



Understanding Suspension, Debarment and Blacklisting – Jessica Tillipman

[00:00:08] Welcome back to Bribe, Swindle or Steal. I'm Alexandra Wrage, and implausibly enough, today's guest is going to make the lesser known enforcement tools of suspension and debarment lively for us. My guest is an assistant dean and lecturer at George Washington Law School where she teaches a government contracts, anti-corruption and compliance seminar. Prior to joining George Washington, she was at Jenner & Block. She's a senior editor with the very popular FCPA Blog. She writes prodigiously and speaks frequently on corruption, compliance, suspension and debarment. Her legal commentary is sought out by major U.S. media outlets. Jessica Tillipman, thanks so much for joining me today.

[00:00:46] Thank you for having me. Happy to be here.

[00:00:48] Why don't you start by describing these penalties for us and the rationale behind each?

[00:00:54] I'm really happy that you asked me to describe it as a penalty because not every single debarment regime views debarment or blacklisting or suspension as a penalty. That's probably one of the biggest misnomers about the system as a whole. I'll just describe this in general. There's a variety of different systems or ways that people can address this. You use the word suspension, debarment and blacklisting. They're often used interchangeably, but for purposes, I think we can call it debarment. It really just means exclusion or banning from obtaining government contracts or from doing business with the government. Basically, there are a variety of systems, but I think the most mature system is the United States. We've had ours the longest here in the U.S., and I think that's the easiest to describe. The U.S. has the most mature suspension and debarment system in the world. There are a variety of systems. The World Bank has a very prominent system. Now it is newer, but it's fairly prominent and active. The EU has a system now that has been changing in recent years, and its most recent change occurred in 2015. They are still, I'd say, attempting to obtain their sea legs when it comes to suspension and debarment, so it's a little muddled still, but they have a system as well. So the U.S. suspension debarment system, the reason I said in the beginning that I was glad you used the word "penalty" is because that's often a misunderstanding. It's the most frequent misunderstanding about the U.S. suspension and debarment system. Most people hear stories about contractors. Maybe they've engaged in fraud. Maybe there's been a corruption settlement. They think, "Why is that government contractor still receiving U.S. government taxpayer dollars?" It makes people angry and rightfully so. It's been a big selling point for a lot of politicians. They see these big contractors as a very easy target, and so you hear a lot of stories about proposed legislation or, I'd say, a civil society, good governance

groups, the media pointing their fingers at contractors that received money despite stories that come out of the media about fraud or corruption. What the tool of government of debarment is actually means to protect the government. When we think of government contractors or any organization or person that does business with the government, we think of when they engaged in bad behavior. Typically, the way that our government will punish that person or company is through fines, penalties and incarceration. That's why we have our Justice Department. On the contrary, when a government contractor obtains taxpayer dollars through government contracts or grants or other sources of government funding, they're doing that with the government, and the government's wearing its business hat. It's a completely separate process. The government views this as a business partnership. So when it looks to whether or not to continue to do business with a company that's engaged in wrongdoing, it does so not from the perspective of punishing the company through a penalty or a sanction, but as a means of protecting the government by excluding that company through future business. It's a really interesting distinction because I think because people often see debarment as another means to punish a company, it would make sense if that was the way the system worked - that you would get rid of these quote unquote bad contractors when they engage in corruption. But because it's the company or the government acting with its business hat, a lot of times companies don't get suspended or debarred when people expect them to.

[00:04:20] I appreciate that clarification, and clarity is important, but as a practical matter for the company, how does this feel like anything other than a penalty?

[00:04:31] Oh, sure. Of course, we refer to debarment as the corporate death penalty because it is. When a company is suspended or debarred, and they're cut off from future revenue streams, it absolutely feels like a punishment and, quite frankly, can put the company out of business. And it has put companies out of business. More frequently, smaller companies and oftentimes even individuals that are debarred have no ability to get loans. They have to change their jobs. It's really - I don't want to say a life-ending sentence for an individual - but it really is a life-altering sentence for an individual. But for a small company, it very frequently puts them out of business. For a large company, it can have significant impact on the company and their revenue stream. It feels like a punishment, but by highlighting the difference between punishment and protection, that really goes to the heart of when companies are debarred. I'll give you an example of it. When BAE, as you recall, was prosecuted - and eventually it resulted in a settlement agreement with the U.S. government for bribery in Saudi Arabia - at the time there was a lot of outrage because BAE has a lot of business with the U.S. government and was still continuing to receive government contracts despite the fact that it had settled this major anti-corruption enforcement action with the U.S. What had actually happened in that case is that the Air Force had reached out to BAE, who was not cooperating with the Justice Department at the time in its inquiry, and basically sent what's referred to as a show cause letter. I always say it's a "show us why we shouldn't debar you" type letter. You get this letter. A company receives it, and they basically have to tell whatever U.S. agency reaches out to them, "Hey, here are all the things that we're doing to show you why we should not be excluded from

receiving government contracts." Not surprisingly, because that threat of debarment is so severe, BAE started cooperating with the U.S. government across the board, both the Justice Department and the Air Force. By doing so, what it did is it opened up its doors to the Air Force and show them all the changes that it had made to its compliance program - all the things basically the Justice Department looks at when it settles FCPA enforcement actions - and convince the Air Force that debarment was not appropriate. When the settlement came out, a lot of people were really angry because they thought, "How could BAE still be receiving U.S. contracts despite this corruption?" And the answer was simple: because the regime is not punitive. It's not punitive like the justice system. There's no fines and penalties. Because it's the business arm, the fact that BAE was still able to demonstrate to the government that, "Hey, we're still a good contractor despite this bad behavior. We fired the responsible parties. We've engaged in revamping our compliance program. We've admitted wrongdoing in one sense of the word or another." Because of those reasons, the debarment was not appropriate because, again, that's the distinction between punishment and protection.

[00:07:22] It sounds like it's an enforcement tool rather than a penalty, but perhaps you could give us a couple of more examples. The BAE brings this to life for us. I'm curious if you can talk us through a couple more examples.

[00:07:33] Another big one would be Siemens. Siemens, we all know up until recently, was one of the largest FCPA cases of all time. So one would expect, "Why on earth would Siemens still continue to receive U.S. government contracts when, if you looked at the facts of the Siemens case, they were incredibly egregious?" It really tainted the whole company. What we saw with Siemens from the FCPA perspective is that when Siemens settled with both the U.S. government and German authorities, it engaged in an extensive revision of its compliance program. It fired those that were responsible for the bad behavior. Truly, we can look to Siemens, as it has such a significant overhaul in its compliance program that it was almost serving as a benchmark for compliance reform for companies that followed it with its settlements with the U.S. government. In fact, the Justice Department would go around following this Siemens settlement, saying, "Look at Siemens. This is the gold standard in compliance." Well, for those reasons, at the time of the settlement with Siemens, there were a lot of folks questioning why Siemens was still saving U.S. contracting dollars. What Siemens actually did was go proactively to the Defense Logistics Agency, which, at the time, was probably one of the agencies with whom it had most of its contract dollars, and said to them, "Look, here are all the compliance steps that we're taking to reform our company to make sure this never happens again." When DLA really is conducting an analysis to determine whether or not they need to continue doing business with the company or whether that company needs to be excluded, they're looking at two things. First, they're looking to see, "Is there grounds for debarment?" And in Siemens' case, there was abundant grounds for debarment. And two, even if there are grounds for debarment, are there mitigating factors that weigh against debarment, demonstrating that this is unlikely to happen again, that the company has basically reformed its ways and is unlikely to pose a risk to the government. Siemens was able to demonstrate that.

They were able to say, "Look, the same compliance system and the same reforms that we've implemented in order to settle with the U.S. government are the same things that will ensure you, Defense Logistics Agency, that we're not going to be a threat to the government in the future through corruption because we've reformed so much." Because of that, they were able to get an affirmative statement from the Defense Logistics Agency to show that they were a responsible company and that they could safely do business with the government going forward.

[00:09:47] This is an interesting segue because you've just described BAE and Siemens. Both are vast multinational companies with a great deal of business with U.S. government, but other governments as well. I know you've written on this, but maybe you can talk us through your position on the argument we hear that there are some companies that are just perceived as too big to debar. That is, this doesn't apply to them because it's just too complicated for the government to have them debarred. So smaller companies receive this - stopping myself from saying penalty.

[00:10:22] It's hard. It's hard.

[00:10:23] This debarment, application of this tool disproportionately. What is your response to the "some companies are too big to debar" position?

[00:10:33] I believe that this statement, "too big to debar," is nothing more than really a catchy slogan, and kudos to the person who came up with that, or the "too big to fail" phrase because it really does resonate. It's a great slogan with a lot of populist appeal. I see that. But I think if you actually look at the way the system functions in reality, there are explanations for why the large multinational companies are able to - I don't want to say escape debarment or avoid debarment - are better able to demonstrate their responsibility and their ability to continue working with the government than small companies or individuals. If you look at the large companies, the factors that a suspension and debarment official will actually look at to determine whether or not a company is responsible enough to do business with the government are actually the same factors that generally lead to settlements in FCPA actions. Those factors - like revamping a compliance program, admitting responsibility, restitution, paying fines and penalties, cooperating during an investigation, firing those responsible parties - all of those are the same factors that a suspension and debarment official actually looks at. If you look to large multinational companies, they generally have preexisting compliance programs. They're better able to implement these changes. They have more resources to do so. They're better able to assure a suspension and debarment official that they aren't posing a threat going forward. More often than not, when there is an issue - for example, with Boeing. This happened years ago - if there's an issue in a particular office or division, that division alone will be suspended or debarred because they can sever off the diseased sector or portion of the company while the government can continue doing business with the sections that aren't really impacted by this bad behavior. The same thing happened with Booz Allen in recent years, where they had an office, the San Antonio office. There was an individual that left government.

He took with him proprietary data about competitors, shared it with the whole office to help them with their bids on future government contracts. Nobody said anything. When the headquarters of Booz Allen finally found out, they reported it, but what the government basically did was suspend that particular office - not the entire company. So they're able to deal with that. Oftentimes it also involves suspending or barring the responsible individuals. There is that capability that just doesn't exist when you have a small company who, again, are going to be the bulk of the suspensions and debarments in the system. Let's say it's a mom and pop organization. They're a small business. If the leader of the company, the founder of this small company, has that special expertise that enables them to provide certain goods or services to the government - if they're knocked out, it's going to be really hard for the company to otherwise continue on without them. The same goes for when they're actually excluded. They don't tend to have as many resources to deal with the problems. I do believe that, these days, many experienced agencies have ways to try to work with smaller companies and individuals because they realize it's less fair for them in a sense because they don't have the existing compliance programs. It's just, unfortunately, the way things are in reality. They oftentimes don't have the resources. Oftentimes, it infects the entire company. All these things that otherwise would not be able to convince an official that they're still responsible enough to get government contracts.

[00:13:51] I can see that it's tricky. TRACE obviously works closely with SMEs - small- and medium-sized enterprises. It can be really challenging if an entity is completely wrapped up in one or two people - the personality of the founder, that sort of thing. But there must be a way forward for mid-sized companies to get themselves off of these lists or avoid debarment and somehow reconstitute themselves. It seems like it shouldn't be a prerogative just of the very large companies.

[00:14:22] It is possible. The midsize companies have the ability to do this, and we see it a lot, more so than, of course, the smaller companies. The best thing that a company could do across the board would be to implement a compliance program before they ever get into trouble. That's always the hope. Unfortunately, with smaller companies, that doesn't often happen because they're so focused on surviving and being a successful business that they don't focus on compliance, oftentimes until it's too late. With midsize companies, it often sneaks up on them. They become big fairly quickly due to the government contracts and their size, and all of a sudden they find themselves a midsize business that doesn't have an existing compliance program. If they're able to get a preexisting compliance program that helps them on the front end, on the back end, less so but they tend to have more resources to deal with it. I will say this is part of another aspect of the system, which is a little less fair, which is that your larger or mid-sized companies are going to be able to go onto K Street and call up the very successful attorneys that tend to represent companies in front of suspension of department officials, whereas the small companies will typically call their local counsel who have no familiarity with this system. You really do see a disparity when it comes to how people handle these proceedings. Somebody that's a litigator that gets caught by a small company will often try to

view this as a litigious, combative experience. They'll try to go to war with a suspension and department official and fight them like they would a prosecutor in court, whereas the midsize and large companies hire these experienced counsel who know that the system is actually less about re-litigating what happened and more about - again, this is the government's business arm - so it's about demonstrating that they're not going to be a threat to the government in the future. It's a far more amiable, co-operative experience. Oftentimes, the big businesses or mid-sized companies will contact the suspension and department officials informally, before they are even contacted first to show them proactively all the changes that they've made in the company in the hopes to avoid debarment, whereas you have smaller companies or folks that are oftentimes outside the D.C. area. They just don't know who to call, and they don't oftentimes get the benefit of a doubt that these larger, midsize companies would.

[00:16:35] My last comment was giving these smaller companies the benefit of the doubt. Now the flip-side of that is what is done to prevent the possibility of a very small company that is tied to one or two personalities from just wrapping itself up, dissolving itself and then reconstituting itself under a new name. Smaller companies can do that with more agility.

[00:16:56] They absolutely can. In fact, the rules are designed to prevent against that, so they do go after affiliates of the companies, and they view affiliates quite broadly. The system does allow the government to reach its tentacles out and exclude all affiliates. The aim is to try to do that to avoid that sort of problem you're describing. Even the U.S. system is not alone in doing that. The World Bank does the same thing. It's even harder in the World Bank context because they're often dealing with smaller companies in developing countries where it's really difficult to figure out which company is affiliated with whom and whether it's popping up somewhere else under a different name. They're designed to actually capture and prevent that problem but, unfortunately, none of these procedures are foolproof and, certainly, companies do it a lot, especially in the development context.

[00:17:48] One of the scariest aspects of suspension and debarment is the nature of cross debarment. It would be helpful to have you describe how cross debarment works across organizations.

[00:18:01] It's interesting. There's cross debarment by its formal name that we use in the World Bank context, and I can certainly talk about that. There's also the interesting aspect of cross department in the US system, and that is what we refer to as total exclusion from government contracting. So an exclusion by, let's say, the Environmental Protection Agency has the ability to exclude the company government-wide, so one agency can determine it for the entire government.

[00:18:27] That doesn't happen automatically.

[00:18:29] What's interesting - most people don't realize - is that if you're a company, and you get debarred by one agency, you are entirely prohibited from receiving future contracts from any other government agency. You cannot receive government contracts. You cannot receive

task orders. You cannot enforce options. You can't obtain subcontracts. You can't obtain licenses or loans or other sorts of things, again, leading to the name "corporate death penalty." In the U.S. system, any decision by one basically defines the decision for the entire federal government. In fact, there are situations that have happened where one agency might meet with a contractor and determine that they're responsible enough. They don't debar them, but then another agency meets with them, and they wind up deciding the other way. Then for purposes of future business opportunities, that contractor is completely debarred. It does actually automatically debar that contractor from all U.S. government contracts if they get excluded by one agency. That's a particularly detrimental aspect of the U.S. system. On the World Bank side, cross department is a relatively new feature, just like the World Bank sanction system. I want to briefly, before I talk about cross debarment, mention the fact that I said "sanction system." Unlike the U.S. system, which is more about protection and as not a punishment, the World Bank system is just that: It is a punitive system. The World Bank folks that talk about the system explain that that's because, unlike the U.S. system that has the Justice Department, on which it can rely to punish people through fines and other sorts of penalties, the World Bank system doesn't have a justice system or other remedies like that. Their sanctions system is their way of dealing with contractors that engage in wrongdoing. They do have a punitive system. It is a sanction, and cross debarment is one of its most recent tools. Basically, if you have a debarment that lasts longer than a year - so if the World Bank debars a company longer than a year - that company will then be excluded from receiving or doing business with the other banks. That would be the Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development and the Inter-American Development Bank.

[00:20:37] This cross debarment amongst the international financial institutions - that can mean that the due process of one makes a determination for all, and I think it's fair to say that not all of those organizations have comparable processes in place.

[00:20:57] I think that's a very fair assessment. The World Bank by far has the most mature sanctions system. The Inter-American Development Bank does have an increasingly mature sanction system as well, I'd say fairly close to the World Bank, but by far it's the World Bank, and the others a little bit less so. I do think that there is that real concern of companies as to whether or not they have access to due process. They've had a fair process when they engage in the sanctions process, depending on which bank handles the procedures. It's an interesting process. I have to say, the World Bank's is almost quasi-judicial in nature, whereas the U.S. system is significantly less formal and can even involve calling up a suspension debarment official and having an informal meeting. The World Bank's system is far more complicated and robust, and it's really designed to provide a lot of procedural fairness to those individuals that have been accused of wrongdoing with respect to World Bank finance contracts. If I could say one quick point about the small businesses, I find that in the World Bank's endeavor to try to provide more procedural fairness to a lot of its individuals that face potential sanctions proceedings, it's almost made the system so complicated that it's even more difficult for small

businesses and individuals that have to navigate the system to do so fairly well. I've seen statistics from the bank and the vast majority, like in the U.S., of those entities that are debarred by the bank are small businesses, midsize businesses and individuals. It's often we see that whereas the large multinational companies will get counsel and engage in the process and take all the steps that they need to do to try to, if they cannot avoid debarment, try to end it as quickly as possible through compliance or other remediation, the small businesses oftentimes don't even engage. They receive the notices from the World Bank, and they don't engage in the process because it's more expensive for them to do so or maybe they just decide to pull out of doing business with the development big banks altogether. If you look at the actual process, there's a lot of explanatory materials from the World Bank. It's designed to try to help small businesses, but truly, when you read it, they are complicated, and if you're working and doing business in Bangladesh, you are unlikely to know which lawyers to call up to help you navigate the system. There are very few debarment experts in Bangladesh - I don't know personally, but I'm just going to assume that - to help them, guide them through the system. I think it's got even more procedural shortcomings when it comes to fairness, as even opposed to the U.S. government.

[00:23:37] That certainly reflects the stories that we hear as well. We have a partner law firms in most countries, and we do hear that they occasionally are approached to represent small companies in these cases, but most give up. It's overwhelming, and that's an interesting question to end on. Do you think that the specter of suspension and debarment is skewing penalties? That is, entities are so determined to avoid entering into this whole process that they are more willing to pay substantial penalties.

[00:24:14] Oh, absolutely. The debarment system is the ultimate threat because the consequences, as I've described, are just so severe for companies that I do think that it does tend to move them towards a system of cooperation and settlement. I think the BAE case is the perfect example. This was earlier in the kind of FCPA enforcement area - I don't think it was too early, but it was certainly on the earlier side - of when the Justice Department was ramping up FCPA enforcement. The UK was resistant to cooperating. Its own country had decided to forego prosecuting the company at that time, which was controversial in its own right. But the threat of debarring BAE was so substantial that they immediately started cooperating with the government and agreed to settle, I believe it was a false statements case. So I think, because of that, yes, certainly companies will do anything to get out of debarment. Again, it's going to be the same way, I think, even for companies that try to settle FCPA actions. Although we increasingly are seeing some companies not disclose, there are still many, many companies that run to the government to disclose their cases because they'd rather pay an enormous fine than risk potential collateral consequences.

[00:25:30] One of the most unusual examples of the unintended consequences of suspension and debarment is probably the Siemens case. Can you describe that for us?

[00:25:40] The Siemens case was very unique because of the way that the government settled the charges in that case. If you've looked at the documents in that case and the evidence in that case, the documents were full of stories involving bribery all over the company, not just in certain subsections or subsidiaries of the company. What's fascinating is, at the time, when Siemens was negotiating its settlement with the U.S. government and also, as I mentioned before, talking to the Defense Logistics Agency to make sure that it maintained its U.S. contracts, there was this constant threat of the European Union's mandatory debarment regime. At the time, when Siemens was settling the case, the EU had a regime in which basically any company or company that did business with European governments would be mandatorily debarred for various offences, including corruption. To avoid this, given that Siemens is a German company, and this could be devastating, and that this was mandatory - there was no discretion on the part of the European Union to actually avoid debarment - this settlement with the U.S. government was quite unique. What happened was that the parent company, Siemens AG, wound up settling and pleading guilty to criminal books and records charges, which, if you can think about it, are not going to be really considered corruption charges under EU law, so criminal books and records were asked. The subsidiaries in Bangladesh and Venezuela pleaded guilty to criminal anti-bribery violations, so basically, those two subsidiaries took the anti-bribery violations, and then Siemens itself, the parent, took a books and records charge - again, to avoid the very unfortunate and potentially devastating consequence of mandatory debarment in the EU. The same goes for BAE. At that time, BAE, again, was full of bribery charges involving Saudi Arabia, but BAE only settled and agreed to a guilty plea involving false statements. What's interesting is actually in the charging documents involving BAE, they actually stated that they purposely only charged BAE with false statements to avoid mandatory exclusion under EU debarment rules.

[00:27:48] This does give rise to a certain amount of cynicism when you see these prosecutorial gymnastics to avoid pleading guilty to an offence that would trigger debarment. Is it fair to say that this is a tool that we're going to see more of?

[00:28:05] Absolutely. I think from, at least in the U.S. perspective, it's a fairly active regime. There's always consistently pressure on the U.S. agencies to continue suspending and debarring rogue or bad or even incompetent contractors. I think there's always going to be that pressure, and we'll continue to see that. The World Bank continues to publicize its decisions. It continues to improve its system, and we do continue to see a global effort towards this. The one area where I think we expect to see more activity in the future is in the European Union as it begins to implement the new debarment rules. Like I said, most recently enacted in 2015, we'll start to see, as those governments tend to implement them, more European debarments as well. I think that this is a regime that's here to stay. I think that many governments see this as an important tool in protecting the dollars of its citizens. I think we're going to continue to see a lot of action in the future

[00:29:04] Great. Thank you so much. I promised a lively discussion on suspension and debarment, and you didn't disappoint. Thank you for your time today, Jessica.

[00:29:13] Thank you for having me.