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Mandatory Debarment for FCPA Violations? A Bad Idea Whose Time Should Never Come

February 13, 2012 by Mike Emmick

In the fervor of the U.S.'s current anti-foreign-corruption efforts, a particularly misguided proposal has occasionally reared its ugly head: Requiring “mandatory debarment” for any company that violates the Foreign Corrupt Practices Act (“FCPA”).

On the merits, such a proposal is completely wrong-headed. Debarment is a severe, forward-looking administrative remedy – the corporate “death penalty” – not a vehicle to “boost” the penalties for past criminal FCPA violations.

Nonetheless, in 2010, such a “mandatory debarment” bill was passed by the House, only to die in Congress due to Senate inaction. Optimistic multinational contractors might therefore have concluded, “Whew, we dodged that bullet.”

However, a recent law-review article has sought to resurrect the debarment idea, contending that no other remedy will deter large global companies from violating the FCPA.

Below is a snapshot of the relevant law, recent developments, and pertinent arguments. As will be explained, despite the recent article, the notion of “mandatory debarment” is unlikely to gain traction – even the Department of Justice (“DOJ”) opposes it – but the article and the current anti-corruption frenzy may cause authorities to reconsider the idea. Any multinational company that does substantial government contract work should therefore monitor and resist such efforts.

As nearly everyone who operates in this market knows by this time, the FCPA prohibits U.S. companies from paying bribes to foreign officials in order to obtain or retain business. The FCPA also requires accurate books and records and meaningful internal accounting controls. Violations of the FCPA can result in huge criminal and civil fines, disgorgement of profits, and payment of interest, not to mention a wide range of collateral consequences. The FCPA is enforced by DOJ and the SEC.

Over the past five years DOJ has been extremely aggressive in its prosecution of FCPA violations. Eight of the ten largest FCPA fines in history occurred in 2010, and multi-million-dollar fines have now become routine. There are currently dozens of pending FCPA investigations – many more than in previous years. Indeed, DOJ has dubbed this “the new era of FCPA enforcement.”

Congress attempted to climb aboard this FCPA-enforcement bandwagon when, on September 15, 2010, the House unanimously passed a “mandatory debarment” bill – H.R. 5366, known as the 2010 Overseas Contractor Reform Act. The bill would have created a government-wide policy that no contracts be awarded to companies or individuals that violated the FCPA. H.R. 5366, § 3. Procedurally, the law would have required the contracting agency to propose for debarment all contractors found to be in violation of the FCPA.

The bill was flawed in many ways. It did not define a “finding” of an FCPA violation, so it was unclear whether the debarment would be triggered by a non-prosecution or deferred prosecution agreement. The bill failed to differentiate between major and minor FCPA violations, or between different kinds of violations (i.e., bribe payments versus “books and records” or accounting violations). The bill did not require or permit consideration of how the violation occurred, whether the company self-reported the violation, or whether the company dramatically improved its anti-corruption compliance program thereafter.

Shortly after the bill was passed, DOJ answered questions about the FCPA generally, as the Chamber of Commerce was proposing FCPA amendments. DOJ expressed its opposition to “mandatory debarment,” stating that mandatory debarment “would likely be counterproductive, as it would reduce the number of voluntary disclosures and concomitantly limit corporate remediation and the implementation of enhanced compliance programs.” According to DOJ, such a debarment program could also hurt the government's ability to investigate and prosecute transnational corruption. Linking debarment to criminal conviction would “fundamentally alter the incentives of a contractor-company,” because an FCPA resolution would then cause the company to suffer a dramatic reduction in revenue. That, in turn, would negatively impact prosecutorial discretion and the flexibility to reach an appropriate resolution given the facts and circumstances of the particular case.

DOJ's opposition would ordinarily be enough to ensure that “mandatory debarment” would not be taken seriously. And in fact the Senate took no further action on the House bill, perhaps because of DOJ's opposition after the House bill was passed.

However, a recent law-review article has sought to resurrect this misguided debarment notion. In November 2011, Fordham Law Review published a 70-page article entitled “FCPA Sanctions: Too Big to Debar,” available here, which was written by Professor Drury Stevenson of the South Texas College of Law, along with one his law students. The article took the position that debarment should be considered as an additional punishment for FCPA violations. According to the article, corporations can only be punished via fines, and government contract revenues are so large that fines often become a mere “cost of doing business,” which prevents those fines from having deterrent value. In addition, the public may interpret a failure to debar a company as suggesting that companies can buy their way out of FCPA violations.

The article acknowledged that mandatory debarment might discourage self-disclosure – one of DOJ's concerns – but proposed that self disclosure might be meaningfully rewarded through a reduced criminal fine. The article also acknowledged that debarment might be the contractor's “death knell”; it might even raise an “Arthur Andersen” problem by driving an important and responsible company out of business entirely, which might harm the contracting market, foreign relations, national security, and the company's shareholders. As an alternative to mandatory debarment, the article proposed an increase in discretionary debarments based on FCPA violations.

For a number of reasons, “mandatory debarment” for FCPA violations is a bad idea. In fact, In January 2012, two months after “Too Big to Debar” was published, Fordham Law Review published a responsive article authored by Jessica Tillipman, a professor at George Washington Law School. Jessica Tillipman, “A House of Cards Falls: Why “Too Big to Debar” is All Slogan and Little Substance”, available here. Tillipman disagreed with nearly all of Professor Stevenson's conclusions and analysis, and her remarks warrant summarizing here.

First, the debarment provision in the Federal Acquisition Regulations (FAR) is itself inconsistent with “mandatory debarment.” FAR 9-402(b) states that “the serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and *not for purposes of punishment*.” (Emphasis added.) The point of debarment is to ensure that the government works with “responsible partners.” Indeed, that is why the prosecutors handle the fines, and the debarring officials handle the debarment.

Second, the FAR expressly requires the debarment officials to consider whether the contractor undertook remedial measures or whether the violation involved mitigating factors that demonstrate that the contractor is still “presently responsible.” FAR 9-406-1. Mandatory debarment would make those provisions meaningless, and would shift the focus of debarment from future conduct to past conduct.

Third, imposing the remedy of “mandatory debarment” would unfairly focus on government contractors, not on other companies or individuals that may violate the FCPA. Why should contractors be discriminated against – especially *automatically* discriminated against?

Fourth, debarment is an inappropriate “all or nothing” remedy. Its use might destroy responsible companies – even essential companies – that have thousands of employees and contribute immensely to the economies of the U.S. and the world. That is why debarment should be used only rarely, and only after an extensive review of what prompted the transgression, how the company responded, and other important factors.

Fifth, if mandatory debarment were to become the law, it might even discourage large companies from engaging in business with the U.S., because their devotion of time to and their monetary investments in government contract work could be lost at the whim of federal prosecutors, perhaps as the result of actions by rogue employees who clandestinely refused to adhere to the companies' anti-corruption compliance program.

Finally, as DOJ itself pointed out in 2010, “mandatory debarment” might actually hurt the US's FCPA-enforcement efforts by discouraging corporate self-disclosure and cooperation as part of the remediation process. Those procedures are currently a critical source of information for DOJ to use in its prosecution of FCPA violations.

In light of DOJ's opposition, “mandatory debarment” for FCPA violations is unlikely ever to become law. Nonetheless, because the consequences would be potentially devastating, any such possibility should be monitored closely by and vigorously opposed by global contractors.