

Felony Convictions and Funding Restrictions: Understanding Your Eligibility for Fiscal Year 2012-Funded Contracts (and Beyond?)

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The federal government's fiscal fourth quarter is under way—is your company (or business unit) competing or planning to compete for a federal contract funded at least in part by FY2012 appropriations? In the last two years, has your company, or any officer or agent, also been convicted of, pled to or faced the prospect of felony charges related to corporate activities? Before submitting your next offer for an FY12-funded contract or implementing defense and plea-bargaining strategies, your company should understand how new restrictions on funding contracts to entities with felony convictions could prevent your company from receiving contract awards.

FY 2012 Appropriations Acts

For FY12, a contractor's eligibility for contracts involving certain appropriated funds is subject to a restriction akin to suspension and debarment. Specifically, Congress appropriated funds in two similarly named consolidated acts: The Consolidated Appropriations Act of 2012, Pub. L. No. 112-74 and The Consolidated and Further Continuing Appropriations Act of 2012, Pub. L. No. 112-55. Provisions in both acts prohibit use of appropriated FY12 funds “to enter into a contract . . . [with] any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months.” *E.g.*, Pub. L. No. 112-74, Div. A, § 8125. In other words, there should be no FY12-funded awards for any corporation convicted of *any* felony (not just fraud- or procurement-related felonies) in the past two years.

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Were this a blanket restriction in the two appropriations acts, then the funding restriction would be onerous but at least uniformly applicable to all FY12 funds. Not so, however. Congress did not insert the restriction into each “division”—the equivalent of an individual agency-specific appropriations bill—in the consolidated acts, meaning the restriction does not apply to all agencies' appropriated FY12 funds. For example, funds for the Department of State, appropriated in Division I of Pub. L. No. 112-74, are not subject to this restriction.

Agencies' Implementation of the Appropriations Acts

Agencies with appropriations subject to this funding restriction have largely implemented it by issuing class deviations. The DoD, for example, issued class deviation 2012-O0004 to implement the funding restriction in Division A § 8125 of Pub. L. No. 112-74 (Department of Defense Appropriations Act). In so doing, DoD introduced a new Defense Federal Acquisition Regulation Supplement (DFARS) clause, 252.209-7999, to be included in solicitations: The clause requires offerors to certify whether they (the corporations) have been convicted of federal felony criminal violations in the previous 24 months. Other class deviations have led to similar clauses for the AGAR, GSAR, HHSAR and other acquisition regulations.

These class deviations highlight further confusing variations in the appropriation acts' funding restriction. A second DoD class deviation, 2012-O0007, implements the restriction on Pub. L. No. 112-74 Division H funds (Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, 2012), which, in contrast to Pub. L. No. 112-74 Division A's restriction, applies to corporations convicted of federal- *and state-law* felonies. The Department of Treasury's class deviation, in contrast, applies the restriction on Pub. L. No. 112-74 Division C funds only to federal felony convictions—but the covered convictions include those of the corporation as well as any of “an officer or agent of such corporation acting on behalf of the corporation.” In addition, the Department of Interior's class deviation does not limit covered convictions to those from the previous 24 months, even though the associated Pub. L. No. 112-74 provision, § 433 of Division E, does. All important differences.

The table below illustrates these critical variations with examples of the funding restriction imposed on different agencies by the consolidated acts and the agencies' implementing class deviations:

| Agency | Division | Felony Type | Entity Type | 24-Month Limit? | Pub. L. No. 112-74 |
|------------------------|----------|--|-------------|-----------------|--|
| Defense - Ops. | Div. A | Federal Corporation | Yes | Yes | Defense - Ops. Div. A Federal Corporation |
| Energy | Div. B | Federal Corporation, Officer, Agent | Yes | Yes | Energy Div. B Federal Corporation, Officer, Agent |
| Treasury | Div. C | Federal Corporation, Officer, Agent | Yes | Yes | Treasury Div. C Federal Corporation, Officer, Agent |
| Interior | Div. E | Federal Corporation | No | No | Interior Div. E Federal Corporation |
| Defense - Construction | Div. H | Federal or State Corporation | Yes | Yes | Defense - Construction Div. H Federal or State Corporation |
| Agriculture | Div. A | Federal or State Corporation, Officer, Agent | Yes | Yes | Pub. L. No. 112-55 Agriculture Div. A Federal or State Corporation, Officer, Agent |
| Commerce | Div. B | Federal Corporation | Yes | Yes | Commerce Div. B Federal Corporation |
| Justice | Div. B | Federal Corporation | Yes | Yes | Justice Div. B Federal Corporation |
| NASA | Div. B | Federal Corporation, Officer, Agent | Yes | Yes | NASA Div. B Federal Corporation, Officer, Agent |

Even setting aside the variations in scope reflected above, the consolidated acts' funding restriction is still ill-defined. As but one example, the restriction is limited to *agencies' "award[ing] a contract . . . to a corporation" convicted of a felony*, which suggests the restriction does not apply to prime contractors' awards to subcontractors with felony convictions. Whether agencies—including suspension and debarment officials—read the restriction that way, however, remains to be seen.

Legal Considerations in Light of Appropriation Acts

The uncertainty about how the appropriation rules will be interpreted and enforced means contractors with potential felony exposure that plan to seek FY12-funded prime contracts must be especially cautious. For instance, contractors and their counsel must carefully consider the effect of these new rules when defending against felony charges and negotiating plea agreements. Indeed, a facially favorable plea deal to avoid a potentially risky felony conviction at trial may be less than ideal if it carries the additional, unintended penalty of rendering a contractor unable to obtain certain federally funded contracts.

Similarly, the certification requirement many agencies have implemented to ensure that funds are not directed to contractors with felony records is a potential hotbed for civil False Claims Act (FCA) violations. If a contractor's certification about its felony-conviction status is a pre-condition to obtaining federal funding, an inaccurate certification could give rise to FCA liability. Beyond accurately disclosing any corporate felonies, contractors should remember that a felony committed by a member of corporate management or the executive board while acting on behalf of the company could impact the company's certification status—even if the individual was terminated as a result of the crime. In addition, because of the ambiguity surrounding how the appropriations rule will apply to prime contractor-subcontractor relationships, contractors should perform due diligence on all subcontractors to ensure that any certifications accurately reflect subcontractors' felony-conviction statuses.

While employing cautionary measures is certainly recommended, contractors with felony records may still be able to enter into prime contracts funded by FY12 appropriations subject to the felony-conviction funding restriction. Throughout the consolidated appropriations acts, as well as the associated class deviations, the funding restriction for felony convictions does not apply where “the agency has considered suspension or debarment of the corporation, [or such officer or agent, if required] and made a determination that this further action is not necessary to protect the interests of the Government.” *E.g.*, Pub. L. No. 112-74, Div. A, § 8125. To be sure, this exemption is another example of ambiguity in the restriction (e.g., who in the agency must consider suspension and debarment? What type of “further action” must be deemed unnecessary?). But contractors may nonetheless want to explore voluntary disclosures or other proactive measures to encourage agencies to apply this exemption.

Looking Forward to FY 2013

Although the limitations in the FY12 appropriations acts may apply only to one year's funding, the limitations themselves—and accompanying confusion—may be around for much longer. Already this year, the House-passed FY 2013 appropriations bill for the Department of Homeland Security (H.R. 5855 §§ 558-59) includes a similar limitation on funding contracts and other agreements with contractors who have felony convictions, whereas the House-passed FY 2013 National Defense Authorization Act (H.R. 4013) omits the restriction. Whether Congress ultimately includes this limitation in all appropriations bills, and does so using consistent language, remains to be seen. But given the experience with FY12, we recommend that any time your company or an officer or agent faces the prospect of a felony charge related to corporate activities, you

consider carefully the implications for FY12- or FY13-funded contracts.