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In this article, Nadira Clarke and Anne M. Carpenter of Katten Muchin Rosenman LLP provide an overview of federal suspension and debarment authority. The government's exercise of authority in this area can have a significant impact on companies that hold federal contracts or have customers with federal contracts.

Enforcement

Practitioner Insights: Suspension and Debarment Authority

Suspension and debarment actions (collectively referred to as ''exclusion'' actions) bar an entity or individual from direct or ancillary involvement in federal government business based on conduct that raises questions with respect to corporate or individual integrity, including civil judgments and criminal convictions. Suspension is a temporary exclusion from government business, while debarment is an exclusion for a set period of time.

While exclusion is designed to protect federal interests, as opposed to punish, the government's broad discretion in this space can exact a greater toll than the fines or probation prescribed by statutory enforcement provisions. Moreover, under certain statutes, including the Clean Water Act (CWA) and the Clean Air Act (CAA), a criminal violation, even a misdemeanor, mandates ''automatic'' statutory exclusion (known as disqualification). The collateral consequences of such convictions are often unanticipated and not widely publicized.

For example, following the Deepwater Horizon incident, BP Exploration & Production Inc.'s plea to a misdemeanor CWA charge (among other charges) triggered the company's statutory disqualification from government business for the corporate headquarters and discretionary exclusion of 19 of the company's domestic and foreign corporate affiliates. The exclusions eventually were resolved through an extensive administrative agreement that incorporated and expanded on the terms of the criminal probation. Interestingly, neither the required statutory exclusion nor the threat of the associated discretionary exclusions was mentioned in the official U.S. Department of Justice (DOJ) press release detailing the resolution of the criminal matter.

This article provides a general overview of federal suspension and debarment authority, with special focus on the scope and resolution of program actions related to matters arising under the CAA and CWA. The government's exercise of authority in this area can have a significant impact on companies that hold federal contracts or have customers that do so. Nevertheless, suspension and debarment remains a little considered collateral consequence of government enforcement actions. Recent proposed budget cuts to federal agencies,

including the Environmental Protection Agency, may have an impact on the scope of the various suspension and debarment programs, but for now it remains a consideration worthy of attention.

Federal Authority to Exclude The federal government's suspension and debarment authority is governed by two sets of regulations—the Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 9.4, which governs exclusions from federal contracts for goods and services, and the Nonprocurement Common Rule (NCR), 2 C.F.R. Part 180, which governs all other government transactions including grants, cooperative agreements, loans, leases and subsidies. Federal agencies also follow separate agency-specific supplements to the FAR and NCR.

Suspension and debarment actions involve prohibiting participation in new contracts or ''covered transactions'' with the federal government: This includes procurement contracts for goods and services or the provision of federal benefits (e.g., grants or leases on federal mineral rights). A suspension is a temporary exclusion from such transactions, while a debarment is an exclusion for a set period of time. Suspension and debarment actions are designed to protect the business interests of U.S. government and must involve an offense, or evidence, that signals a lack of business integrity (as present responsibility).

As previously noted, under certain statutes, including the CAA and CWA, exclusions are mandatory following certain violations. In addition, federal regulations grant agencies the broad authority to contemporaneously institute a discretionary exclusion of corporate entities affiliated with the target of an action.

Exclusion actions are not limited to individuals and entities that are currently government contractors; they prohibit any person ''who has been, is, or may reasonably be expected to'' engage in a federal contract or covered transaction from future participation in such business. ''Person'' is defined to mean ''any individual, corporation, partnership, association, unit of government, or legal entity, however organized.'' A suspension or debarment action will prohibit a ''person'' who is not currently engaged in federal contracts from becoming a government contractor during the term of the exclusion. In both examples, the debarred contractor is excluded from business even though it has *no* direct government contracts. Similarly, a current government contractor is prohibited from entering into new government contracts during the term of the exclusion.

Both suspension and debarment actions apply to direct contracts between a company and a federal agency, as well as subcontracts between a company and a federal contractor. Importantly, companies that contract directly with the federal government are prohibited from entering into a covered subcontract with an excluded party unless the government grants an exception to the exclusion. Subcontractors to a federal contract may be similarly prohibited in contracting certain work to third parties. As a result, many federal government contractors simply avoid contracts with excluded companies.

For example, if a major manufacturing company wanted to outsource the construction of widgets for use in equipment commissioned by the federal government, that manufacturing company would be prohibited from contracting with a suspended or debarred entity to build the widgets (unless an exception is granted by the government). Or, if an oil and gas major was awarded a federal oil and gas lease, that oil major would be prohibited from contracting with a suspended or debarred entity to provide labor services to perform work on that lease (unless an exception is granted by the government).

When seeking to resolve a potential or existing exclusion action, an entity may enter into an administrative agreement prescribing certain terms and conditions designed to address any underlying violations; such agreements are applicable to both the company *and* its current affiliates.

To forestall or limit the scope of exclusion actions, in some circumstances, it may be prudent for entities under investigation or indictment in connection with integrity-related violations, or CAA/CWA violations, to initiate early engagement with an agency's Suspension and Debarment Office.

What Triggers Suspension? Suspension is always a discretionary decision on the part of an agency's Suspension and Debarment Official (SDO), the full-time official responsible for issuing suspensions and debarments and adjudicating contested actions. It is a temporary exclusion from government contracting pending completion of an investigation or legal proceeding. A suspension may last no more than 18 months, assuming a debarment proceeding is not initiated against the entity. If a debarment proceeding is initiated, then the suspension may last as long as the associated investigation, legal proceeding, or debarment proceeding.

An SDO has the authority to suspend an entity, without prior notice, by including the entity on the list of disqualified contractors in the federal database that tracks exclusions, which is known as the System for Award Management (SAM). To issue a suspension, the SDO first must find that there is adequate evidence that a cause for debarment exists. Causes for debarment include:

(1) integrity- or honesty-related offenses (such as antitrust violations, embezzlement, bribery, falsification or destruction of records, false statements, and obstruction);

(2) a serious violation of the terms of a federal contract (such as a willful failure to perform, a history of failure to perform, or a willful violation of a statutory or regulatory provision applicable to the contract);

(3) debarment of an entity by another federal agency;

(4) knowing conduct of business with an excluded entity;

(5) failure to pay a federal debt;

(6) violation of any agreement to resolve a suspension or debarment action; and

(7) ''[a]ny other cause of so serious or compelling a nature that it affects [a company's] present responsibility.''

The FAR provides additional causes that support exclusion for supervisory employees, *i.e.*, principals, of a federal contractor. A principal is defined as ''an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).'' Under the FAR, a principal may be excluded for a knowing failure to disclose credible evidence of a federal criminal violation, a False Claims Act

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violation, or a significant overpayment in connection with a federal contract or subcontract. Importantly, such exclusion actions are live for three years following final payment on the relevant contract.

The ''adequate evidence'' standard to support a suspension is similar to the ''probable cause necessary for an arrest, a search warrant, or a preliminary hearing.'' (*Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972)). For example, an indictment or criminal information for an honesty- or integrity-related offense will suffice as adequate evidence of a cause for debarment. In the context of a potential civil or criminal offense, agencies also presumably have the authority to institute suspension proceedings absent a pending civil or criminal investigation.

In order to issue a suspension, the SDO also must find that ''immediate action'' is necessary to protect the public interest. Whether immediate action is required is an inference drawn from the facts and circumstances of a matter, and is based on a determination by the SDO regarding whether the entity is ''presently responsible'' to perform government contracts.

What Triggers Debarment? Debarment may either be mandated by statute or left to the discretion of an SDO. It is a disqualification or exclusion from government contracting for a set period of time and is a ''final determination'' that an entity is ''not presently responsible'' for purposes of contracting with the government, subject to challenge under the Administrative Procedure Act (APA), 5 U.S.C. § § 701-706.

Mandatory Debarment Following a conviction under the CAA or CWA, debarment is required until the SDO certifies that the condition underlying the conviction has been corrected. There is no set time limit on statutory debarment. As soon as the EPA learns of a CAA or CWA conviction, the agency will enter the name and address of the defendant and the violating facility (or facilities) into SAM and, ''as a courtesy,'' will attempt to notify the excluded entities of the disqualification. Under EPA regulations, the regulated public is ''legally on notice'' by the statutes that a criminal conviction [under] the CAA or CWA [Clean Water Act] automatically disqualifies [them].''

Notably, an SDO may—and likely will—institute discretionary suspension or debarment actions in tandem with a mandatory debarment under the CAA or CWA.

Discretionary Debarment For a discretionary debarment, the SDO must provide notice and an opportunity to respond prior to listing a company on SAM. To institute a debarment, the SDO must establish the existence of at least one of the causes for debarment by a preponderance of the evidence. In the context of a civil or criminal violation, a civil judgment or conviction meets this burden.

Discretionary debarment generally is limited to no more than three years. The term of this debarment is based on the seriousness of the underlying offense: The more egregious the conduct, the longer the term. The SDO may extend a discretionary debarment beyond the initial term based on a finding that ''an extension is necessary to protect the public interest.'' This decision must be based on more than the facts and circumstances that led to the initial debarment, such as continuing misconduct during the debarment term or subsequent misconduct unrelated to the initial debarment.

CAA and CWA Suspension and Debarment Actions Under the CAA and CWA, and EPA's implementing regulations, mandatory debarment for violations of the acts is applicable to the convicted entity, the facility at which the underlying violation occurred, and ''other facilities owned or operated'' by the convicted entity. EPA has broadly defined ''violating facility'' to include any place that ''gives rise to a CAA or CWA conviction'' including a ''site of operations.'' The EPA has applied the term to include a company's corporate headquarters and all its underlying operations and divisions. In the *Deepwater Horizon* suspension and debarment proceeding under the CWA, the EPA interpreted ''violating facility'' to apply to the corporate headquarters of BP Exploration & Production (BPXP), where it argued bad management decisions lead to the actions on the rig and that BPXP employees on the rig acted ''as extensions of [headquarters].'' (*See* U.S. EPA's Mem. in Supp. of Summ. J., *BP Expl. & Prod. Co. v. McCarthy*, No. 13-cv- 2349 (S.D. Tex. Jan. 28, 2014)).

Further, in conjunction with a statutory debarment action, the EPA should be expected to exercise its discretionary suspension or debarment authority. Under this authority, the SDO may, and generally will, extend an exclusion action to an entity's affiliates. This can include domestic and foreign parent companies, subsidiaries, sister companies, subsidiaries of sister companies and joint ventures. For example, in the *Deepwater Horizon* proceeding, EPA used its discretionary authority to suspend 19 affiliated companies of the targeted entity, including foreign corporations, on the basis of joint control by British-based parent company BP p.l.c. (*See* Compl. at 2, *BP Expl. & Prod. Co. v. McCarthy*, No. 4:13-cv-02349 (S.D. Tex. Aug. 12, 2013)).

Resolution of Suspension and Debarment Actions An entity that is under investigation or indictment for an integrity-related violation or CWA/CAA criminal violation may consider, in some instances, early engagement with the relevant agency's Suspension and Debarment office to forestall possible suspension in the event of an indictment, to provide a basis for certification by the SDO to resolve a mandatory disqualification in the event of a CAA or CWA conviction, and to prevent or limit the scope of related discretionary exclusion actions.

If more than one federal agency is interested in pursuing an exclusion action against an entity, such as when a potential violation could implicate two separate statutory regimes or regulatory programs, the Interagency Suspension and Debarment Committee (ISDC) will facilitate the determination of a ''lead'' agency to be responsible for the action. For example, in matters where a CAA or CWA violation occurs in tandem with another statutory violation, the EPA almost always will take the lead in a subsequent exclusion action due to each statute's mandatory exclusion requirements.

Initial Outreach Initial outreach should be directed to the agency personnel that investigate and provide factual support for the suspension and debarment actions the SDO takes. In some agencies this is handled by an office separate from the arbitrative functions of the SDO, while in others the investigative and arbitrative functions are combined in a single division. The EPA, for example, has two separate divisions: The EPA Suspension and Debarment Division (SDD) is a separate office from the SDO, dedicated to investigating and

providing factual support for suspension and debarment decisions of the SDO. Criminal investigators and prosecutors also can refer issues directly to the investigative function for agency follow-up. See U.S. Attorneys' Manual (directing the U.S. Attorney's Offices and DOJ Litigating Divisions and Trial Attorneys to coordinate with other agency attorneys, including ''suspension and debarment authorities,'' to coordinate appropriate and timely remedies).

The goal of early outreach is to convince the agency to decline or limit the scope of a discretionary exclusion action, and, in the event of a mandatory exclusion, offer evidence that the SDO could use later to certify that any conditions allegedly underlying a conviction have been corrected. As part of this approach, the company might provide the agency with a characterization of underlying facts that reflects both a responsible corporate character and evidence of corrective actions to address any alleged violations. The investigated entity should be prepared to discuss the company's business ethics program and health, safety and environmental compliance program both prior to and following any alleged violations.

Contesting Exclusion Actions If a Suspension and Debarment Office proceeds with a discretionary exclusion action or institutes a mandatory disqualification, the excluded party (known as the ''Respondent'') will receive an official notice of the action (i.e., a notice of suspension or proposed debarment). This notice triggers the Respondent's right to present information (in written as well as oral format) contesting the discretionary action or requesting delisting for a mandatory debarment action. In the event of a suspension based on an indictment, conviction, or other civil judgment, or other action for which an opportunity to contest relevant facts has been provided, however, the Respondent will not have an additional opportunity to challenge the facts in support of the action.

While a discretionary suspension action takes effect prior to an opportunity to contest the action, a discretionary debarment may not be issued until the Respondent has an opportunity to contest the proposed action. Respondents may present witnesses and other evidence to the SDO, and may confront any witnesses offered against them. The EPA has published guidance on information that a corporate Respondent should cover when contesting a discretionary action or seeking reinstatement after a mandatory debarment, which includes information regarding the company's ethics and compliance infrastructure.

In the event of a mandatory disqualification following a CAA or CWA conviction, a Respondent must submit a written request for reinstatement to the SDO that describes the causes that led to the conviction and how these were remedied. The Respondent may apply for reinstatement at any time following a CAA or CWA mandatory debarment, but prior to granting this request, the SDO must determine and certify that the ''technical and non-technical causes, conditions and consequences of the Respondent's actions have been sufficiently addressed.''

The SDO will issue a final written decision on a contested action or request for reinstatement within 45 days of the close of the administrative record under the NCR, and within 30 working days under FAR (i.e., the date of the final submissions from either the Respondent or the agency). Appeal of an SDO's decision generally will be prescribed by agency's specific procedures. For example, following a written final decision by the EPA SDO, a Respondent has 30 days to appeal the decision to the EPA's Office of Grants and Debarment (OGD). The OGD has discretion to review the SDO's decision, and if the OGD accepts the appeal, the review is limited to either: (1) clear errors of material fact or law; or (2) decisions that are arbitrary, capricious, or an abuse of discretion. The Respondent may appeal the final decision of the agency pursuant to the APA, 5 U.S.C. § § 701-706.

Negotiating an Administrative Agreement An agency may use an administrative agreement to resolve potential and existing suspension and debarment actions, both discretionary and mandatory. In CAA or CWA mandatory actions, an agreement will contain a certification that the conditions that gave rise to the underlying conviction were corrected.

Any administrative agreement will include a negotiated set of terms and conditions that may contain, among other elements:

- recitation of corrective actions implemented for any alleged violations, or the conduct of conviction;
- overview of Respondent's existing corporate compliance programs;
- requirement to implement improvements or maintain certain aspects of such compliance programs;

requirement for reporting on compliance with the agreement, as well as certain types of misconduct reported through the corporate compliance hot line or other corporate reporting avenues;

- requirement for an Independent Monitor to review and audit compliance with the agreement.

In negotiating an administrative agreement, the agency may seek to apply its terms to both the Respondent and any affiliates, as defined above. Final administrative agreements are publicly available, and may be found through the Federal Awardee Performance and Integrity Information System.

Early Engagement May Help A company under investigation for civil or criminal integrity- or honesty-related violations, or violations of a statute such as the CAA or CWA, should be cognizant of three key realities: (1) an indictment could support a temporary exclusion from government business; (2) a conviction or civil judgment could be grounds for expansive discretionary exclusion; and (3) a CAA or CWA conviction, even for a misdemeanor, will trigger mandatory disqualification.

Early engagement with an agency prior to or immediately following an indictment could help build goodwill with the agency and forestall or limit an exclusion action applicable to both the target company and its current affiliated corporate entities (both domestic and foreign). Such engagement may lead to an administrative agreement that resolves the exclusion and permits continued government contracting by the company and its affiliates subject to compliance with certain conditions.

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This article does not represent the opinions of Bloomberg BNA, which welcomes other points of view.