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Practical Tips For Responding To A World Bank Investigation

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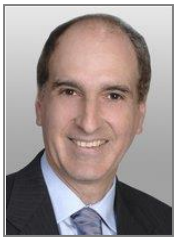
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Your company receives an audit letter from the World Bank's Integrity Vice Presidency, or INT, asking for myriad documents within just three weeks. What does this mean and how should you proceed?

More and more companies are faced with these questions. We offer some answers based on our experience handling World Bank sanctions cases.

World Bank Loans and Sanctionable Practices

In 2019, the World Bank committed to fund $62.3 billion in global development projects, and substantial further funding commitments have been made by the other key multilateral development banks, or MDBs.[1] This means that there are significant opportunities for companies to bid on and participate in MDB-financed projects.

With those opportunities, however, come considerable compliance risks for companies whose business depends on MDB-financed contracts, as the MDBs have established, and rigorously enforce, suspension and debarment regimes focused on targeting sanctionable practices including fraud, corruption, collusion and other forms of misconduct.

The sanctions process is laid out in detail in a recent 2019 World Bank Group Sanctions Board Law Digest.[2]

This article focuses on practical steps that companies can take to prepare for and respond to a World Bank investigation.[3]

Take Steps to Prevent Sanctionable Practices Before an Investigation Occurs

Companies involved in World Bank-financed projects should train their employees on the types of practices that can lead to a debarment proceeding, as employees who are not trained on sanctionable practices often do not appreciate how broadly they are defined.

For example, employees may not realize that a fraudulent practice can arise:

- Where any false or misleading document is submitted in relation to a tender or during the course of a project (e.g., inaccurate time sheets, a CV that misrepresents an individual's qualifications or the inclusion of an individual's name in a bid when the individual may not be available to participate in the project), or where the company fails to disclose material information (sanctions proceedings frequently involve allegations of precisely this nature);

- Regardless of whether the misrepresentation or omission at issue was intentional or merely reckless (meaning that a debarment proceeding may be brought even if an employee lacked the intention to mislead but was careless in submitting materials); and

- Regardless of whether the misrepresentation or omission related to a critical part of the bid, actually misled anyone or influenced the tender process (indeed, a debarment proceeding may be brought even where the company did not win the tender in which a misrepresentation was made)

By way of further example, even employees who are well-trained on international anti-bribery laws such as the U.S. Foreign Corrupt Practices Act may not appreciate the breadth of the World Bank's definition of a corrupt practice, which is not restricted to the payment of bribes to government officials, but rather includes the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party.[4]

Companies should also implement policies, procedures and controls to guard against the occurrence of sanctionable practices.[5] In doing so, it should not be necessary to duplicate work that has already been done to implement a corporate compliance program.

For example, an anti-corruption compliance program consistent with the expectations of international enforcement authorities will generally also be consistent with INT's expectations. In our experience, compliance program gaps are most likely to exist with respect to potential fraudulent practices, such as the submission of falsified documents in relation to tenders or during the course of projects.

Implementing controls to avoid fraudulent practices is particularly important in the context of World Bank-financed projects, given how broadly fraudulent practices are defined and the fact that most suspension and debarment matters are based at least in part on fraudulent practice allegations.[6]

It can thus be highly beneficial to conduct a risk assessment that is specifically scoped to identify gaps in internal controls that may lead to fraudulent practices.

Take Audit Letters Seriously — There Is No Such Thing as a Routine INT Audit

A company's first contact with the INT often comes in the form of a letter seeking to exercise the World Bank's contractual audit and inspection rights — a so-called audit letter.

Some companies interpret these letters as routine audit requests on technical accounting or other issues and do not take the necessary steps to prepare for the upcoming engagement with the INT.

It is important to understand, however, that the INT is the bank's investigative unit. Any request from the INT (or the investigative unit of any other MDB) should, therefore, be considered investigative in nature.

Moreover, INT investigations are typically resource-intensive in nature and considered carefully from a staffing and budgeting perspective. This means that an audit letter generally signals that the matter is a relatively high priority for the INT.

The INT may also contact a company using a show-cause letter. An audit request is typically sent when the INT is seeking to gather evidence to build a case. By contrast, a show-cause letter is normally sent when the INT believes that it already has sufficient evidence to bring a sanctions proceeding.[7]

It is important not to ignore a show-cause letter. The response gives a company the opportunity to present its understanding of the facts and to provide context concerning issues raised by the INT.

Moreover, if the company responds to the show-cause letter, the INT will be obligated to produce and address the response when it files a Statement of Accusations and Evidence with the Office of Suspension and Debarment, the bank office that authorizes the initiation of a sanctions proceeding. This means that the OSD's determination will be based on both parties' accounts rather than being based solely on the INT's presentation of the facts.

Whether the initial contact comes in the form of an audit request or a show-cause letter, the recipient should take the approach from the INT seriously and take appropriate steps to respond, including by seeking advice from counsel qualified to advise on suspension and debarment matters.

Harness the Facts by Conducting a Thorough and Credible Investigation

When a potential sanctionable practice is identified, it is important to conduct a thorough internal investigation. This will help the company understand bad facts and identify helpful ones, which will inform the company's position in settlement discussions with the INT or any adjudicative process before the OSD or the World Bank Sanctions Board (the body that ultimately resolves sanctions cases).

Moreover, conducting an effective internal investigation and sharing the facts with the INT is one of the mitigating factors set forth in the World Bank Group's sanctioning guidelines, and doing so may result in a penalty reduction of up to 33% (or more, in extraordinary circumstances).

Finally, conducting an internal investigation will help the company identify potential personnel misconduct or compliance program gaps and take prompt remedial action.

In addition to benefits in the context of the sanctions proceeding, conducting an investigation will allow the company to make informed decisions about whether to disclose any misconduct that is identified to national law enforcement authorities that may extend leniency to companies that self-disclose violations of law (such as the U.S. Department of Justice and the U.K. Serious Fraud Office).

The investigation process should be objective, defensible and well-documented. To ensure that those goals are met, it is generally helpful to engage an independent external investigator who is familiar with investigation best practices, the suspension and debarment process, and the INT's expectations.

This may also help the company secure mitigation credit; in determining whether and to what extent an internal investigation warrants mitigation credit, the Sanctions Board considers whether the investigation was conducted thoroughly and impartially by persons with sufficient independence, expertise, and experience.[8] It can also be beneficial to have any investigation conducted at the direction of counsel to maximize privilege protections.

Where a company has already been approached by the INT, it should keep the INT informed of the investigative steps it plans to take in order to ensure that none of those steps would be viewed by the INT as impeding or interfering with its investigation. Companies should also consider Sanctions Board jurisprudence concerning how the conduct of an investigation may impact the assessment of the evidence that is presented.

For example, in assessing the evidentiary weight to be given to interview summaries, the Sanctions Board has considered factors such as whether the interviewees were appropriately informed and able to participate in the conversation, whether the interviewees agreed that the interview summary was accurate, how and when the summaries were prepared, and the level of detail presented in the summaries.[9]

Identify and Remedy Compliance Gaps Early in the Process

The sanctioning guidelines state that mitigation credit may be appropriate where the record shows that the respondent has taken voluntary corrective action, including by establishing or improving its compliance program. However, a compliance program that is implemented late in the sanctions process will generally warrant less mitigation credit, as it is more likely to be viewed as a calculated step to obtain a reduced sanction.[10]

Accordingly, a company that receives an audit letter or show-cause letter from the INT should take swift action to identify and remediate any gaps in its compliance program, or to implement a program if it does not yet have one.

The compliance assessment and remediation processes can take place in parallel with the company's investigation of the specific facts underlying the INT investigation. Any adverse findings identified as the investigation progresses should be fed into the compliance assessment to ensure that the root causes of the misconduct are appropriately addressed.

You Only Get One Chance to Make a First Impression

Companies sometimes try to navigate the World Bank's process internally in the first instance and only seek advice from experienced counsel when the matter is at an advanced stage and it has become apparent that a debarment is likely.

This can be a dangerous strategy, as a company that is not well-versed in the process and proceeds without advice from counsel may make submissions, or take other steps, that will ultimately prejudice its position.

In our experience, it can be difficult to undo harm that is done at early stages of the process. For example, we have represented clients at late stages of the investigative process and found that the INT sometimes becomes entrenched in a position based on early submissions that overlooked key exculpatory evidence or otherwise did not portray the company's case in the most beneficial light.

It is also important to ensure that the company is prepared to stand by any submissions that are made early in the process, as it can be difficult to retract or modify submissions if new evidence is identified that contradicts the initial submissions, or if the company realizes that it would be more advantageous to take a different position.

Indeed, the Sanctions Board has held that shifting factual assertions at different stages of the process can constitute an aggravating factor for sanctioning purposes.[11] For these and other reasons, it is important to seek advice from experienced counsel prior to making submissions at any stage of the process.

Cooperation Comes With a Host of Benefits, But Is Not Without Risk

As the INT does not have the legal ability to compel witnesses or the production of documents, it relies on the World Bank's audit rights, and the cooperation of parties under investigation, to conduct its investigations.

When assessing how to engage with the suspension and debarment process, a company should take into account the benefits of cooperation. For one thing, a failure to cooperate with an INT investigation may be viewed as obstruction, which is a separate sanctionable practice.[12]

Further, interference with the investigative process is considered an aggravating factor for sanctioning purposes and may result in a one to three year increase in any period of debarment.

By contrast, cooperation with an investigation is considered a mitigating factor and may result in a penalty reduction of up to 33% (or more in extraordinary circumstances). Cooperating with the INT is also likely to put the company in a stronger position to negotiate a favorable settlement.

Although it is generally advisable to cooperate with the INT, doing so is not without risk. For example, the INT regularly refers information to national law enforcement authorities, which may lead to criminal, civil or administrative enforcement actions in addition to sanctions proceedings.

Accordingly, a company that chooses to cooperate with the INT may wish to consider whether it should also engage proactively with other enforcement authorities.

Settlements Are Often Preferable to Adjudication

Any company or individual under investigation by the INT will be given the option of resolving the matter through settlement. Settling will often be preferable to litigating for several reasons.

First, it will likely save time and resources. Second, it offers certainty. And third, it may often (though not always) result in a reduced sanction.

Although it may be tempting to argue a matter before the OSD or the Sanctions Board, in considering whether to do so a company should bear in mind that the INT generally only refers cases to the OSD that it considers to be strong enough to succeed, and the majority of cases submitted to the OSD ultimately result in a sanction.[13]

A company that wishes to enter into a settlement with the INT should indicate its desire to do so at the earliest appropriate opportunity. Although it is technically possible to initiate settlement discussions at any stage of the process, one of the principal reasons for the INT to offer a reduced sanction under a settlement is that settling the matter will save resources. That rationale becomes less compelling at later stages of the process.

It is also important that any effort to initiate settlement discussions be made in good faith and out of a genuine desire to reach an agreement. By the time the INT enters into settlement negotiations, it will often already have begun to prepare a sanctions case, and any indication that settlement discussions are being used as a delay tactic may prompt it to commence a sanctions proceeding.

Settlement Negotiations Are an Opportunity for Creativity

In attempting to settle a matter with the INT, it is important to have a firm grasp of the evidence and to draw the INT's attention to any exculpatory evidence and mitigating factors, without seeking to avoid or minimize any bad facts that have been identified.

It is also useful to identify recent suspension and debarment cases that involved misconduct of a similar type and gravity to the misconduct at issue and were resolved through terms that would be considered acceptable to the company.

Companies should be guided by, but not feel limited to discussing, the aggravating and mitigating factors set forth in the sanctioning guidelines, as the INT has the discretion to consider a wide range of potentially relevant facts.

For example, policy arguments may sometimes be persuasive if a lengthy period of debarment would result in substantial job losses or impair the World Bank's operational objectives (e.g., because the only other contractors available to complete certain projects in a given region are less competent or experienced than the respondent).

Other potentially relevant facts include a significant delay between the misconduct and the initiation of sanctions proceedings (depending on the reasons for the delay), or changes in the ownership, control or management of the company.

Companies and their counsel should also explore whether the INT would be open to reducing the length of a proposed debarment, or the number of group entities to which the proposed debarment would apply, in exchange for enhanced cooperation and remediation measures.

For example, we have successfully helped companies negotiate reductions to the length and scope of proposed debarment periods by agreeing to enhanced cooperation measures, such as voluntary investigations into work on World Bank-financed projects other than the project under review.[14]

Such proposals may be attractive to the INT, because they can generate evidence that the INT can use in investigations or proceedings against other companies or individuals.[15]

Settlement discussions also typically afford companies the opportunity to disclose potential sanctionable conduct in which they may have engaged in connection with other bank-funded projects, without fear that the disclosure will result in an additional sanction.

The INT will typically offer companies a "safe harbor" to disclose any such misconduct — that is, the INT will agree that information about potentially sanctionable conduct involving other bank-funded projects that is disclosed during settlement discussions will not be used against the company or its officers and employees in a sanctions proceeding.

The INT will typically commit not to use the information against the company, its officers, or employees, even if no settlement is ultimately reached and litigation thus ensues. If the INT commits in writing to this safe harbor, it gives companies a potentially valuable opportunity to avoid the risk of a future sanctions case if the INT independently learns of the misconduct. A company can also potentially use its disclosures affirmatively, arguing that its cooperation and transparency warrant enhanced mitigation credit.

Conclusion

A World Bank investigation presents both risks and opportunities. If managed properly, such an investigation can present an opportunity for the company to identify any gaps in its compliance program and strengthen its processes, without resulting in an unnecessarily broad and damaging period of debarment. The company often can also disclose potential issues concerning other bank-funded projects without risk of further sanction.

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[1] See World Bank, Annual Report 2019, at 9; African Development Bank Group, 2019–2021 Work Programme and Budget Document; European Bank for Reconstruction and Development, Annual Report 2018; Asian Development Bank, 2018 Annual Report; Inter-American Development Bank, Annual Report 2018: The Year in Review.

[2] Available at https://www.worldbank.org/en/about/unit/sanctions-system/sanctions-board/brief/2019-sanctions-board-law-digest.

[3] Although the discussion in this advisory is framed by reference to the World Bank's process, many of the points discussed herein are broadly applicable to an investigation or debarment proceeding by any MDB.

[4] The World Bank's May 2010 Procurement Guidelines indicated that the reference to "another party" referred to a public official acting in relation to the procurement process or contract execution, and the Guidelines clarified that this included World Bank staff and employees of any other organization taking or reviewing procurement decisions. However, more recent versions of the Bank's Procurement Regulations have omitted the reference to public officials altogether. See World Bank, Procurement Regulations for IPF Borrowers (July 2016, rev. November 2017 and August 2018); see also Guidelines on Preventing and Combating Fraud and Corruption in Projects Financed by IBRD Loans and IDA Credits and Grants (rev. July 2016).

[5] Even if compliance controls fail to prevent misconduct, they can put the company in a better position to defend itself in a debarment proceeding. For example, when determining whether a representation was reckless for purposes of assessing whether a company has committed a fraudulent practice, the Sanctions Board has indicated that it will consider whether the company took precautions that were commensurate with the risk at issue. Similarly, in assessing whether a company should be held responsible for the actions of a "rogue employee," the Sanctions Board generally considers whether the company had controls and supervision in place sufficient to prevent or detect the misconduct in question. If a company is sanctioned, demonstrating that a robust compliance program is in place may help to secure a shorter period of debarment or avoid the imposition of a compliance monitor.

[6] For example, in the 2019 financial year, approximately 77% of cases submitted to the OSD included at least one fraudulent practice accusation. See World Bank Group, Sanctions System Annual Report FY 2019.

[7] If the show cause letter includes a specific offer of settlement (typically, a fifteen-month debarment), this may be a signal that the matter has been categorized internally as a "fast-track" investigation, which means that the INT considers the evidence to be clear and does not wish to expend extensive resources negotiating a settlement. In such cases, there may be limited scope to negotiate the terms of the proposed settlement, and the INT will be more likely to refer the matter to the OSD if the company does not accept the settlement offer. This observation is, however, based on our experience of the processes in place under the INT's former leadership, and the INT's leadership is currently in transition. It is possible that certain of the INT's practices described herein may change over time.

[8] See, e.g., Sanctions Board Decision No. 91, at paras. 44–45.

[9] See 2019 World Bank Group Sanctions Board Law Digest, at 34.

[10] The Sanctioning Guidelines note that "[t]he timing, scope and quality of the [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." Consistent with this guidance, in a recent Sanctions Board decision, the respondent firm received only partial mitigation credit where it engaged a consultant to enhance its compliance program but did so two years after indicating in a response to a show cause letter that it would implement reforms. See Sanctions Board Decision No. 120, at paras. 55–56.

[11] See Sanctions Board Decision No. 73, at para. 54.

[12] "Obstructive practices" are broadly defined to capture any conduct that may impede an investigation or hinder the Bank's exercise of its contractual audit rights. Obstructive practice charges have been brought where respondents refused to cooperate with investigations, provided inaccurate or

incomplete documentation in response to requests for information, fabricated documents, or deleted relevant email correspondence.

[13] In the 2019 financial year, for example, the OSD reviewed 36 cases and issued a Notice of Sanctions Proceedings in 30 of those cases. The Sanctions Board, for its part, considered 9 contested sanctions cases in the 2019 financial year and determined that the INT had met its burden of proof (i.e., to demonstrate that it is "more likely than not" that a Sanctionable Practice occurred) with respect to at least one count of misconduct in all but one case. See World Bank Group, Sanctions System Annual Report FY 2019.

[14] In such cases, an agreement may be reached with the INT not to take action against the settling company if the voluntary investigations identify misconduct in the investigated projects.

[15] In providing information to the INT in relation to any investigation, it is important to consider the extent to which investigative steps or submissions may raise concerns under relevant data privacy laws. In our experience, the INT has been amenable to negotiating appropriate safeguards in such cases (for example, by entering into data transfer agreements and/or agreeing to redactions to certain categories of personal data).