

First-Ever Public World Bank Sanctions Board Decisions Confirm Necessity of Pre-Existing Effective Compliance Programs and Independent Internal Investigations

May 31, 2012

On May 30, 2012, the World Bank Sanctions Board issued its first seven publicly available decisions. Although the Bank has sanctioned more than 530 firms and individuals since 1999, until now the bases for the determination of the appropriate sanction in contested Bank proceedings had not been publicly disclosed. The public release of these opinions is an important milestone for the Bank's sanctions process, which since 2006 has also implemented a voluntary disclosure program, provided for preliminary review of alleged sanctionable practices by an evaluation and suspension officer, entered into a cross-debarment agreement with other multinational development banks, authorized the negotiated settlement of sanctions investigations, adopted new sanctions procedures, and most recently published a law digest containing summaries of prior, non-public Sanctions Board decisions.

The first seven public decisions demonstrate the Sanctions Board's awareness of and appreciation for broader global compliance trends. These decisions also emphasize the Board's willingness to take an independent view of the submissions presented to them and to provide a detailed analysis of the matters under submission. Key points from the published decisions include the following:

The Sanctions Board expects internal investigations to be undertaken by persons with sufficient independence, expertise, and experience.

The Sanctions Board refused to give mitigating credit in a case where the persons conducting the investigation were not sufficiently independent from the misconduct at issue and where such persons lacked the necessary expertise and experience to conduct a competent and thorough investigation. (No. 50 ¶ 67) This finding puts the Board on equal footing with other regulatory agencies inside and outside the United States which have insisted on similar criteria for crediting corporate investigations of potential misconduct.

The Sanctions Board recognizes an effective compliance program defense to vicarious corporate liability.

Amidst the ongoing debate over whether there should be an "effective compliance program" defense in the context of U.S. Foreign Corrupt Practices Act violations, the Sanctions Board's decisions emphasize the Board's recognition of such a defense to the imposition of corporate liability for the acts of employees. If an employer can demonstrate to the Board's satisfaction that it had

implemented, prior to the conduct at issue, controls reasonably sufficient to prevent or detect the conduct, the employer would appear to have a defense from liability for its employees' actions. (No. 46 ¶ 29; No. 47 ¶ 32; No. 48 ¶ 28) The availability of the defense would appear to be more problematic in cases where high-level managers are found to have been involved in the misconduct. (No. 50 ¶¶ 50-52; No. 51 ¶ 42)

For companies that have or may seek World Bank Group-financed contracts, these decisions create a substantial incentive to review and, as necessary, recalibrate existing compliance programs to both anticipate likely compliance risks and to generally meet the World Bank's expectations for compliance programs.

The Sanctions Board gives credit for compliance program modifications implemented in response to alleged misconduct

Even if a pre-existing compliance program had not been reasonably designed to prevent or detect the conduct at issue, the Sanctions Board has indicated that it will also provide mitigation credit for post-conduct compliance modifications designed to prevent or detect recurrence of the alleged misconduct. (No. 51 ¶¶ 51-52) The Sanctions Board's decisions caution, however, that such post-conduct compliance program modifications should be largely implemented before the respondent company appears before the Board (No. 51 ¶ 52), must be reasonably designed to prevent the misconduct (No. 47 ¶ 51), and should be applied throughout the company as appropriate (not just to the specific contract or project at issue) (No. 52 ¶ 40). Disciplining responsible employees is also important to the Board, which in one case declined to provide mitigation credit for voluntary corrective measures that did not include putting in place an effective compliance program and disciplining the involved employees. (No. 49 ¶ 38)

Mitigation Credit Is Meaningful

The seven decisions demonstrate that mitigation credit can indeed be meaningful. Even though the World Bank's sanctioning guidelines set a three-year debarment with conditional release as a "baseline" sanction, one decision imposed as sanctions a six-month debarment with unconditional release in the presence of substantial mitigating factors. (No. 46)

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Going forward, all of the Sanctions Board's decisions in contested cases will be made public and, if the first seven are any guide, will provide valuable insights into the World Bank sanctions process.

If you would like to discuss the information contained within this Alert or other related matters in more detail, please contact Kevin T. Abikoff at (202) 721-4770 or abikoff@hugheshubbard.com.

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