Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System

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Recommended Citation
Dubois, Pascale Helene () "Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System," University of Chicago Legal Forum: Vol. 2012: Iss. 1, Article 10. Available at: http://chicagounbound.uchicago.edu/uclf/vol2012/iss1/10

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Domestic and International Administrative 
Tools to Combat Fraud & Corruption: A 
Comparison of US Suspension and 
Debarment with the World Bank’s 
Sanctions System 

Pascale Hélène Dubois†

INTRODUCTION

Although numerous nongovernmental organizations (NGOs) and international organizations make it their mission to challenge the oft-presumed inevitability of fraud and corruption, such misconduct in various forms continues to contaminate the work of private businesses, individual governments, and intergovernmental organizations. The number and types of regulatory tools that aim to monitor and discourage corrupt behavior have also grown at domestic, regional, and international levels. Bribery is a particularly salient example of such misconduct, and the United States has acted as a conspicuous and early pioneer in fighting bribery and other misconduct.

The US Congress enacted the Foreign Corrupt Practices Act† (FCPA) in 1977, after the infamous Watergate scandal, in which
an investigation into President Nixon's campaign contributions revealed prolific overseas bribery by US corporations.\(^2\) Such payments to foreign officials in exchange for business opportunities were not illegal in the United States or any other country at the time.\(^3\) The FCPA explicitly criminalized bribe payments to foreign officials, as distinguished from bribes paid to American government officials, which were already illegal under existing US laws.

Over the next thirty years, the focus on foreign bribery became a truly international concept when, under pressure from the US, the Organisation for Economic Co-operation and Development (OECD) and, later, the United Nations (UN), drafted conventions targeting foreign bribery. Not surprisingly, international institutions such as the World Bank (hereinafter “the Bank")\(^4\) also began to address this issue. In 1996, the Bank formally drafted procedures to address accusations of fraud and corruption under Bank-financed contracts; the OECD promulgated its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997;\(^5\) and the United Nations Convention against Corruption was signed in 2003.\(^6\) Although the Bank’s efforts to combat corruption have been described as a component of the post-FCPA international response to foreign bribery,\(^7\) the Bank’s sanctions system is, in

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3. Id.
4. The World Bank is composed of two institutions: the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The World Bank is one part of a larger group of institutions known as the World Bank Group, which also includes the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Center for the Settlement of Investment Disputes (ICSID). See The World Bank Group, Who We Are: Five Agencies, One Group (World Bank Jan 19, 2012), online at http://go.worldbank.org/BLDCT5JM10 (visited Sept 10, 2012).
fact, a somewhat broader, quasi-judicial administrative system that addresses accusations of corruption, fraud, collusion, coercion, and obstructive practices in connection with Bank-financed projects.

During the development stage of the Bank's sanctions system, several models were considered, including those of diverse national agencies, intergovernmental organizations, and other development banks. A committee tasked with reviewing the Bank's anticorruption procedure observed that US government agencies' debarment practices "would be the most pertinent from the Bank's standpoint." The committee referred specifically to the suspension and debarment provisions within the Federal Acquisition Regulation (FAR).

The FAR is a broad-ranging administrative rule that governs contracting by executive agencies within the US government. Although it contains numerous provisions with respect to procurement, the component most relevant to this Article is Subpart 9.4, which governs the debarment and suspension of certain contractors.

The creation of the Bank's sanctions system may well have been prompted by the thematic antibribery focus of the FCPA. However—as this Article will show—the substantive details of the sanctions system's provisions are strongly reflective of the broader, quality-of-procurement approach of the FAR's Subpart 9.4.

In Section I, the Article will provide an overview of the US debarment system under the FAR by reviewing the causes for exclusion, the procedures leading to a decision, the period and effects of exclusion, the availability of judicial review, and the use of administrative agreements. After reviewing the FAR

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9 See id.

10 The FAR is promulgated by the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration under the authority of the Office of Federal Procurement Policy Act of 1974. See Pub L No 93-400, 88 Stat 796, codified at 41 USC §§ 401–38. See also DoD, GSA, and NASA, Establishing the Federal Acquisition Regulation: Final Rule, 48 Fed Reg 42142 (Sept 19, 1983).

11 48 CFR § 9.400 et seq.

12 Deming, The FCPA at 347 (cited in note 7).

13 An "administrative agreement" or "compliance agreement" is an agreement in lieu of suspension or debarment between a contractor and the federal agency that has alleged
process, in Section II, the Article will provide a detailed explanation of the Bank's administrative sanctions system by examining the system's components: the sanctionable practices, the sanctions process, the types and scope of sanctions, and the use of negotiated settlements—many of which are analogous to the FAR system. Although the systems appear to mirror each other in several respects, this Article will point to critical distinctions in their applications and effects. Section III concludes, noting that both systems have yielded results, and suggesting that diverse approaches to fighting fraud and corruption in procurement can be both effective and vital.

I. THE FEDERAL ACQUISITION REGULATION

As the world's largest single buyer of goods and services, the United States government has an interest in ensuring its funds are being used appropriately. Indeed, as a matter of policy, the federal government seeks to prevent the improper dissipation of public funds in its contracting activities by doing business only with responsible contractors. To this end, the United States employs a suspension and debarment system that seeks to preclude US government agencies from entering into new contractual dealings with contractors whose actions suggest they are not responsible in fulfilling their legal or contractual obligations.

By examining the "present responsibility" of a contractor, any US agency is able to render a contractor ineligible for new government contracts, thereby reducing the overall risk of harm...
to the procurement system. Under the FAR, each executive branch department and agency has a designated suspending and debarring official (an SDO) who has the authority to suspend and debar nonresponsible contractors. At the same time that the FAR seeks to protect the US government, it establishes processes that ensure that all contractors facing debarment receive due process.

This Article focuses on suspension and debarment under the FAR as it is the mechanism that is most analogous to the Bank’s sanctions system, given the FAR’s administrative nature and regulation of procurement programs and activities. The Article will examine the following aspects of the FAR system: (1) causes for debarment; (2) procedures; (3) period and effect of debarment; (4) judicial review; and (5) administrative agreements.

A. Causes for Debarment

Generally speaking, the FAR’s causes for debarment can be grouped into the following categories: (i) conviction of a crime or civil fraud, (ii) poor contract performance, or (iii) other serious misconduct showing that the contractor is not responsible.

18 See, for example, Caiola v Carroll, 851 F2d 395, 398–99 (DC Cir 1988) (“The security of the United States, and thus of the general public, depends upon the quality and reliability of items supplied by these contractors. When items enter the supply system through fraud or deceit, the national security, public welfare, and personal safety are all potentially compromised and endangered.”).


20 For an opposite view, see Kathleen Miller, U.S. Seeks to Debar Federal Contractors, The Washington Post A18 (Dec 26, 2011) (highlighting how contractors argued that the Obama administration’s uptick in debarments may have undermined due process).

21 The FAR regulates government procurement programs and activities. The Nonprocurement Common Rule is used by executive agencies to suspend, debar, or exclude contractors from participating in nonprocurement transactions under Executive Order 12549. See 48 CFR § 9.403. Nonprocurement transactions include grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. Id. A debarment or a suspension action under either the procurement or the nonprocurement umbrella has government-wide effects across the entire array of federal agencies. See Executive Order 12689, 54 Fed Reg 34131 (1989). Further, a procurement debarment also makes the respondent ineligible for participation in federal assistance programs. Id. A nonprocurement debarment also makes the respondent ineligible for federal government contracting. 48 CFR § 9.401.

22 See Shaw, Suspension and Debarment at 1 (cited in note 19).
fraud or upon a conviction for any number of criminal offenses. The specific civil and criminal violations that provide a basis for debarment may themselves be grouped into three categories: violations relating to public contracts and transactions, violations of certain statutes, and other offenses indicating a lack of business honesty.  

The second group of causes for an SDO's debarment decision are fact-based. Although these causes have historically been associated with poor contract performance, in recent years they have also followed uncharged criminal and civil violations. This category of offenses does not rely on an indictment, conviction, or civil judgment, but instead requires a preponderance of the evidence to demonstrate that the contractor violated contract or subcontract terms or committed other wrongdoing serious enough to justify debarment. A "willful failure to perform" or a "history of failure to perform, or of unsatisfactory performance" in accordance with the terms of "one or more contracts" would constitute such a violation.

Finally, an SDO may debar a contractor based on "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor." This category of causes is known as the "catch-all" provision because it provides the SDO with broad discretion to take action for conduct not encompassed by the other categories—such as negligent performance of a commercial contract—where such conduct affected the contractor's present responsibility.

Figure 1 below provides of summary of the three categories of misconduct discussed above.


B. Procedures for Debarment

1. Referral and sources of evidence.

The FAR deals solely with the administrative remedy of suspension and debarment and does not address the issue of how referrals of improper conduct are brought to the SDO's attention. In practice, debarring officials consider evidence of improper conduct from many sources, including both referrals from investigators, fraud counsel, auditors, contracting officials, prosecutors, and, on occasion, from the public. For each, the debarring official undertakes the same analysis in determining whether sufficient evidence exists and whether administrative action is necessary to protect the government. The investigators mentioned are not part of the debarring official's office. An investigator acts independently, and his or her interest in a case, in most instances, goes beyond purely the administrative remedy of suspension and debarment and includes criminal, civil, and contractual remedies.

Agencies are also required by the FAR to establish procedures for the appropriate reporting, investigation, and referral of

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See, for example, id at 62–63.
matters to the SDO.\textsuperscript{31} The United States Department of Agriculture, for instance, prescribes the general documents to be submitted with a referral.\textsuperscript{32} The Department of Defense provides a detailed list of the information that should be included in a referral to the appropriate SDO, including an estimate of the damages incurred by the alleged misconduct.\textsuperscript{33} The United States Agency for International Development employs a contrasting approach, with a brief and direct referral to the FAR.\textsuperscript{34}

\textit{a) Determination of lead agency.} Because federal contractors sometimes work with several agency clients simultaneously, a suspension or debarment proceeding under the FAR may impact agencies beyond the one that received the evidence of alleged impropriety.\textsuperscript{35} Prior to initiating a debarment or suspension action, the SDO that is seeking suspension will notify other government agencies, through the Interagency Suspension and Debarment Committee (ISDC), that it is considering such action, and will request the role of lead agency. In the event that another agency’s SDO objects, then the SDOs coordinate among themselves regarding how to proceed. If the matter cannot be resolved informally, the ISDC is empowered to resolve the issue.\textsuperscript{36} The agencies involved may accomplish this task by informally consulting with one another, or the ISDC may resolve the issue. In practice, lead agency requests are handled without issue or involvement of the ISDC.

\begin{itemize}
\item \textsuperscript{31} See 48 CFR § 9.406-3(a).
\item \textsuperscript{32} See 48 CFR § 409.406-3(a) (“The case must be accompanied by a complete statement of the facts . . . along with a recommendation for action.”).
\item \textsuperscript{34} See \textit{Eligibility of Suppliers, Contractors, and Recipients}, Automatic Directives System 313.3.2.1 (US Agency for International Development 2011), online at http://www.usaid.gov/policy/ads/300/313.pdf (visited Sept 10, 2012) (“USAID must follow [sic] the FAR 9.4 for all procurement suspension and debarment actions and 22 CFR 208 for all non-procurement actions.”).
\item \textsuperscript{35} See Bednar, \textit{The Practitioner’s Guide} at 64 (cited in note 13).
\item \textsuperscript{36} See 48 CFR § 9.402(d). The FAR does not prescribe a particular method for determining the lead agency, but rather encourages the agencies to establish methods and procedures for coordinating their debarment or suspension actions. See 48 CFR § 9.402(c). See also Bednar, \textit{The Practitioner’s Guide} at 64–65 (cited in note 13); \textit{Interagency Suspension and Debarment Committee} (EPA Jan 14, 2010), online at http://www.epa.gov/oepd/sadd/isdc.htm (visited Sept 10, 2012).
\end{itemize}
b) SDO’s consideration of debarment. The SDO for the designated lead agency then reviews the referred evidence to determine whether it supports a finding under the FAR of one of the listed causes for debarment. This review can occur when an agency receives an indictment, conviction, or civil judgment from a US Attorney’s office, an Inspector General, another government investigative organization, a contracting officer, or the media. For fact-based cases where there is no indictment, conviction, or civil judgment, the SDO relies on her or his review of the evidence received from others.

c) Suspension. Frequently, a contractor’s first encounter with the US government’s debarment system results from the receipt of a Notice of Suspension. Suspension under the FAR is a mechanism that permits any agency to temporarily exclude a contractor for the duration of an agency’s investigation or ensuing legal proceedings. According to the FAR, suspension may be “imposed on the basis of adequate evidence . . . when it has been determined that immediate action is necessary to protect the Government’s interest.” In other words, suspension is possible where (1) the SDO finds adequate evidence—that is, information sufficient to support the reasonable belief that a particular act or omission has occurred—and (2) immediate action is necessary to protect the Government’s interest. In determining whether adequate evidence exists, the agency considers “how much information is available, how credible it is given the circumstances, whether or not important accusations are corroborated, and what inferences can reasonably be drawn as a result.” Such a determination should include the examination of documents such as contracts, inspection reports, and correspondence.
d) Notice. If an SDO suspends a contractor, the contractor is immediately advised by certified mail. The Notice of Suspension includes the following components:

(1) Notice that the contractor has "been suspended and that the suspension is based on an indictment or other adequate evidence that the contractor has committed irregularities (i) of a serious nature in business dealings with the Government or (ii) seriously reflecting on the propriety of further Government dealings with the contractor." The Notice describes any such irregularities "in terms sufficient to place the contractor on notice without disclosing the Government's evidence;"

(2) Notice "that the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;"

(3) A list of causes relied upon for imposing suspension;

(4) Notice "of the effect of the suspension;"

(5) Notice that, "within thirty days after receipt of the Notice, the contractor may submit (in person, in writing, or through a representative) information and arguments opposing the suspension;" and

(6) Indication that "additional proceedings to determine disputed material facts will be conducted unless (i) the action is based on an indictment or (ii) a determination is made, on the basis of Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced."

The FAR does not expressly require the suspending agency to provide to a contractor the full administrative record upon which an SDO's decision was based, but case law indicates that compliance with requests for such information is required. In


47 These additional proceedings include the preparation of written findings of fact upon which the suspending official bases his/her decision to modify or terminate the suspension, or leave it in force. See 48 CFR § 9.407-3(d)(2)(i), (d)(3).

practice, agencies provide the administrative record in one of two ways: either directly with the Notice of Suspension, or, to avoid the administrative burden, only when requested by the respondent.\textsuperscript{49} Individual, agency-specific regulations leave decisions regarding the process for providing the record to the SDO.

e) Effect and duration. When an SDO suspends a contractor, the agency publicly lists the name of the suspended party or parties and the fact of the suspension on the General Services Administration's (GSA) List of Parties Excluded from Federal Procurement and Non-Procurement Programs (the "Excluded Parties List System," or EPLS).\textsuperscript{50} Accordingly, the contractor and any specifically named affiliates are excluded from receiving contracts, subcontracts, or new task orders on existing contracts, and agencies may not solicit offers from such contractor. The suspended contractor also cannot conduct business with the Government as an agent or representative of other contractors.\textsuperscript{51} This suspension lasts for the period pending the completion of the investigation and any ensuing legal proceedings.\textsuperscript{52} However, if legal proceedings are not initiated within twelve months after the date of the suspension notice, the suspension automatically terminates unless an Assistant Attorney General (AAG) requests a six-month extension. In total, a suspension under the FAR may last for not more than eighteen months before legal proceedings have been commenced.\textsuperscript{53} But once legal proceedings have commenced, a suspension may continue until the resolution of legal proceedings, including appeals.\textsuperscript{54}

f) Termination. An SDO has broad discretion in deciding to terminate a suspension.\textsuperscript{55} Terminations are typically based on one of four grounds. First, the SDO may terminate the suspension based on a contractor's submission in response to the initial

\textsuperscript{49} See Bednar, The Practitioner's Guide at 75–76 & n 284 (cited in note 13).
\textsuperscript{51} 48 CFR § 9.405(a). See also notes 89–93 and accompanying text.
\textsuperscript{52} 48 CFR § 9.407-4(a).
\textsuperscript{53} 48 CFR § 9.407-4(b).
\textsuperscript{55} 48 CFR § 9.407-3(d)(3) ("Such a decision is "without prejudice to the subsequent imposition of (i) suspension by any other agency or (ii) debarment by any agency."). See also 48 CFR § 9.407-4(a) ("Suspension shall be for a temporary period . . . unless sooner terminated by the suspending official or as provided in this subsection.").
Notice of Suspension. Second, the SDO may find he or she must lift the suspension (and remove the public listing from the EPLS) as a matter of law, if no legal proceedings are initiated within twelve months of the suspension notice and an AAG has not submitted a request for extension.\textsuperscript{56} Third, the SDO possesses the discretion to terminate a suspension based on the individual facts of each case.\textsuperscript{57} Finally, the SDO must terminate the suspension upon the resolution of a legal proceeding, such as an acquittal or a conviction. Upon conviction (sentencing), the termination of the suspension would generally be accompanied by a Notice of Proposed Debarment based upon the conviction.\textsuperscript{58}

2. Notice of proposed debarment.

If the contractor is not suspended, and hence, does not receive a Notice of Suspension, its first encounter with the US Government's debarment system will be in the form of a Notice of Proposed Debarment (NPD). The NPD:

(1) informs the recipient "that debarment is being considered;"

(2) provides notice of the conduct on which the proposed debarment is based;

(3) states the causes for the proposed debarment;

(4) explains that the contractor may submit, within thirty days after receipt of the Notice, "information and arguments in opposition to the proposed debarment;"

(5) informs the contractor of the "agency's procedures governing debarment decisionmaking;" and

(6) explains the effects of the issuance of the NPD and the "potential effect of an actual debarment."\textsuperscript{59}
The full administrative record may accompany the NPD, but, more often, an agency will only provide the full administrative record upon request. If no suspension is in effect, the debarring official must render a decision within thirty working days after the receipt of any information and arguments submitted by the contractor, but the debarring official may extend this thirty-day period for good cause.

3. Decision-making process.

a) Two-pronged inquiry. The SDO must first answer the question of whether underlying misconduct has been established under a “preponderance of the evidence” standard of proof. If not, the inquiry ends there: the contractor, assuming there is no criminal conviction, cannot be debarred. If, however, the SDO determines that misconduct has indeed been established, the burden of proof shifts to the contractor, which must then demonstrate present responsibility if it wishes to avoid debarment. The concept of present responsibility refers, in a broad sense, to a contractor’s ethical integrity. In an operational sense, however, it focuses on the contractor’s ability to perform without violation in the future, given the context of past conduct and performance. The existence of remedial measures or mitigating factors provided for under the FAR (cooperation, internal investigation, etc.) bolsters the claim of present responsibility by the contractor.

Stage 1: Misconduct Inquiry. The SDO must first determine whether the alleged misconduct was committed by the requisite standard of proof. If the answer is negative, the SDO will termi-

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60 See Bednar, The Practitioner’s Guide at 75 n 284 (cited in note 13).
62 48 CFR § 9.406-3(d)(3) (“In any action in which the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.”).
63 48 CFR § 9.406-1(a)(10) (“[I]f a cause for debarment exists, the contractor has the burden of demonstrating . . . its present responsibility and that debarment is not necessary.”).
nate the proposed debarment. If, however, it is positive, the burden of proof shifts to the contractor.

Stage 2: Present Responsibility. At this stage, the contractor bears the burden of demonstrating its present responsibility.

- If the burden is not met, the SDO will determine a period of debarment for the affected contractor that is appropriate given the goal of protecting government interests. The FAR instructs the SDO to consider a series of factors—from timely disclosure to institution of internal ethics provisions—before arriving at the debarment decision.

- If the burden is almost met, the SDO will likely strongly consider an administrative agreement that includes remedial measures to "close the gap" between a robust showing of present responsibility and the contractor's actual situation. The administrative agreement will also likely stipulate monitoring/verification measures to ensure compliance.

If the debarring official determines that the contractor is presently responsible and debarment will not be imposed, the debarring official must notify the contractor and any affiliates involved. Figure 2 below summarizes the process for determining present responsibility.

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66 48 CFR § 9-406-4(a)(1) ("Debarment shall be for a period commensurate with the seriousness of the cause(s).”). See also notes 83–87 and accompanying text.

67 See notes 74–79 and accompanying text. See also Bednar, The Practitioner’s Guide at 92 (cited in note 13).


b) Disputed issue of material fact. The FAR provides for two types of meetings between a contractor and the SDO, and these two meeting types are intended to protect the contractor's due process rights. An informal fact-finding hearing is available to contractors prior to the debarment decision. A contractor may initially request to meet with the SDO and make an informal oral submission, with or without counsel. If the SDO determines that a genuine dispute of material fact exists, the contractor may also request a fact-finding hearing. In the latter, the contractor
has the opportunity to appear with counsel, submit documentary evidence, and present and confront witnesses. Alternatively, the contractor may simply make a documentary submission and receive the SDO’s determination without an in-person hearing. One exception to this opportunity is debarment on the basis of an existing conviction. In such cases, the hearing received prior to the conviction “suffices for due process in the debarment proceeding.”

**c) Determination of present responsibility.** The existence of a cause for debarment does not mandate debarment of the contractor. Rather, this decision is made at the SDO’s discretion. The SDO may only suspend or debar a contractor if the imposition of debarment would further the public interest, because the FAR does not permit debarments for purposes of punishment. Accordingly—where there is a finding that the contractor committed the type of misconduct set forth in the FAR by the requisite standard of proof—the SDO must, before debarring the contractor, also determine whether the contractor has demonstrated its present responsibility by considering various mitigating factors.

The mitigating factors provided for under the FAR include the following: disciplinary action taken by the contractor against the individual(s) responsible for the misconduct; institution or improvement of a compliance program; payment for the improper activity; cooperation with the respective agency, including voluntary disclosure; and internal investigation by the contractor of the circumstances surrounding the misconduct. The SDO also should consider factors such as: (1) “whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity, which constitutes cause for debarment, or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debar-

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70 48 CFR § 9.406-3(b).
73 48 CFR § 9.402(b) (“The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment.”).
75 See id.
ment";76 (2) "whether the contractor has implemented or agreed to implement remedial measures";77 (3) "whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment";78 and (4) "whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence[s]."79

Consideration of the aforementioned mitigating factors is mandatory under the FAR. Although the language of the FAR states that "the debarring official should consider factors such as" those listed above, at least one court has found that failure to consider mitigating factors may provide a basis for overturning a debarment because the FAR requires their consideration.80

4. SDO's debarment decision.

If, after considering the entire administrative record, the SDO decides to debar the contractor, the official must notify the contractor and any involved affiliates, referring to the NPD, specifying the reasons for debarment, and stating the period of debarment, including the effective dates.81 The official also must advise the contractor that the debarment is "effective throughout the executive branch of the Government unless the head of an agency or a designee . . . state[s] in writing the compelling reasons justifying continued business dealings between that agency and the contractor."82

C. Period of Debarment

After an SDO decides to debar, he or she must determine the period of debarment. A debarment must be for a fixed term that

is commensurate with the seriousness of the violation(s). Generally, this means that debarment should not exceed three years, except in certain situations like debarment for violation of the Drug-Free Workplace Act of 1988, which allows for a five-year debarment term.

The SDO must always consider the “time served,” meaning the period of suspension and proposed debarment, if applicable, in determining the time period of the affected contractor's ineligibility. The requirement of such consideration does not necessitate that agencies give credit for those pre-debarment periods (although some may well do just that), but, at a minimum, that agencies take this fact into account during determination of the term of debarment. After the imposition of the debarment, the FAR permits the SDO to reduce the period or extent of debarment for “[1] newly discovered material evidence; [2] reversal of the conviction or civil judgment upon which the debarment was based; [3] bona fide change in ownership or management; [4] elimination of other causes for which the debarment was imposed; or [5] other reasons the debarring official deems appropriate.” Consideration of these factors is not prescribed, but is conditioned upon the contractor's request and supporting documentation.

D. Effects of Suspension or Debarment

A person or entity that is debarred, suspended, or proposed for debarment under the FAR is prohibited from receiving federal executive branch contracts—including new task orders on existing contracts—and certain subcontracts, and from participating in certain types of federal assistance programs. Although existing contracts with the affected agency are permitted to con-

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84 48 CFR § 9.406-4(a)(1). The term “generally,” which appears in the text of the regulation, has been interpreted as giving implied authority to impose a period either more or less than the stated three years. See, for example, Bednar, The Practitioner's Guide at 92 (cited in note 13).
86 48 CFR § 9.406-4(c). In practice, the language of § 9.406-4(c)(5) (“other reasons”) has been interpreted to include the mitigating factors enumerated in § 9.406-1(a). Section 9.406-1(a) states that “mitigating factors should be considered in making any debarment decision,” which could plausibly include the length of the debarment period. 48 CFR § 9.406-1(a) (emphasis added).
88 48 CFR § 9.405(a); 54 Fed Reg at 34131 (cited in note 21).
continue under the FAR, some agencies discourage placement of
new task orders under existing contracts that do not contain
quantity restrictions. Such contractors are also excluded from
conducting business with the government as agents or represen-
tatives of other contractors. Agencies are, in turn, prohibited
from soliciting offers from contractors that have been debarred,
suspended, or proposed for debarment, without a compelling rea-
son for such action.

The debarments and suspensions imposed under the FAR
are prospective, and thus, an agency may generally allow the
contractor to continue performance under any current contracts
or subcontracts unless the agency head makes a different deter-
mination. In addition, the FAR authorizes agencies to waive a
contractor's exclusion and enter into new contracts with that
suspended or debarred contractor if there is a "compelling rea-
son" to do so. The FAR itself does not define the term "compel-
ling reason," but the Defense Federal Acquisition Regulation
Supplement provides that compelling reasons include the follow-
ing:

- a lack of alternative contractors;
- urgency;
- an existing agreement between the contractor and the
  agency, covering the same events that resulted in the debar-
  ment or suspension and including the agency's decision not to
debar/suspend the contractor; or,
- the requirements of national defense.

Figure 3 below summarizes the consequences of suspension
and debarment under the FAR.

91 48 CFR § 9.405-1(a). See also Manuel, *Debarment and Suspension of Government
Contractors* at 10 (cited in note 17).
noted that "two of the agencies [it] reviewed in depth—the Air Force and the Army—[had]
issued compelling reason waivers to continue doing business with excluded parties." William T.
Woods, *Federal Procurement: Additional Data Reporting Could Improve the Sus-
pension and Debarment Process*, GAO-05-479 at “Highlights” (GAO July 2005), online at
93 48 CFR § 209.405(a).
**Figure 3. Suspension and Debarment Under the FAR**

<table>
<thead>
<tr>
<th>SUSPENSION</th>
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<tbody>
<tr>
<td><strong>Effect</strong>: contractor ineligible to do business with US government</td>
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<tr>
<td><strong>Term</strong>: temporary period pending completion of ongoing investigation</td>
</tr>
<tr>
<td><strong>Causes</strong>: a serious violation of a govt contract or other misconduct that indicates a lack of business integrity/honesty, or that is so serious/of compelling a nature that it affects a contractor's present responsibility</td>
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<tr>
<td><strong>Standard of proof</strong>: &quot;adequate evidence&quot;</td>
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<table>
<thead>
<tr>
<th>DEBARMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Effect</strong>: contractor ineligible to do business with US government</td>
</tr>
<tr>
<td><strong>Term</strong>: specific period</td>
</tr>
<tr>
<td><strong>Causes</strong>: a serious violation of a govt contract or other misconduct that indicates a lack of business integrity/honesty, or that is so serious/of compelling a nature that it affects a contractor's present responsibility</td>
</tr>
<tr>
<td><strong>Standard of proof</strong>: &quot;preponderance of the evidence&quot;</td>
</tr>
</tbody>
</table>

Additionally, in some cases, letters terminating suspension and debarment proceedings or pre-exclusion Notices by the agency may also serve to communicate the agency’s concern or observations to the contractor.

E. Judicial Review

A contractor may appeal an SDO’s decision by seeking judicial review of the debarment decision in a federal court. Most often, a contractor will request review under the Administrative Procedures Act (APA). Under the APA, a court may reverse an SDO’s decision only where it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Generally, the SDO’s decision will be upheld where there is a “rational connection between the facts found and the choice made.”

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95 5 USC § 706(2)(A).
96 _Natural Resources Defense Council, Inc v United States_, 966 F2d 1292, 1297 (9th Cir 1992).
F. Administrative Agreements

Executive agencies may employ administrative agreements as alternatives to debarment and suspension even though the FAR does not present them as a specific option for the SDO. However, the Government Accountability Office has recommended that, before entering into these agreements with a contractor, the SDO should determine whether another federal agency had a similar agreement with that contractor, the terms of such an agreement, and whether the contractor complied with its obligations as outlined in the agreement.

Administrative agreements generally last for three years and include an admission of wrongful conduct by the contractor as well as a listing of the remedial measures that led to the present responsibility determination. Such remedial measures may include restitution, removal, or isolation of the wrongdoer, implementation of an ethics or compliance program, outside auditing, and agency access to contractor records. For example, some typical administrative agreements entered into by the US Air Force SDO contain provisions requiring the contractor (1) to “engage an outside consultant . . . to perform two reviews of the contractor's business standards program” both pre- and post-agreement and (2) to “submit periodic reports to the [agency] in which extensive information is provided about the operation of the contractor's business.” The execution of such an agreement generally terminates the suspension or proposed debarment.

In some instances, administrative agreements also include the use of an independent monitor that reports directly to the government on the company’s adherence to the agreement’s terms, as well as its overall compliance. As such, the administra-

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97 See Manuel, Debarment and Suspension of Government Contractors at 9 (cited in note 17).
99 Bednar, The Practitioner's Guide at 83 (cited in note 13). Contractors are advised to contact the agency early in the suspension or debarment process to explore the possibility of resolving an existing or potential proceeding via an administrative agreement. Id at 84.
100 See id at 83–84; Manuel, Debarment and Suspension of Government Contractors at 9 (cited in note 17).
101 Shaw, Suspension and Debarment at 7 (cited in note 19).
tive agreement option and the breadth of provisions that it enables provide a toolkit for the lead agency to address the alleged misconduct.

In 2006, the Office of Management and Budget instructed agency officials to share administrative agreements with the ISDC. More recent reports referred to the database of contractor responsibility information that includes administrative agreements. A new system ensuring ready availability of information regarding administrative agreements has been in use since 2011.

II. THE WORLD BANK

A. Background

The Bank is an international financial institution providing low-interest loans, interest-free credits, and grants to developing countries for a multitude of purposes. In its 2011 fiscal year, the World Bank Group committed US$57.3 billion in loans, grants, equity investments, and guarantees to its members and to private businesses. Much like the US government, the Bank has an interest in ensuring that its funds are used appropriately. Indeed, under its Articles of Agreement, the Bank has a fiduciary duty to ensure that proceeds of its financing are used for their intended purposes and with due attention to economy and efficiency. Accordingly, the Bank has established a sanctions system to help prevent and combat fraud and corruption—two of the

103 See Denett and Combs, Memorandum to the Heads of Departments and Agencies (cited in note 98).
greatest obstacles to economic and social development—in Bank projects and programs. This system seeks to uphold the Bank’s fiduciary duty by excluding certain actors from access to Bank financing, by deterring misconduct, and by incentivizing rehabilitation. More broadly, the Bank hopes that the sanctions system furthers a global disincentive for the types of behavior it seeks to curb and prevent.

B. Sanctionable Practices

The Bank’s sanctions system is a quasi-judicial administrative process that provides the accused party (respondent) with procedural protections to ensure basic fairness before any decision is reached as to what misconduct has occurred and, if so, what sanction is appropriate. Under this process, a respondent may be sanctioned for engaging in fraud, corruption, collusion, coercion, or obstructive practices (collectively known as “sanctionable practices”) in the procurement or execution of Bank-financed contracts.

Causes for debarment within the Bank’s system are not as extensive as those under the FAR. Specifically, the Bank’s system relates to fraudulent, corrupt, collusive, and coercive practices in both the procurement and execution of Bank-financed contracts. Criminal convictions or civil judgments are not includ-

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107 See id. Contracts for goods and non-consulting services financed in whole or in part by the Bank are subject to the rules found in the Bank’s Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD and IDA Credits & Grants (“the Procurement Guidelines”). The policies and procedures for selecting, contracting, and monitoring consultants required for projects financed in whole or in part by the Bank are found in the Bank’s Guidelines: Selection and Employment of Consultants under IBRD Loans & IDA Credits & Grants by World Bank Borrowers (“the Consultant Guidelines”). Both the Procurement and Consultant Guidelines contain provisions prohibiting contractors from engaging in “sanctionable practices.” The Bank has also established guidelines designed to prevent and combat fraud and corruption that may occur during the preparation and/or implementation of IBRD- or IDA-financed investment projects (“the Anti-Corruption Guidelines”). See id at 4 n 6, 12–13, 17–19. For access to the Guidelines, see The World Bank, Key and Reference Documents, online at http://go.worldbank.org/CVUUUS7HZO (visited Sept 10, 2012).


109 World Bank, Information Note at 3 (cited in note 106).

ed as distinct causes for sanctioning by the Bank. Poor but non-
fraudulent contract performance, in and of itself, is likewise not
grounds for sanction. However, the Bank considers sanctionable
any conduct that is obstructive to a World Bank investigation.\footnote{111}

C. Sanctions Process

Figure 4 below provides a summary of the World Bank Sanctions System.

**FIGURE 4. SUMMARY OF WORLD BANK SANCTIONS SYSTEM STAGES**

1. Investigation.

The Bank’s Integrity Vice Presidency (INT) receives numerous complaints and referrals, many of which are submitted by those involved in activities supported by Bank funds, including Bank staff. Referrals can be made via direct submissions to INT or by calling an anonymous hotline.\footnote{112} INT performs an initial assessment of every complaint that it receives “to determine whether the complaint relates to a sanctionable practice . . . whether the complaint has credibility, and whether the matter is

\begin{itemize}
  \item[i)] deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or (ii) acts intended to materially impede the exercise of the Bank’s contractual rights of audit or access to information.
\end{itemize}

\footnote{111}{See id. The Bank defines “Sanctionable Practices” to include “Obstructive practice,” and defines “Obstructive practice” as,}

of sufficient gravity to warrant an investigation." Assuming that the accusation falls under INT's jurisdiction, INT commences an investigation to develop an evidentiary record of whether the firm or individual has engaged in a sanctionable practice. During the course of the investigation, INT may, under certain circumstances, seek to temporarily suspend the firm or individual under investigation via a special mechanism known as Early Temporary Suspension (ETS).

The Bank's sanctions process therefore begins in much the same manner as it does under the FAR, although the Bank's more limited list of causes for debarment means that there may be somewhat fewer channels for submission of information. (For example, as noted above, criminal or civil judgments do not by themselves give rise to a cause for debarment.) Also, INT does not encounter the issue of lead agency determination found in the domestic US context because INT possesses exclusive authority to investigate fraud and corruption involving Bank-financed contracts.

2. Early temporary suspension.

Before concluding an investigation, INT may believe that sufficient evidence already exists to support a finding that a respondent engaged in a sanctionable practice and that it is highly likely that the investigation will be successfully concluded and a Statement of Accusations and Evidence (SAE) will be presented to the Evaluation and Suspension Officer (EO) within one year. In such cases, INT may seek an ETS from Bank-financed contracts by submitting a Request for Temporary Suspension (RTS) to the EO.\footnote{116}

\footnote{113} World Bank, Integrity Vice Presidency: Annual Report at 26 (cited in note 112).
\footnote{114} INT's investigative mandate focuses on sanctionable practices engaged in by recipients of World Bank funds. With respect to officials within the member state governments, it nevertheless has been the Bank's long-standing policy not to sanction governments or government officials. The rationale for this policy lies in the cooperative structure of the Bank, respect for the sovereignty of its Member, and the fact that alternative means are available to address these cases, in particular the Borrower's obligation to take timely and appropriate action and the Bank's ability to exercise contractual remedies in the event that the Borrower fails to do so. However, this exemption is functional in nature. "To the extent that a government official engages in a Sanctionable Practice in his or her private capacity, the exemption does not apply and the official is subject to sanction." World Bank, Information Note at 19–20 (cited in note 106). See also World Bank, Sanctioning Guidelines at *1 (cited in note 108).
\footnote{115} World Bank, Information Note at 4 (cited in note 106).
\footnote{116} See World Bank, Sanctions Procedures § 2.01(a) at 7 (cited in note 108). The World
After receiving this request, the relevant EO may impose a temporary suspension on the subject of the INT investigation prior to the commencement of formal sanctions proceedings if the EO finds that there is sufficient evidence that the firm or individual has engaged in at least one sanctionable practice and that, had the accusations been included in an SAE, the EO would have recommended a sanction of debarment for at least two years.117 In determining whether sufficient evidence exists, the EO considers the information contained in the RTS drafted by INT and the accompanying evidence.

a) Notice. If the EO decides to apply an ETS, the EO issues a Notice of Temporary Suspension (NTS) to the respondent and notifies the Chair of the World Bank Sanctions Board ("Sanctions Board") and INT.118 The NTS contains the following information: (1) notification of the respondent’s ETS and the procedure by which the respondent may provide a Preliminary Explanation,119 and (2) the RTS and the accompanying evidence submitted by INT, together with copies of the current Sanctions Procedures and the Sanctions Board Statute.120

b) Effect and duration. Upon issuance of the NTS by the EO, the respondent is temporarily suspended from eligibility for contracts for Bank-financed projects and cannot otherwise participate in new activities in connection with Bank projects.121 The initial duration of an ETS is six months, but INT may request an additional six-month extension no later than five months after Bank Group has four EOs—one for each of (i) the World Bank (IBRD/IDA), (ii) IFC, (ii) MIGA, and (iv) Partial Risk Guarantees (PRGs). See note 4.

117 World Bank, Sanctions Procedures § 2.01(c) at 7–8 (cited in note 108). The term “sufficient evidence” means “evidence sufficient to support a reasonable belief, taking into consideration all relevant factors and circumstances, that it is more likely than not that the respondent has engaged in a Sanctionable Practice.” Id § 1.02(a) at 5.

118 Id § 2.01(c) at 7–8. The EO may decide to withhold evidence if INT shows that “there is a reasonable basis to conclude that (i) the disclosure of such evidence would have a material adverse effect on the investigation, and (ii) the [r]espondent would retain the ability to mount a meaningful response to the accusations against it notwithstanding the withholding of such evidence.” Id § 2.01(d) at 8.

119 A Preliminary Explanation is distinct from the Explanation (see Part IIIB4a) in that the former may be submitted in response to a Notice of Temporary Suspension, whereas the latter may be submitted following the Respondent’s receipt of the SAE (see Part IIIB3).

120 World Bank, Sanctions Procedures §§ 2.01(b), 4.01(b)(ii)–(iv) at 7, 11–12 (cited in note 108).

121 Id § 2.03 at 8–9.
the commencement of the temporary suspension. The fact that a respondent has been temporarily suspended is shared with certain personnel of the Bank’s member countries via a limited-access website.

c) Termination. An ETS may be terminated under three scenarios. First, the EO may decide to terminate the suspension upon review of a Preliminary Explanation submitted by the respondent within thirty days after the issuance of the NTS. Second, the EO may terminate the temporary suspension at any time upon a finding that there was a manifest error in the NTS or other clear basis for termination. Finally, if INT does not submit an SAE to the EO prior to the end of the period of temporary suspension, the suspension automatically expires.

The ETS mechanism under the Bank’s procedures functions much like suspension under the US system, as it permits the Bank to temporarily suspend a respondent during the course of an investigation. Further, the contents of the Notice of Suspension under the FAR in some ways mirror those of the NTS under the Bank’s sanctions system. In each case, the recipient is informed of the suspension, the basis for the suspension, its duration and effect, the procedures by which the contractor may contest the suspension and/or submit explanatory materials, and the additional proceedings that may occur following the suspension.

But the Bank’s ETS process differs somewhat from the FAR suspension process in terms of additional procedures, information transmitted to a respondent, the suspension’s publicization and duration, and termination options. First, the Bank’s procedures do not provide a respondent with the opportunity to request a hearing regarding the EO’s imposition of an ETS. Rather, the respondent may only submit a Preliminary Explanation upon which the EO may decide to terminate the ETS. In contrast, under the FAR, if a contractor’s response to the Notice of Suspension raises a genuine dispute over material facts, addi-

122 Id § 2.04(a) at 9.
123 Id §§ 2.02–2.03 at 8–9.
124 World Bank, Sanctions Procedures § 2.04(d) at 9–10 (cited in note 108).
125 Id § 2.04(c) at 9.
126 Of course, when the EO temporarily suspends a respondent or continues an early temporary suspension already imposed because the EO has issued a Notice of Sanctions Proceedings to that respondent, the respondent has an opportunity to contest the matter to the World Bank’s Sanctions Board. See notes 139–41 and accompanying text.
tional proceedings are conducted unless either of two limited exceptions applies.\textsuperscript{127} As mentioned above, additional proceedings under the FAR include the preparation of written findings of fact upon which the suspending official bases his or her decision to modify or terminate the suspension or to leave it in force.\textsuperscript{128}

Moreover, in terms of information transmitted to a respondent, the Bank’s procedures require the EO to send all information that he or she reviewed to the respondent, subject to the limited exception noted above. In contrast, the FAR does not explicitly require the suspending agency to disclose the entire administrative record supporting a suspension. However, the FAR has been found to require this through developed case law; as a result, the administrative record is regularly shared, either upon the contractor’s request or via inclusion with the Notice of Suspension.\textsuperscript{129}

Third, the Bank’s ETS differs from the FAR’s suspension in terms of publicity, minimum duration, and maximum duration. In terms of publicity, the Bank disseminates the names of suspended respondents via a controlled-access website to its member countries, whereas the GSA publicly lists the fact of each suspension\textsuperscript{130} and identifies the suspended entity or individual on the EPLS. Additionally, the Bank’s rules stipulate a minimum period of six months for the duration of the suspension while the FAR does not provide a fixed minimum. Finally, the FAR and the Bank’s procedures diverge on the maximum time period allowed for suspension. While the Bank’s procedures provide for a maximum period of twelve months without the submission of an SAE, the FAR allows a suspension to last twelve months (extendable by an additional six months, for a total of eighteen months) without the initiation of legal proceedings. Once legal proceedings are initiated, there is no longer a time limit on the length of a suspension.\textsuperscript{131}

\textsuperscript{127} See note 47 and accompanying text.
\textsuperscript{128} See note 71 and accompanying text.
\textsuperscript{129} See generally Todd J. Canni, \textit{Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments}, 38 Pub Contract L J 547, 573 (2009) (“Due process requires a sufficiently detailed Notice of suspension.”).
\textsuperscript{130} This listing does not, however, include the suspension decision itself.
\textsuperscript{131} See notes 52–54 and accompanying text.
A final difference between the Bank’s ETS mechanism and the FAR’s suspension pertains to the various options under which a suspension or ETS may be terminated. Grounds for termination of an ETS under the Bank’s sanctions system are explicit but limited. Unlike the Bank’s procedures, the FAR does not explicitly allow for the termination of suspension based on manifest error or any other clear basis, but the suspending official possesses the discretion to terminate a suspension at any time. Figure 5 below summarizes the procedural differences between the FAR and the World Bank ETS Mechanism.

**FIGURE 5. COMPARISON OF SUSPENSION UNDER THE FAR AND THE WORLD BANK ETS MECHANISM**

<table>
<thead>
<tr>
<th>Suspension under the FAR</th>
<th>World Bank ETS Mechanism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Makes contractor ineligible during investigation and suspension</td>
<td>Makes contractor ineligible during investigation and suspension</td>
</tr>
<tr>
<td>Contractor formally notified of suspension and investigation</td>
<td>Contractor formally notified of suspension and investigation</td>
</tr>
<tr>
<td>Contractor may request meeting; hearing possible where genuine issue of material fact</td>
<td>Contractor may submit Preliminary Explanation only</td>
</tr>
<tr>
<td>Contractor may request administrative record of case.</td>
<td>Contractor provided with RTS and INT evidence.</td>
</tr>
<tr>
<td>Fact of suspension shared via public listing</td>
<td>Fact of suspension shared with certain personnel of member countries via extranet</td>
</tr>
<tr>
<td>Duration: 0–18 months</td>
<td>Duration: 6-12 months</td>
</tr>
<tr>
<td>Termination is at SDO’s discretion</td>
<td>Termination may take place according to Sanctions Procedures (3 scenarios)</td>
</tr>
</tbody>
</table>

See notes 55–57 and accompanying text.

After concluding its investigation, if INT believes sufficient evidence exists that a firm or individual engaged in one or more sanctionable practices, INT may seek to initiate sanctions proceedings by submitting an SAE to the relevant EO.  

The SAE must contain:

(i) INT's specific accusations of Sanctionable Practices; (ii) INT's designation of each respondent alleged to have engaged in such practices . . .; (iii) INT's summary of the facts constituting the Sanctionable Practice . . .; and (iv) the evidence in support of its accusations, together with any exculpatory or mitigating evidence.


The World Bank's sanctions system can be described as a "two-tier process"—in recognition of the two levels of review afforded to the accusations and evidence behind every SAE. At the first tier, the EO reviews the accusations and evidence and, where he or she finds the evidence sufficient, recommends a sanction that will be imposed in the absence of an appeal. If the respondent does subsequently contest the accusations and/or recommended sanction, the matter enters a second tier of review, conducted by the World Bank Group's Sanctions Board.

   a) EO review. When INT submits an SAE to the EO, the EO evaluates whether the evidence presented by INT is sufficient to support a finding of sanctionable practice. If the EO determines that sufficient evidence supports INT's accusations in the SAE, he or she issues a Notice of Sanctions Proceedings ("the Notice"), recommends an appropriate sanction, and, if applicable,
temporarily suspends the respondent from eligibility for Bank-financed contracts. A respondent will be temporarily suspended upon issuance of the Notice only where the EO recommends a sanction including a minimum period of debarment exceeding six months.\footnote{Id §§ 4.01(a), 4.01(c), 4.02(a), 4.02(c) at 11–14. For an overview of the "considerations . . . relevant to any sanctioning decision," see World Bank, Sanctioning Guidelines (cited in note 108).}

The Notice includes the following information: (1) the recommended sanction(s); (2) if applicable, notification of the respondent’s temporary suspension; (3) the procedure by which the respondent may submit an Explanation to the EO; (4) the manner in which the respondent may contest (to the Sanctions Board) the accusations and/or the recommended sanction in the Notice; and (5) INT’s SAE and the accompanying evidence, together with copies of the current Sanctions Procedures and the Sanctions Board Statute, in effect at the time of issuance of the Notice.\footnote{World Bank, Sanctions Procedures § 4.01(b) at 11–12 (cited in note 108).} If the EO temporarily suspends a respondent, a notification of such suspension will be posted on a limited-access website.\footnote{Id § 4.02(e) at 14.}

Within thirty days of receipt of the Notice, the respondent may file an “Explanation” with the EO seeking either dismissal of the case or a revision to the recommended sanction.\footnote{Id § 4.02(b) at 13–14.} Upon reviewing the Explanation, the EO may withdraw the Notice (also simultaneously terminating the temporary suspension) or revise the recommended sanction.\footnote{Id §§ 4.03(a), 4.02(c) at 14.} Within ninety days of receipt of the Notice, the respondent may contest the case by submitting to the Sanctions Board a “Response,” including written arguments and evidence.\footnote{World Bank, Sanctions Procedures § 5.01(a) at 15–16 (cited in note 108).} No more than thirty days after a respondent submits a Response, INT may submit to the Sanctions Board a Reply to the arguments contained in the Response. Id § 5.01(b) at 16.

\footnote{Id § 4.04 at 15.} In this case, the EO notifies the respondent, and the full text of the EO’s uncontested determination is publicly disclosed.\footnote{Id §§ 4.04, 10.01(b) at 15, 30.}
b) Sanctions Board review. If, by submitting a Response, the respondent contests the accusations made by INT and/or the sanction recommended by the EO, the case is referred to the Sanctions Board, the second and final tier in the sanctions process. The Sanctions Board meets several times a year to decide cases presented on appeal and is composed of three Bank staff members and four non-Bank staff members, one of whom is the Chair. Where requested by the respondent or INT, the Sanctions Board also holds a hearing on the matter.

The Sanctions Board conducts a de novo review by considering the accusations and evidence contained in the Notice, the arguments and evidence submitted by the respondent in the Explanation and Response, INT’s Reply brief, the parties’ presentations at a hearing, if applicable, and any other materials contained in the record. After completing its review, the Sanctions Board determines whether it is more likely than not that the respondent engaged in a sanctionable practice. If insufficient evidence exists, the proceedings will be terminated. If the evidence supports a finding that the respondent engaged in a sanctionable practice, the Sanctions Board will impose an appropriate sanction. In making these determinations, the Sanctions Board is not bound by the EO’s prior recommendation. Decisions by the Sanctions Board are final and cannot be appealed.

The two-tier sanctions proceeding phase of the Bank’s process can be similar to the FAR’s Notice of Proposed Debarment phase in that the Notice and the NPD largely serve the same purpose—namely, notifying the respondent or contractor of a potential sanction or debarment, respectively. Moreover, both systems provide for additional proceedings after the contractor/respondent has submitted a response to the Notice. However,


145 See World Bank, Sanctions Procedures § 6.01 at 19 (cited in note 108). The request for a hearing must be made in the respondent’s Response or INT’s Reply. Id.

146 Id § 8.02(a) at 22. See also World Bank Group Sanctions Board, Law Digest at 19–20 (cited in note 144).

147 World Bank, Sanctions Procedures § 8.01 at 21–22 (cited in note 108).

148 Id.

149 Id § 8.03(a) at 23.
the FAR's additional hearings are triggered only where the respondent/contractor's response to the NPD raises a genuine dispute over the material facts. On the other hand, a respondent may avail itself of a Sanctions Board hearing under the Bank's procedures upon request, regardless of whether a dispute regarding material facts exists. The Bank's sanctions proceedings also differ from the FAR's NPD phase in terms of the information provided to a contractor/respondent. As with the Early Temporary Suspension procedure discussed above, the Bank automatically sends all evidence to the respondent. The FAR does not explicitly require disclosure of the administrative record at the NPD stage, but it is regularly shared with contractors, in the same way as with the suspension procedure.150

Another distinction between the Bank's procedures and those of the FAR pertains to disclosure. As mentioned above in the context of ETS, when the EO temporarily suspends a respondent, a notice is posted on a limited-access website.151 But, under the FAR, when a contractor is proposed for debarment, the contractor is publicly listed on the EPLS.152

D. Types of Sanctions

When the Sanctions Board or the EO (in an uncontested case) determines that a respondent has engaged in sanctionable practices, the Sanctions Board or the EO may choose from a range of five possible sanctions: (1) debarment with conditional release, (2) debarment for an indefinite or fixed term, (3) conditional non-debarment, (4) public letter of reprimand, and (5) restitution.153 The Sanctioning Guidelines provide that the baseline sanction is debarment with conditional release with a minimum period of debarment of three years.154 During the period of debarment, the respondent is not eligible to be awarded Bank-financed contracts, receive the proceeds of Bank loans, or other-

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151 This refers to the Bank’s Client Connection extranet, which is a system that is accessible by a limited audience within the governments of the Bank’s client countries.
152 See note 50 and accompanying text.
wise participate in the preparation or implementation of Bank programs.\textsuperscript{155}

Though debarment with conditional release with a minimum period of debarment for three years is the baseline sanction, aggravating and mitigating factors may justify a different length or type of sanction. The following aggravating factors may increase the debarment term or favor a more stringent type of sanction: (1) the severity of the misconduct, (2) the magnitude of harm caused by the misconduct, (3) interference by the sanctioned party with the investigation, and (4) the sanctioned party’s past history of adjudicated misconduct.\textsuperscript{156} Conversely, the following mitigating factors may decrease the debarment term or favor a less stringent sanction: (1) minor role in misconduct; (2) voluntary corrective action taken, such as cessation of misconduct, internal action against the responsible individual, implementation or improvement of a corporate compliance program, or restitution; and (3) cooperation with the investigation including, but not limited to, assistance and/or ongoing cooperation, conducting an internal investigation, admission or acceptance of guilt or responsibility, or voluntary restraint from bidding on Bank-financed tenders.\textsuperscript{157}

The Sanctions Board or the EO may also consider the period of temporary suspension already served by the sanctioned party, a sanctioned party’s breach of the confidentiality of the sanctions proceedings, and any other factor the Sanctions Board or the EO deems relevant in relation to the sanctionable practice.\textsuperscript{158}

The World Bank’s Sanctioning Guidelines are “intended to provide predictability and consistency while ensuring that both the EO and the Sanctions Board retain the ability to reflect the unique circumstances of each particular case” in the sanctions they impose.\textsuperscript{159} As such, the Sanctioning Guidelines provide examples of situations in which deviation from the baseline sanction may be appropriate, including the following: where conditionality would not serve any reasonable purpose, a fixed term of debarment may be appropriate; where it is unreasonable to conclude that a respondent can be rehabilitated through compliance

\textsuperscript{155} World Bank, \textit{Sanctions Procedures} § 9.01(c) at 24 (cited in note 108).

\textsuperscript{156} Id § 9.02 at 25–26. See also World Bank, \textit{Sanctioning Guidelines} at *3–4 (cited in note 108).


\textsuperscript{158} World Bank, \textit{Sanctions Procedures} § 9.02(f)–(i) at 25–26 (cited in note 108).

\textsuperscript{159} World Bank, \textit{Information Note} at 6 (cited in note 106).
or other conditionalities, indefinite debarment may be warranted; where a respondent already has taken comprehensive corrective measures and other mitigating factors apply so as to justify non-debarment, conditional non-debarment may be applied; and in exceptional circumstances, where a quantifiable amount of money can be restored to the client country or project, restitution may be used.\footnote{World Bank, \textit{Sanctioning Guidelines} at *2 (cited in note 108). See also Anne-Marie Leroy and Frank Fariello, \textit{The World Bank Group Sanctions Process and Its Recent Reforms}, 4–5 (World Bank 2011), online at http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/SanctionsProcess.pdf (visited Sept 10, 2012); World Bank, \textit{Information Note} at 6–8 (cited in note 106).}

Here, the Bank’s procedures are similar to their counterparts under the FAR, in that the mitigating factors largely overlap and permit the sanctioning individual or body to consider any other relevant (under the Bank’s Sanctions Procedures) or appropriate (under the FAR) factors. Furthermore, the Sanctions Board or EO and the SDO may consider the time served as part of the sanction determination. But the treatment of the range of sanctions under the FAR and the Bank’s rules differ in terms of the types of sanctions available. The FAR only provides for fixed-term debarment, whereas the EO or the Sanctions Board, as the case may be, can choose from five types of sanctions. The Bank’s procedures also differ from their FAR counterparts with respect to the consideration of aggravating circumstances. The Bank employs a specific list of potentially aggravating factors. Although the SDO additionally considers aggravating factors, the FAR does not name any. As such, a sanction greater than the default position (three years) is only provided for explicitly in the single circumstance listed above.\footnote{As referenced in note 84 and accompanying text, violation of the Drug-Free Workplace Act of 1988 allows for a five-year debarment term.}

E. Affiliates

The Bank’s procedures provide for the sanctioning of affiliates, which is also the case with debarments under the FAR. The Bank may temporarily suspend and/or sanction some affiliates of respondents “so as to prevent circumvention of Bank sanctions through the use of affiliates or changes in corporate forms.”\footnote{Leroy and Fariello, \textit{The World Bank Group Sanctions Process} at 17 (cited in note 160). See also World Bank, \textit{Information Note} at 9, 20 (cited in note 106).} Under the Bank’s Sanctions Procedures, “[a]n entity is an ‘affili-
ate' of another entity if: (i) either entity controls or has the power to control the other, or (ii) a third party controls or has the power to control both entities,”\(^{163}\) while “[c]ontrol' means the ability to direct or cause the direction of the policies or operations of another entity, whether through the ownership of voting securities, by contract or otherwise.”\(^{164}\) If the EO temporarily suspends and/or recommends the imposition of a sanction on an affiliate that controls or is under common control with the respondent, the EO must provide a copy of the Notice to the affiliate, and the Bank’s procedures afford the affiliate procedural rights equivalent to those of the respondent.\(^{165}\) In addition to affiliates, the Bank may also sanction successors and assigns of sanctioned parties.\(^{166}\)

The Bank’s definition of affiliate is very similar to that found in the FAR.\(^{167}\) The FAR explains that:

Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.\(^{168}\)

The Bank uses similar language.\(^{169}\) Figure 6 below provides a comparison of the two categories.

\(^{163}\) World Bank, Information Note at 22 (cited in note 106).

\(^{164}\) Id.

\(^{165}\) See World Bank, Sanctions Procedures § 9.04(b) at 29 (cited in note 108). However, the Preliminary Explanation, Explanation, Response, and other formal submissions of the affiliate and the respondent must be consolidated unless the EO or Sanctions Board, as a matter of discretion, determines otherwise. Id.

\(^{166}\) Id § 9.05 at 30. See also Leroy, The World Bank Group Sanctions Process at 18 (cited in note 160); World Bank, Information Note at 9, 22 (cited in note 106).

\(^{167}\) The FAR defines affiliates to mean "associated business concerns or individuals if, directly or indirectly, [e]ither one controls or can control the other; or [a] third party controls or can control both." 48 CFR §§ 2.101, 9.403.

\(^{168}\) 48 CFR § 9.403.

\(^{169}\) See World Bank, Information Note at 22 (cited in note 106). The World Bank notes that:

Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following
F. Effect of Sanctions

1. Public disclosure.

Like debarments under the FAR, sanctions imposed by the Bank are publicly disclosed. The name of the sanctioned respondent, together with the sanction(s) imposed, is publicly available on the “World Bank Listing of Ineligible Firms & Indi-

Indicia of control include, but are not limited to:

- interlocking management or ownership
- identity of interests among family members
- shared facilities and equipment
- common use of employees
- a business entity organized following the imposition of a sanction that has the same or similar management, ownership, or principal employees as the person that was suspended or debarred.

'Control' means the ability to direct or cause the direction of the policies or operations of another entity, whether through the ownership of voting securities, by contract or otherwise.

The imposition of a sanction that has the same or similar management, ownership, or principal employees as the person that was suspended or debarred.
individuals” on the Bank’s website. Additionally, for all Notices issued after January 1, 2011, the Sanctions Board’s decisions, as well as the EO’s determinations in uncontested cases, are publicly disclosed and posted on the Bank’s website. Individual US agencies may also post final debarment decisions on their websites, but the depth of disclosure and the ease of access are heterogeneous among executive departments.

2. Cross-debarment.

*Those who cheat and steal from one will be debarred by all.*

Robert B. Zoellick, Former President, The World Bank

In 2010, the Bank and other multilateral development banks (MDBs) signed “an agreement to cross-debar firms and individuals found to have engaged in wrongdoing in MDB-financed development projects.” Accordingly, “entities debarred by one MDB may be sanctioned for the same misconduct by the other participating development banks.” This action validated the MDBs’ earlier commitment “to explore further how compliance

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171 See World Bank, Sanctions Procedures § 10.01(b) at 30 (cited in note 108); World Bank Sanctions Board, Law Digest at 18 (cited in note 144) (“In September 2010, the Bank Group established an independent Sanctions Board Secretariat to provide dedicated legal and administrative support to efficiently manage the Sanctions Board’s caseload, carry out research, and assist in preparing substantive opinions for publication.”). In addition to disclosing the identities of sanctioned or suspended firms and individuals, the World Bank—in a first among multilateral development institutions—discloses information about past Sanctions Board decisions, illustrating “the types of cases received and the legal principles the Sanctions Board has applied in deciding liability and sanctions.” World Bank Group, *World Bank Shines Spotlight on Anti-Corruption with New Sanctions Board Law Digest* (World Bank Dec 9, 2011), online at http://go.worldbank.org/MUYRYSVDR0 (visited Sept 10, 2012).

172 Compare the List of Recent Debarments at the Department of the Air Force General Counsel website, online at http://www.safgc.hq.af.mil/organizations/gcr/listofrecentdebarments/index.asp (visited Sept 10, 2012), with the “Debarment and Suspension Contested Case Determinations” at the EPA website, online at http://www.epa.gov/ogd/sdd decisión.htm (visited Sept 10, 2012).


175 Id.

176 Id.
and enforcement actions taken by one institution can be supported by the others.” Since the Bank signed the “Agreement for Mutual Enforcement of Debarment Decisions” in April 2010, a respondent debarred for more than one year is subject to cross-debarment, whereby the other participating MDBs may also debar the respondent.

The MDBs had previously agreed on harmonized definitions for corrupt practice, fraudulent practice, collusive practice, and coercive practice in 2006.

G. Settlements

The Bank mechanism most analogous to an administrative agreement under the FAR is the negotiated resolution agreement, or settlement. INT and a respondent may reach a negotiated resolution of sanctions proceedings at any point during the sanctions proceedings prior to the issuance of a decision by the Sanctions Board. INT and a respondent may also resolve potential sanctions cases via settlement during the investigation stage prior to the commencement of sanctions proceedings.

The Bank’s procedures provide for a number of procedural and substantive safeguards to ensure the fairness, transparency, and credibility of the settlement process. To this end, the Bank’s General Counsel must clear all settlement agreements, and settlements also are subject to a review by the EO to confirm that: (1) the respondent entered into the agreement “freely and fully informed of the terms thereof, and without any form of du-

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177 Id.
181 World Bank, Sanctions Procedures §§ 11.01, 11.02 at 31–32 (cited in note 108). See also World Bank, Information Note at 8–9 (cited in note 106); Leroy and Fariello, World Bank Group Sanctions Process at 20 (cited in note 160). The formal mechanism for settlements was introduced in 2010. Prior to 2010, the Bank had resolved two sanctions cases through settlements. See id.
182 World Bank, Information Note at 9 (cited in note 106).
183 Id.
ress,” and (2) the agreed sanction, if any, does not entail a manifest violation of certain provisions of the Bank’s Sanctions Procedures, “or any guidance issued by the Bank in respect thereof.”184

If, after the aforementioned review, the EO imposes the agreed-upon sanction, the EO notifies INT and the respondent, whereupon the agreement becomes effective—either immediately or as of a date specified in the agreement.185

Under the FAR, administrative agreements often show some a priori demonstration of present responsibility by the contractor. Such agreements act as a mechanism by which the government can continue to monitor the contractor while the contractor endeavors to improve its ethics and compliance program.186

III. CONCLUSION

Both the US government and the World Bank have devised suspension and debarment systems to protect their finances and organizational missions187 by excluding certain actors who have engaged in misconduct (and, under the FAR, otherwise nonresponsible actors) from bidding on contracts. While many similarities exist between the two systems—suspension mechanisms, notice requirements, the use of settlements, and administrative agreements—the systems also are quite distinct from each other, particularly regarding the specific grounds for suspension and debarment, the concept of present responsibility, the effect of suspension, and the period of debarment.

One concluding point must be made in reference to the effectiveness of both processes. Observed differences between the two systems may stem from the respective historical contexts of their regulatory development and the divergent challenges encountered in international procurement as compared to the acquisi-


185 World Bank, Sanctions Procedures § 11.02(c) at 32 (cited in note 108).


tion process at the US executive agencies. Over the past decade, both systems have shown vitality and results, suggesting that creative and diverse approaches to fighting fraud and corruption in procurement have borne fruit at both domestic and international levels.

188 See, for example, World Bank Sanctions Board, *Law Digest* at 18 (cited in note 144) ("To date, the [World Bank] sanctions process has led to the debarment of over 400 firms and individuals and the temporary suspension of over 150 firms and individuals."). As of Sept 10, 2012, the EPLS lists 86,015 current exclusions and 52,353 archived exclusions. See *Agency Statistics*, online at https://www.epls.gov/dashboard/stats.html (visited Sept 10, 2012).