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

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Two senators want to ratchet up the pressure on companies that allegedly run afoul of the law while doing business with the U.S. government. But their proposal may have unintended consequences.

In an Aug. 11 letter to the Department of Justice, Sens. Elizabeth Warren (D-Mass.) and Ben Ray Lujan (D-N.M.) signaled renewed congressional interest in the federal government's right to suspend or debar government contractors — administrative actions taken by the government to disqualify a contractor from contracting with or receiving funding from the federal government.

The Warren-Lujan letter criticized the DOJ for not using its authority to suspend or debar "corporate criminals" and urged the DOJ to "pursue more robust use of its suspension and debarment authority." The senators proposed four ways in which DOJ should "expand its use of debarment":

1. Use debarment authority for corporate entities, not just individuals.
2. Use debarment government-wide (i.e., DOJ should suspend or debar entities that contract with any federal agency, rather than just DOJ contractors).
3. Consider debarment for all corporate misconduct "in any contract — whether the government was harmed or not. …"
4. Use suspension authority while an investigation is pending.

In making these proposals, the senators' letter betrays a failure to appreciate several critical facets of the suspension and debarment regime — particularly the nonpunitive 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.

Notably, the senators' advocacy for the DOJ to use its suspension and debarment authority even for "companies that [DOJ] does not directly do business with," rather than relying on the contracting or lead agencies to pursue suspension or debarment, is paired with calls for DOJ to "systematically refer corporate misconduct to" DOJ's own "debarring officials for review in all appropriate cases."

Critically, these proposals also introduce the possibility for a sea change in DOJ policy that would have dire impacts for companies subject to False Claims Act prosecution.

The civil 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. Meanwhile, the bases for discretionary suspension and debarment include "making false statements" and "any other offense indicating a lack of business integrity or business honesty." The potential bases for FCA liability therefore substantially overlap with the grounds for potential suspension or debarment, and it is no surprise that FCA defendants 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.

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

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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. But the Warren-Lujan approach would encourage the 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 multiyear suspension while defending against an FCA investigation. Moreover, uncertainties regarding when 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.

- **Government-wide, corporate-level suspension and debarment could disincentivize any settlements whatsoever.** 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 suspension and debarment officers early in settlement negotiations in an effort to limit any exclusion 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 the 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 the DOJ's could result in suspensions or debarments that are not in the government's interest.** By advocating for the DOJ to pursue suspension or debarment directly — instead of working through the lead agency — the Warren-Lujan approach ignores that 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. Moreover, those agencies are also in the best position to assess whether a contractor is otherwise presently responsible. Supplanting an agency's judgment with the DOJ's judgment could mean that suspension and debarment decisions are made without a full appreciation of these practical realities.

Although whether and to what extent the DOJ will heed the Warren-Lujan admonitions remains to be seen, any attempt by the DOJ to address the senators' concerns 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.

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