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## **View from Wiley Rein: The World Bank's Sanctions Regime Is a World Apart from the Suspension and Debarment System Federal Contractors Know**



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**S**ince 2007, the World Bank has sanctioned more than 200 firms and individuals for fraud and corruption in connection with World Bank projects. The uptick in sanctions activity and increasing severity of sanctions, the World Bank's focus on transparency and consistency, and our own experiences assisting clients appearing before the World Bank suggest that the World Bank will only become more active in this area. For contractors already working with the World Bank, or considering entering the market to try to capture some of the World Bank's budget in loans, grants, investments and guarantees—a reported \$61 billion in fiscal year 2014 alone—understanding the World Bank's sanctions system is imperative.

The World Bank has identified corruption as the “public enemy number one” of developing countries, and it relies on contractors to avoid and prevent corruption that would divert crucial World Bank funds from its mission to end extreme poverty and boost shared prosperity. The World Bank's sanctions regime differs from the system familiar to most contractors, the U.S. federal government suspension and debarment system, in a number of crucial ways that contractors must consider in deciding whether to compete for a contract, design-

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ing compliance programs, and responding to World Bank audits and inquiries.

**Forget Present Responsibility—The System Is Designed to Punish and Deter.** The focus of the U.S. federal government suspension and debarment system is the contractor's present responsibility. As a result, suspension and debarment are discretionary and are not intended to punish wrongdoing. In stark contrast, the World Bank's sanctions regime is specifically designed to punish and deter wrongdoing. Thus, if the investigating unit—the Integrity Vice Presidency (“INT”)—presents sufficient evidence, the burden of proof shifts to the Respondent (an individual or company implementing a project funded by the World Bank) to demonstrate that its conduct did not rise to the level of a sanctionable practice. Whether the Respondent is a responsible entity is not a consideration. Although mitigating factors do play a role in the severity of the sanction imposed (discussed below), the ultimate decision is simple: if it is more likely than not that the Respondent did what has been alleged, the World Bank's Office of Suspension and Debarment **must** sanction the Respondent.

**Consider the Risk Areas—Fewer Categories of Sanctionable Activity, but with the Potential for Broader Application.** The potential causes for suspension and debarment in the U.S. federal government system are many and varied, including fraud in connection with a public contract or subcontract, antitrust violations, unfair trade practices, knowing failure to comply with the mandatory disclosure rule, and commission of “any other offense indicating a lack of business integrity and honesty” or “any other cause so serious and compelling a nature” that affects the contractor's present responsibility.

The World Bank's list of sanctionable activity is shorter, but open to very broad application. The Sanctions Guidelines contemplate five categories of sanctionable practices:

- Corrupt
- Fraudulent
- Collusive
- Coercive
- Obstructive

These offenses have been construed to include conduct from bribery to submitting false timesheets to including an individual's resume in a proposal without proper permission. Approximately 86 percent of the cases and settlements handled by the World Bank's Office of Suspension and Debarment have been for fraudulent practices, and the Office reports that fraud "can be as significant to development effectiveness as corruption or collusion, because unqualified consultants and contractors often cannot perform or end up delivering defective goods or services." Fraud also is easily investigated and proven with a minimum outlay of resources by the World Bank.

**Stay Cognizant of the Consequences—A Range of Sanctions.** The U.S. federal government system allows for suspension, a temporary exclusion while the investigation continues, and debarment. The period of debarment is supposed to be consistent with the conduct that triggered the exclusion and is generally not longer than three years.

The World Bank, in contrast, has a range of possible sanctions. The least severe (and least used) are the letter of reprimand, a public and formal acknowledgment of the Respondent's misconduct, and conditional non-debarment, under which the Respondent is required to comply with certain conditions to avoid debarment. The next level of sanctions includes debarment and debarment with conditional release. Under debarment, a Respondent may not be awarded a contract, serve as a subcontractor, or "receive the proceeds of any loan made by the Bank or otherwise [] participate further in the preparation or implementation of any Bank Project." This final prong of the World Bank's debarment is distinct from the U.S. federal government system, which does not require the Government to terminate existing contracts with a debarred contractor. If the World Bank Respondent receives debarment with conditional release, it must demonstrate compliance with specified remedial, preventative, or other conditions before it is released from debarment. The default, or "base sanction," for all misconduct is a three-year debarment with conditional release. The World Bank's system also authorizes the Bank to order restitution or remedy to the entity that borrowed the World Bank funds and any other party affected by the sanctionable conduct.

The U.S. federal government system allows contractors to resolve or even avoid suspension and debarment proceedings in settlements known as administrative agreements, which document remedial measures to prevent a recurrence of the conduct that led to suspension or debarment. The World Bank's settlement procedures, known as negotiated resolution agreements, are much more formal and generally result in a lesser sanc-

tion rather than no sanction. The Respondent must first agree to standard terms and conditions, and the INT must satisfy itself that a settlement is warranted based on the following criteria: admission of culpability; potential resource savings for the World Bank; degree of cooperation with the INT's investigation; and evidence of corrective measures. A negotiated resolution agreement must be accompanied by an affidavit certifying the Respondent's understanding of the sanctions procedures and guidelines and affirming it is entering the settlement of its own free will.

The World Bank has a cross debarment agreement with the African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, and the Inter-American Development Bank to mutually enforce debarment actions. It does not have a cross debarment agreement with the U.S. federal government, so a sanction would not automatically result in suspension or debarment by any federal agency. If a contractor finds itself the subject of World Bank sanctions proceedings, however, the contractor should proactively approach the relevant U.S. federal government suspending and debarring official to persuade that official that the contractor remains presently responsible notwithstanding any sanctionable activity related to World Bank projects.

**Save Yourself—Different Mitigating Factors, with Different Effects, and Specified Aggravating Factors.** The U.S. federal government system lists 10 mitigating factors that the Suspending and Debarring Official should consider in making the debarment decision, all consistent with the focus on present responsibility and future behavior. The regulations are clear that these are only factors for the Suspending and Debarring Official's consideration, and that their "existence or nonexistence . . . are not necessarily determinative of a contractor's present responsibility."

The World Bank also has published specific mitigating factors, but instead of informing the decision about whether to sanction at all, the mitigating factors allow a specific percentage decrease from the sanction that would otherwise be imposed based on the character of the sanctionable conduct. Some of these mitigating factors overlap with the U.S. federal government's, but many are either unique to the World Bank or have a unique definition more applicable to a punitive system—including consideration of whether the Respondent's actions show "genuine remorse":

- Minor role in misconduct (up to 25 percent decrease), defined as "[m]inor, minimal, or peripheral participant; if no individual with decision-making authority participated in, condoned, or was willfully ignorant of the misconduct."

- Voluntary corrective action taken (up to 50 percent decrease absent exceptional circumstances allowing for a greater reduction), including:

- Cessation of misconduct;
- Internal action against responsible individual;
- Effective compliance program; and
- Restitution or financial remedy.

For each of these voluntary corrective actions, the World Bank specifies that it will consider, based on the timing, scope, or quality of the action, whether it reflects "genuine remorse and intention to reform, or

merely a calculated step to reduce the severity of the sentence.”

■ Cooperation with investigation (up to 33 percent decrease absent exceptional circumstances allowing for even greater reduction), including:

- Assistance and/or ongoing cooperation;
- Internal investigation, including sharing the results with the INT;
- Admission/acceptance of guilt/responsibility, with more weight for admissions made earlier in the INT’s investigation; and
- Voluntary restraint from bidding on World Bank-financed projects.

The World Bank has not established a mandatory disclosure rule and, despite mitigating factors for related activities like voluntary corrective action and cooperation with the investigation, does not specifically recognize self-disclosure as a factor to decrease the potential sanction. Instead, the World Bank has established a formal Voluntary Disclosure Program open only to companies that are not under investigation. That program requires agreement to, among other conditions, three years of rigorous compliance monitoring.

In another departure from the U.S. federal government system, the World Bank also has published categories of aggravating factors, and the associated increase in the sanction term above the base sanction. The first category is the severity of the misconduct, with an associated increase to the sanction term of one to five years. This category considers factors such as whether the conduct was part of a repeated pattern, the complexity and duration of the misconduct, management’s participation in or willful ignorance of the mis-

conduct, and whether any public officials or World Bank staff were involved. The second category considers the harm caused by the misconduct and also carries a potential one- to five-year increase in the sanction term depending on the degree of harm to the World Bank-funded project and whether there was foreseeable risk of death or bodily injury or endangerment of public health or safety. The third category protects the sanctions regime itself, and associates a one- to five-year increase in the sanction term with interference with the World Bank’s investigation, including deliberately destroying evidence; materially impeding the World Bank’s contractual rights for audit and access to information; and intimidation or payment of a witness. The final category is a past history of adjudicated misconduct, including by another multi-national development bank, which carries a 10-year increase to the sanction term.

The World Bank’s published guidelines do not specify whether the increases associated with these aggravating factors are cumulative. However, recent sanctions cases include debarments lasting up to 11 years.

**Conclusion.** The World Bank’s global reach, important mission, and multi-billion-dollar annual budget are a big draw for contractors. Contractors that are considering competing for work financed by the World Bank, and contractors that have already won World Bank work, should be aware of the World Bank’s ever-increasing focus on sanctions as a tool to combat fraud and corruption and the important differences between the U.S. federal government’s suspension and debarment system and the World Bank’s sanctions regime.