedural Protections within the Sanctions System

If INT does submit a case to OSD and OSD issues a Notice of Sanctions Proceedings, the first procedural safeguard a supplier may take advantage of is to submit an Explanation to OSD and thereby seek reconsideration of OSD’s initial recommendation. This Explanation process may include correcting evidentiary issues or challenging legal conclusions. While evidence of actual innocence could result in avoiding debarment altogether, evidence of additional mitigating factors or remedial action is only likely to reduce the duration of the recommended debarment.

Despite its obligation to include all mitigating evidence in the SAE, there is no guarantee that INT will actually uncover all mitigating evidence that exists, and there is little incentive for INT to actually emphasize that mitigating evidence. This creates a real possibility that OSD may reduce the recommended sanction if a Respondent submits additional evidence of mitigating circumstances. If the Explanation does not result in an adequately reduced sanction, Respondents should not discount the possibility that sanctions may be reduced or completely removed by the Sanctions Board.

The second procedural protection is to appeal OSD’s initial decision by submitting a Response to the Sanctions Board, but the decision to do so requires balancing risks and rewards. First, the length of time necessary to receive a decision from the Sanctions Board may be longer than the recommended period of debarment, preventing the Sanctions Board from providing any meaningful remedy. Second, the Sanctions Board conducts de novo review of an OSD decision and even allows additional evidence to be submitted by the Respondent and INT, so while the Sanctions Board may issue a decision more favorable to the Respondent, it may also issue a more severe sanction than OSD initially recommended. Third, many suppliers will have several Bank-financed contracts, any of which may receive different levels of scrutiny from INT. It is possible that challenging INT at the Sanctions Board may result in increased scrutiny from INT in relation to other Bank-financed projects. Finally, to regain eligibility to receive Bank-financed contracts after receiving the default sanction of Debarment with Conditional Release, a debarred supplier must work with and receive approval from the Integrity Compliance Officer (ICO). While the ICO

32 Id. ¶¶ 30-31, 37-39.
33 Id. ¶¶ 42-45.
technically operates independently of INT, it is nevertheless an organizational unit within INT. Challenging INT at the Sanctions Board may disrupt a supplier's working relationship with the ICO and make it more difficult to regain eligibility for Bank-financed contracts.

Conclusion

As the World Bank sanctions system continues to evolve as an international anti-corruption enforcement mechanism, companies working on Bank-financed contracts will have to adapt accordingly to remain compliant and avoid suspension and debarment. Understanding the sanctions system and implementing the practice tips above will help companies perform World Bank projects while mitigating the risks created by the Bank’s sanctions system.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following professionals:

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35 The Bank acknowledges this issue but asserts that its safeguards are adequate:

The decision to place the ICO function inside of INT was not without some controversy, in particular given INT’s role . . . as ‘prosecutor’ of sanctions cases. Some parties may see this as a possible conflict of interest, even if in some legal systems prosecutors do, in fact, play an analogous role. But the Bank has adopted several safeguards to the fairness and impartiality of the ICO’s decision making.