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E-ALERT | White Collar Crime & Investigations

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WORLD BANK ISSUES FIRST EVER SUSPENSION AND DEBARMENT REPORT

On 26 June 2014, the World Bank's Office of Suspension and Debarment ("OSD") released a report setting out data and discussing lessons learned in relation to all debarment cases handled by the World Bank since 2007. According to the report, 224 firms and individuals were debarred or otherwise sanctioned from 2007 to 2013: 185 pursuant to OSD and the appellate Sanctions Board decisions, and 39 pursuant to settlement agreements. These statistics do not include cross-debarments from other multilateral development banks, or the sanctions imposed on affiliates of sanctioned firms.

The World Bank has—together with other international financial institutions—been active in recent years in bringing debarment actions against companies alleged to have engaged in corruption and other forms of misconduct in projects financed by those institutions. This alert provides an overview of the World Bank's debarment process, and a summary of the key findings from the report.

THE SANCTIONS PROCESS

The World Bank's sanctions process is a quasi-judicial administrative process aimed at excluding parties that engage in certain forms of misconduct from Bank-financed projects, while seeking to afford due process to companies and individuals under investigation. The World Bank's Sanctions Procedures focus on fraudulent, corrupt, collusive or coercive practices in connection with the awarding or execution of a Bank-financed contract, and the obstruction of a World Bank audit or investigation. The five sanctions that may be imposed under the Sanctioning Guidelines are (i) debarment with conditional release; (ii) debarment for a fixed period (without conditions); (iii) conditional non-debarment; (iv) a letter of reprimand; and (v) restitution and other remedies.

A number of other major multilateral development banks—including the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the African Development Bank—have implemented sanctions procedures that are broadly similar to the Bank process, and with equivalent "sanctionable practices" standards. Moreover, those institutions have a standing agreement—first implemented in 2010—that generally requires (subject to certain exceptions) the participating institutions to cross-debar parties that are debarred by one of them.[1] In practice, however, although all of the participating multilateral development banks generally implement cross debarments, the World Bank has thus far been substantially more active than the other banks in investigating corrupt practices and bringing forward debarment actions.

The World Bank sanctions process begins with an investigation by the World Bank's Integrity Vice Presidency ("INT"), the unit that has since 1999 been responsible for investigating potential sanctionable practices occurring in respect of Bank-financed projects. INT conducts investigations pursuant to the inspection rights included in World Bank contracts and procurement guidelines. If INT identifies sufficient evidence to support a finding that one or more sanctionable practices has

[1] *See* http://siteresources.worldbank.org/NEWS/Resources/AgreementForMutualEnforcementofDebarmentDecisions.pdf.

occurred, it submits a case to OSD by filing a Statement of Accusations and Evidence ("SAE"). The SAE sets out INT's claims and attaches supporting evidence, such as documents and records of witness interviews. INT is required to disclose all relevant evidence in the SAE, including any exculpatory or mitigating evidence. According to the report, INT submitted 172 cases to OSD between 2007 and 2013.

An OSD team led by the Chief Suspension and Debarment Officer (the "SDO") reviews the SAE to assess whether it contains sufficient evidence to support a finding that it is "more likely than not" that each of the alleged sanctionable practices occurred. As the report notes, OSD is independent of INT and is designed to act as "an impartial check and balance on the work of the World Bank's investigators." According to the report, OSD referred thirty-eight percent of cases submitted between 2007 and 2013 back to INT on the basis that there was insufficient evidence to support one or more of the accusations in the SAE. In most cases, however, OSD found that there was sufficient evidence to support at least one of INT's claims, and only five percent of cases were rejected in their entirety.

Where OSD concludes that the evidence is sufficient to support the allegations in the SAE, it issues a Notice of Sanctions Proceedings to the Respondent (along with the SAE and supporting evidence) and recommends a sanction. According to the report, OSD issued 133 such notices between 2007 and 2013. If OSD recommends a sanction that includes a debarment period exceeding six months, a temporary suspension goes into effect immediately upon the issuance of the Notice of Sanctions Proceedings. A temporary suspension is similar to a debarment insofar as the suspended party is ineligible to receive new contracts for Bank-financed projects during the suspension period. Unlike a debarment, however, a temporary suspension is not announced publicly (the information is made available only to World Bank staff and borrowers) and does not fall under the 2010 cross-debarment agreement between the World Bank and other multilateral development banks.

If the Respondent does not respond to the Notice of Sanctions Proceedings, OSD imposes the recommended sanction and posts a Notice of Uncontested Sanctions Proceedings on the World Bank's website. Alternatively, the Respondent may contest the Notice of Sanctions Proceedings in two ways. *First*, the Respondent may submit a written "Explanation" to the SDO within thirty days of the delivery of the Notice of Sanctions Proceedings, arguing that the Notice should be withdrawn or the recommended sanction revised. According to the report, the SDO receives explanations from approximately one third of respondents. *Second*, the Respondent may, within ninety days of the delivery of the Notice of Sanctions Proceedings, contest the case in a formal appeal to the Sanctions Board.

The Sanctions Board is an independent administrative tribunal comprised of four external members and three members appointed from among the World Bank's senior staff. An appeal may be submitted to the Sanctions Board in writing alone, or a hearing may be held at the request of either party (or at the discretion of the Sanctions Board). After conducting a *de novo* review of the parties' submissions, the Sanctions Board issues a reasoned decision as to whether it is more likely than not that the Respondent engaged in a sanctionable practice and, if so, the sanction to be imposed. To date, the Sanctions Board—which, like OSD, was formed in 2007—has issued seventy-one decisions. The first forty-five decisions are summarized in a digest published in December 2011, and all decisions released since the beginning of 2012 are published in their entirety on the World Bank's website. These decisions provide helpful insight into the Sanctions Board's decision-making process and serve as one of the few sources of precedent available.

At any point during the sanctions process, the Respondent and INT may enter into a settlement agreement, which since 2011 has been known as a Negotiated Resolution Agreement ("NRA"). After the World Bank's General Counsel approves the settlement, the SDO reviews the NRA to confirm (i) that it was entered into voluntarily, and (ii) that "the agreed-upon sanction is broadly consistent

with the Sanctioning Guidelines." According to the report, thirty-five NRAs were submitted to the SDO for review between 2011 (when formal settlement procedures were first introduced) and 2013. Sanctions imposed through an NRA are implemented in the same manner as sanctions implemented through the formal sanctions process and are subject to the cross-debarment regime.

ENFORCEMENT TRENDS

According to the report, the most frequently imposed sanction was debarment, in many cases leading to debarment by the other signatories to the cross-debarment agreement described above. OSD imposed temporary suspensions on 239 firms and individuals during the pendency of proceedings (or, in the case of 5 firms and individuals, during the pendency of the INT investigation, pursuant to the Early Temporary Suspension procedures set forth in the Sanctioning Guidelines). Of the 239 respondents placed under temporary suspensions, 185 were ultimately sanctioned, 10 were found not liable by the Sanctions Board, and 37 remained under temporary suspension as of the issuance of the report.

It is also a frequent practice of the World Bank to refer evidence gathered in debarment proceedings to national enforcement authorities, which has led in a number of cases to national prosecutions arising from breaches of local anti-corruption and anti-fraud laws. In the UK, for example, the World Bank referred the case of Macmillan Publishers Limited to the Serious Fraud Office, resulting in a civil recovery order for the company to pay in excess of £11 million in recognition of sums it received that were generated through unlawful conduct related to its Education Division in East and West Africa. According to the annual reports published by INT, the World Bank has also made several referrals in recent years to enforcement authorities in the United States, where Integrity Vice President Leonard McCarthy has commented that INT has been particularly "encouraged by the depth of [its] collaboration with investigative bodies."[2]

The majority of the cases and settlements under the Bank process have involved fraudulent practices (a category that covers a range of conduct, including the submission of fraudulent invoices, certifications, bank guarantees or other documents, and misrepresentations as to prior experience, qualifications, or future performance), with eighty-six percent of cases including at least one fraud allegation. Fourteen percent of cases included a corruption allegation, and nine percent of cases included a collusion claim. Obstruction and coercion claims were rare, with such claims being asserted in only two and one percent of cases, respectively.

FOCUS ON EARLY COOPERATION AND REMEDIATION

The Sanctioning Guidelines set forth various mitigating and aggravating factors relevant to the determination of how severe a sanction should be once misconduct is found to have occurred. While the aggravating factors are largely focused on the nature of the misconduct (including the severity of the misconduct, the harm it caused, the nature of the Respondent's involvement, and whether the misconduct represented a repeat offence), the most significant mitigating factors are:

- **Voluntary corrective action**, including ceasing the misconduct and taking internal action against the responsible individuals, establishing an effective compliance program, and voluntarily addressing any inadequacies in the implementation of the contract (for example, by returning funds obtained in connection with the misconduct). The Sanctioning Guidelines provide that this factor warrants a sanction reduction of up to 50% (or more in "exceptional circumstances"); and

[2] *See* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22967693~menuPK:34464~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

- **Cooperation with INT's investigation**, including by conducting an effective internal investigation into the misconduct and making timely voluntary disclosures, accepting responsibility for the misconduct, and voluntarily restraining from bidding on Bank-financed projects. The Sanctioning Guidelines provide that this factor warrants a sanction reduction of up to 33% (or more in "exceptional circumstances"). Conversely, interfering with an INT investigation constitutes both an independent ground for sanction and an aggravating factor at the sanctioning stage.

The Sanctioning Guidelines place a notable emphasis on the timing of a respondent's mitigating actions, specifying that the timing of any corrective action "may indicate the degree to which it reflects genuine remorse and intention to reform, or a calculated step to reduce the severity of the sentence," and providing that weight should be given to the timeliness of any investigative assistance or admission of guilt. It is important to note, however, that in contrast to the debarment regimes of many national authorities, the World Bank's debarment standards are not driven by a determination of "present responsibility." Thus, in some cases the Bank has pursued debarment actions even in where the company facing debarment has taken strong remedial action to ensure that it does not engage in sanctionable practices in future work.

The World Bank's intention to give credit for early cooperation and remediation is also evident in its Voluntary Disclosure Program ("VDP"), which provides an avenue through which a firm or individual may confidentially disclose past misconduct in the expectation of avoiding debarment (absent a breach of the VDP terms and conditions, which in itself is subject to a mandatory ten-year debarment). However, the terms and conditions of the VDP can result in significant commitments on participating companies—they provide, among other features, that the company must conduct an internal investigation and voluntarily disclose any misconduct that is discovered to the Bank, and that it must adopt a robust compliance program that is monitored for three years by a compliance monitor acceptable to the Bank. In exchange for fulfilling those conditions, the World Bank will not seek the debarment of the participant (or of any affiliated entity or individual involved in the misconduct), as the financial obligation incurred under the VDP will be viewed as a sufficient sanction. However, the VDP is not available to any firm, entity or individual that is already under active investigation by the World Bank or is knowingly under active investigation by another investigating or prosecuting authority.

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As illustrated in the report, the World Bank and other multilateral development banks have significantly increased their fraud and anti-corruption enforcement efforts in recent years. Accordingly, companies involved in projects financed by multilateral development banks should ensure that they have compliance programs in place that are capable of preventing and detecting irregularities in the procurement and execution of contracts related to such projects. When potential issues are identified, companies should be prepared conduct a swift and proportionate investigation, and carefully consider whether there is a need, and if so how, to engage with the financing entity or other authorities.

Covington is well-positioned to advise clients concerning the World Bank debarment process and those of other multilateral development banks. Our lawyers have represented clients in numerous sanctions proceedings, including matters that have been litigated before the Sanctions Board and cases that were resolved through settlements with the Bank or through the VDP program.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our White Collar Crime & Investigations group:

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