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Senators' Call for Increased DOJ Use of Suspension and Debarment Could Impact False Claims Act Investigations and Resolutions

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In an August 11, 2022 letter to the Department of Justice ("DOJ"), Senators Elizabeth Warren (D-Mass) and Ben Ray Lujan (D-N.M.) signaled renewed congressional interest in the Government's right to suspend or debar government contractors and federal financial assistance recipients from obtaining new business, and pressed for DOJ to boost its use of this administrative remedy in connection with its prosecution of criminal or fraud cases.

The bases for discretionary suspension and debarment include "making false statements" and "any other offense indicating a lack of business integrity or business honesty."[1] It is no surprise, then, that companies subject to investigations, litigation, and resolutions under the civil False Claims Act ("FCA") often find themselves faced with the prospect of suspension or debarment from future government work—even when they dispute the merits of the FCA allegations in question.

In most cases, government agencies have significant discretion to decide whether there are sufficient grounds to exclude an entity from receiving government contracts or financial assistance awards. DOJ has traditionally taken an agnostic approach to the interplay between its FCA investigations and the suspension and debarment authority of the government agency affected by the underlying conduct. The Warren-Lujan letter, however, presses DOJ to take a more activist role in suspending or debarring not just the companies it is pursuing as "corporate criminals," but companies that are the subject of "corporate fraud cases" like those under the civil FCA.

While DOJ's response to this congressional outreach remains to be seen, any attempt by the Department to address the Senators' concerns as articulated in the letter would represent a meaningful change in policy and would undoubtedly affect companies' evaluation of whether to litigate or settle FCA claims with the Government. Companies subject to FCA investigations, litigation, and resolutions should be particularly mindful of how they approach mitigating the risk of suspension or debarment in the context of DOJ investigations and resolutions, in light of the Warren-Lujan letter.

Discretionary Suspension and Debarment

The ability to compete for new Government work is critical to the success of any government contractor. So too for companies that depend on Government funding – whether directly, through government grants or cooperative agreements, or indirectly, through state, local, or educational institution projects.

Suspension and debarment are administrative actions taken by the U.S. Government to disqualify a contractor from contracting with or receiving funding from the Federal Government based upon the Government's determination that the contractor is not

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"presently responsible" (i.e., that it lacks the necessary integrity to be a business partner of the Government). Suspensions and debarments are not meant to be employed by the Government "for purposes of punishment."[2] Notably, suspending and debarring officials ("SDOs") often have complete discretion as to whether to exercise the right to suspend or debar.[3] Even when a Government agency finds some past violation that could provide a basis for suspension or debarment, an agency SDO is not required to, and should not, suspend or debar a contractor that is "presently responsible." In addition, an SDO could also decline to suspend or debar a contractor, even where grounds exist to do so, because it would not be in the Government's best interest.[4]

The grounds for suspension and for debarment are substantially similar to one another, with different evidentiary thresholds. Both the suspension and debarment frameworks permit the exclusion of a company based on "adequate evidence" (suspension) or a civil judgment (debarment) for civil fraud, or other conduct that affects an entity's present responsibility, or an offense that indicates a lack of business integrity or business honesty.[5]

FCA Violations as Grounds for Suspension or Debarment

The FCA is the government's primary tool for addressing alleged fraud related to government funds. Under the FCA, both DOJ and would-be whistleblowers (who may file FCA lawsuits on the government's behalf and obtain a percentage of any recovery) can pursue lawsuits against companies that do business with the government, and if successful, obtain treble damages, per-claim penalties, and attorneys' fees and costs.

The FCA creates liability for any party that submits a false claim for payment to the federal government, or who makes a false statement that is material to a false claim. 31 U.S.C. § 3729(a)(1)(A), (B). The Government often takes the position that a violation of contract requirements can create fraud liability under the FCA if it is done with knowledge and is material to payment. Under the "reverse" false claims provision, liability also exists for anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." *Id.* § 3729(a)(1)(G).

Therefore, the potential bases for FCA liability substantially overlap with the grounds for potential suspension or debarment—i.e., "making false statements" and "any other offense indicating a lack of business integrity or business honesty."[6] Accordingly, the consequences of being found liable in an FCA case can be catastrophic, resulting in suspension or debarment from government contracts or exclusion from participation in government programs.

As a matter of policy, DOJ attorneys are required to coordinate with the Government's relevant criminal, civil, regulatory, and administrative attorneys when initiating an FCA suit or investigation, including with regard to suspension and debarment.[7] A 2012 DOJ memorandum, for example, stresses the importance of "[e]ffective and timely communication with representatives of the agency . . . including suspension and debarment authorities," to ensure that appropriate remedies are pursued at the correct time.[8] The Interagency Suspension and Debarment Committee ("ISDC") is tasked with overseeing and coordinating all executive agencies' implementation of suspension and debarment regulations.[9] One such coordination activity involves the designation of a "lead" agency where a case may affect the missions of multiple agencies.[10] Under the current system, the lead agency is the ultimate decision maker as to what suspension or debarment action, if any, will be taken.

The Warren-Lujan Letter

The Warren-Lujan letter to Attorney General Merrick Garland and Deputy Attorney General Lisa O. Monaco criticizes DOJ for not using its authority to suspend or debar

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"corporate criminals" from the government contracting process, and urges DOJ to "pursue more robust use of its suspension and debarment authority." Notably, the letter advocates for DOJ to use its suspension and debarment authority even for "companies that it does not directly do business with," rather than relying on the contracting or lead agencies to pursue suspension or debarment, and calls for DOJ to "adopt policies that call for [DOJ] prosecutors to systematically refer corporate misconduct to" DOJ's own "debarring officials for review in all appropriate cases."

Senators Warren and Lujan propose four ways in which DOJ should "expand its use of debarment":

Use debarment authority for corporate entities, not just individuals.

Use debarment government-wide (i.e., DOJ should suspend or debar entities that contract with *any* federal agency, rather than just its own contractors).

Consider debarment for all corporate misconduct, including "defraud[ing] the government…[t]ax evasion, bribery, unsatisfactory performance, and other harmful conduct," "in any contract—whether the government was harmed or not…."

Use suspension authority while an investigation is pending.

The Senators' letter betrays a failure to appreciate several critical facets of the suspension and debarment regime—particularly the non-punitive nature of such exclusions, the focus on *present* responsibility rather than *past* misconduct, and the primacy of the government's interest in making such exclusion decisions. Moreover, these proposals introduce the possibility for a sea change in DOJ policy that would have dire impacts for companies subject to FCA prosecution.

<u>Implications for FCA Defendants</u>

If adopted as a matter of practice or policy by DOJ, the Warren-Lujan approach could have significant effects for companies facing FCA lawsuits and investigations.

The potential for FCA liability is already a significant risk for government contractors in light of the potential for massive treble damage awards and civil penalties. Indeed, FCA settlements and judgments total billions of dollars every year, with individual settlements often reaching tens or even hundreds of millions of dollars. But debarment or suspension for companies that depend on government business would be ruinous, because those penalties would effectively put companies out of business altogether. The Warren-Lujan approach to suspension and debarment significantly heightens these risks, and makes resolving FCA suits considerably more difficult in several regards:

- **Imposing a Suspension *During an Investigation* May Force Unfavorable Settlements.** In many cases, companies settle or otherwise resolve FCA lawsuits before trial as part of a negotiated resolution, in part precisely because of the risk that an adverse judgment on the merits could result in debarment. This is so even where companies dispute the merits of the FCA claim but wish to avoid the cost and uncertainty of a trial and the resulting collateral consequences of suspension or debarment. Through a negotiated resolution, companies can ensure there is no formal judgment of a false statement, and negotiate a path forward that does not include any suspension or debarment, for example through entering into a Corporate Integrity Agreement (CIA) or other administrative agreement. But the Warren-Lujan approach would encourage DOJ to increase its use of its authority to suspend contractors *while an investigation is pending*, which would significantly increase pressure on companies to quickly settle cases. FCA investigations can last years, and few companies could weather a multi-year suspension while defending against an FCA investigation. Moreover, uncertainties regarding when

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an investigation might result in “adequate evidence” to suspend an entity may lead even companies that have strong defenses and have done nothing wrong to enter into hasty settlements, without a full opportunity to defend themselves, to avoid an interim suspension – though as discussed below, the resolution itself may still raise the specter of exclusion.

- **Government-Wide, Corporate-Level Suspensions and Debarment Could Disincentivize Any Settlements Whatsoever.** Even in cases where debarment or suspension is on the table, FCA defendants typically negotiate to keep those penalties carefully circumscribed. For example, companies may engage with agency SDOs early in settlement negotiations in an effort to limit any suspension or debarment to individual wrongdoers or corporate divisions (as opposed to the entire company). The Warren-Lujan approach would make this far more difficult by calling for DOJ to impose suspensions and debarments at the corporate level. When broad, unlimited penalties of that nature are on the table, a contractor may be unable or unwilling to even consider a negotiated resolution, since it would be a death knell to most government contractors if the corporation was barred from *all* government business.

- **Supplanting Lead Agency Discretion with DOJ’s Could Result in Suspensions or Debarments That Are Not in the Government’s Interest.** Furthermore, by advocating for DOJ to pursue suspension or debarment directly—instead of working through the lead contracting agency—the Warren-Lujan approach ignores an important consideration in the use of suspension and debarment. Agencies that work directly with contractors are best placed to understand the work those contractors do, and often rely deeply on the contractors to compete for new work to serve the agencies’ missions. Those agencies are therefore attuned to the practical, disruptive implications of suspending or debarring a contractor. Indeed, the suspension and debarment regulations specifically contemplate that SDOs must consider the government’s interest in making suspending or debarring decisions.[11] Moreover, those agencies are also in the best position to assess whether a contractor is “presently responsible.” DOJ attorneys are likewise supposed to take into account “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, *as well as at the time of* a charging decision” when evaluating corporate settlements,[12] but the Warren-Lujan approach would have DOJ pursue a suspension and debarment decision apparently with little regard for either corporate compliance improvements or whether an agency is “presently responsible” despite past misconduct. Supplanting an agency’s judgment with DOJ’s judgment could mean that suspension and debarment decisions are made without a full appreciation of these practical realities, and without consideration of the governmental interests.

Although whether and to what extent DOJ will heed the Warren-Lujan admonitions remains to be seen, clients facing FCA investigations, litigation, and potential resolutions must consider how a possible shift in Department policy could impact the appropriate steps to be taken to mitigate against the corporate “death sentence” of suspension or debarment.

__________________________ [1] FAR 9.406-2; FAR 9.407-2; 2 C.F.R. § 180.800. [2] FAR 9.402(b); 2 C.F.R. § 180.125(c). [3] FAR 9.406-1(a), 9.407-1(a); 2 C.F.R. § 180.700; 2 C.F.R. § 180.800. [4] FAR 9.406; *see* 2 C.F.R. § 180.845(a). [5] *See* FAR 9.406-2; FAR 9.407-2; 2 C.F.R. § 180.800. [6] *Id.* [7] Attorney General, Memorandum for All U.S. Attorneys, Director of the Federal Bureau of Investigation, All Assistant U.S. Attorneys, All Litig. Divs., and All Trial Attorneys, Coordination of Parallel Criminal, Civil, Regulatory, and Admin. Proceedings (Jan. 30, 2012), *available at* https://www.justice.gov/jm/organization-and-functions-manual-27-parallel-proceedings. [8] *Id.* [9] *See* Exec. Order No. 12549, Debarment and Suspension, 51 Fed. Reg. 6370 (Feb. 21, 1986). [10] *See* Interagency Suspension and Debarment Committee, “About the

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ISDC," *available at* https://www.acquisition.gov/isdc-home. [11] FAR 9.406; *see* 2 C.F.R. § 180.845(a). [12] U.S. Dep't of Justice, Justice Manual § 9-28.300 (Dec. 2018), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300.

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