Is Debarment a Viable FCPA Enforcement Option?

In a provocative law review article entitled "*FCPA Sanctions: Too Big to Debar?*" South Texas College of Law student Nicholas Wagoner and Professor Drury Stevenson, posit the question: "Are certain private contractors too big to debar?" Their conclusion is "It appears so." In the article's abstract it goes on to state:

The federal government is too dependent on a particular set of large, private-sector corporations for equipment and services. In addition to the virtual immunity from debarment enjoyed by these firms when they violate the FCPA, the fines imposed for engaging in foreign corrupt practices comprise a tiny fraction of the potential revenue generated by lucrative contracts with the U.S. and foreign states. When discounted by the low probability of detection, these sanctions are far too low to deter unlawful activity.

Pretty strong stuff.

The article goes on to further opine that under the current Department of Justice (DOJ) and Securities and Exchange Commission (SEC) policy of corporate sanctions via fines and penalties it actually offers "little deterrence value in the corporate setting" because corporation's are legal fictions with "no soul to damn and no body to kick." The authors argue that corporations view fines and penalties as simply "a cost of doing business" because the risk of losing profitable business outweighs "the cost of getting caught." Even if a corporation pays a large fine and penalty for a Foreign Corrupt Practices Act (FCPA) violation the fact that the US government would continue to do business with it sends a message that such conduct is "excusable" as long as the company that is caught "can buy its way out of the criminal liability." The authors' end this section by noting that they believe the prosecutorial levying of fines and penalties is an invitation for "prosecutorial abuse" due to the large amounts of money involved.

One solution raised by the authors for the issues regarding fines and penalties for companies which violate the FCPA, is debarment and suspension. They urge that debarment would be a significant deterrent for US government contractors and would "increase compliance with the FCPA." The authors also suggest that the threat of debarment as a penalty would increase self-disclosure without any increased enforcement efforts if company's received the "meaningful reward" of a lesser penalty through self-disclosure.

However, just as quickly as the authors suggest the solution, they list several reasons that debarment has not worked in the past. These include issues raised in the abstract cited above, that certain contractors have simply too large a business relationship with the US government to be debarred and that due to the loss of governmental revenues debarment would be "a virtual death knell for the contractor-company." (Cue the Arthur Andersen theme here.) They also raise other issues including something they entitle "Prosecutorial Finger Pointing" which they seem to define as the DOJ having some reluctance to debar companies and that the DOJ's testimony at last fall's Senate hearing that debarments would have low deterrent effect but it might well decrease voluntary disclosures.

The authors also list what they call "Collateral Consequences" of debarment. These include the aforementioned Arthur Andersen, loss of US government flexibility in its contracting process by the removal of contractors through debarment, injured diplomatic relations with foreign allies, threats to national security from the removal of key contractors, risks that debarred companies would miss out on economic opportunities, disproportionate harm to shareholders and other political risks.

The authors conclude by noting that fines and penalties are but one method of FCPA enforcement. They argue that debarment can be a "potent deterrence" and end their article by proposing that a two year debarment for firms caught bribing foreign governmental official in violation of the FCPA would present "remarkable opportunity costs" and would help to foster overall FCPA compliance.

We began this posting by stating this article is "provocative" and we hope that you gleaned some flavor of it. We urge you to read the entire article to fully explore the author's views. Certainly the article is useful in continuing the FCPA debate on both the appropriate incentives for enforcement, coupled with the appropriate fines and penalties for those companies which violate the Act. We believe the increase in enforcement over the past five years, for both companies and individuals, provides proper incentive for US companies to comply with US law. While we disagree with some of the points set out by the authors in their article, we do believe that debarment as a possible remedy or sanction is one which should be considered as a tool which the DOJ can use in its overall FCPA enforcement efforts. We applaud the authors for their valuable contribution.