Goodmans LLP Update

White Collar Risk Management and Investigations

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Canadian Federal Government Moderates "Integrity Framework" Penalties

The Government of Canada has introduced amendments to its "Integrity Framework" to moderate the harsh impact of debarment policies that prevent companies from bidding on federal government contracts if they or their affiliates have been convicted of certain listed criminal offences in Canada or abroad. These debarment policies have been subject to intense criticism over the last fourteen months since they automatically apply even if the company self-reported the offence, cooperated with authorities, or took remedial measures.

With the recent amendments, a company may have the debarment period reduced if it cooperated with authorities or remediates the wrongful conduct. A company may also escape debarment completely if it can prove that it had no knowledge of or involvement in the offence committed by an affiliate company.

While the amendments mark a welcome move away from what many considered draconian standards for procurement, the regime remains stricter than its counterparts' in the U.S. and Europe and continues to present issues that Canadian companies must consider.

Former Sanctions Under Integrity Framework

The Integrity Framework was introduced by Public Works and Government Services Canada (the agency responsible for federal government procurement) as a means of regulating procurement and real property contracts under its purview. The framework provided that if a company, its directors, or its affiliates had been convicted of a listed offence (including fraud, corruption, money laundering, bribery and extortion), the company was ineligible to bid on contracts with the Canadian federal government for ten years.

The regime applied to all contracts regardless of size and to any person or organization who directly or indirectly, legally or *de facto*, controlled the ineligible organization. It did not distinguish between offences involving nominal and significant dollar amounts, nor did it distinguish between offences committed by lower level employers and senior officers. Furthermore, there was no provision for discretionary leniency where companies had self-reported and cooperated with authorities, nor was there any opportunity to seek reinstatement following the implementation of remedial measures. This stringent approach was criticized for deviating too sharply from the more flexible approaches of Canada's trading partners in the U.S. and Europe.

Industry critics had also warned of economic damage if the federal government's major suppliers were to be prohibited from bidding on its contracts. At least one significant Canadian company advised that it might have to file for insolvency restructuring if the existing regime was not amended.

Impact of Amendments

In light of these criticisms, the federal government enacted changes on July 3, 2015, that are designed to encourage companies to cooperate with legal authorities when problems arise and to take corrective and remedial actions to address misconduct. Potential suppliers convicted of an offence remain ineligible to bid on contracts for up to ten years. However, the amendments introduce greater flexibility in how the framework will treat a company that is taking positive steps to remediate harmful conduct.

There are two notable changes that companies operating in Canada should be aware of:

- A supplier that has been convicted of a listed offence may apply at any time to reduce the ineligibility period by up to five years if the supplier has cooperated with legal authorities or addressed the causes of the misconduct. It remains

to be seen what degree of cooperation will be required to obtain the maximum five-year reduction. The burden is on the supplier to demonstrate *either* cooperation with law enforcement authorities or positive steps toward remedying the causes of the wrongful conduct. Where it is granted an exemption, the supplier would be required to agree to an administrative agreement specifying obligatory remedial and compliance measures, which are to be monitored by a third party at the supplier's expense.

- A potential supplier will also no longer be automatically debarred as a result of a conviction of one of its affiliates. To be debarred as a result of an affiliate's conviction, there must be evidence that the supplier had control over the affiliate or that the supplier participated or was involved in the actions that led to the affiliate's conviction. The supplier must secure, at its expense, an independent third party to assess its involvement when an affiliate is convicted of a listed offence. This assessment will be provided to the government for determination of eligibility. In determining control, Public Works and Government Services Canada will consider whether the company directed, influenced, authorized, assented to, acquiesced in or participated in the commission or omission of the acts or offences that rendered the affiliate ineligible to receive a government contract. It remains to be seen to what extent the company's level of control over its affiliate's general operations (as opposed to the impugned conduct specifically) will factor into this determination.

A supplier that is debarred because of its control relationship or involvement in an affiliate's conduct can now seek administrative review of that decision. However, the debarment process itself still lacks the details of that review process.

As in the framework's previous incarnation, the federal government can contract with an otherwise ineligible supplier in exceptional circumstances, namely where: (i) there are no other available suppliers of the particular product or service; or (ii) there is a compelling national security or other urgent reason to do so.

Despite these amendments, the Canadian framework remains more stringent when compared to similar regimes in other countries. Companies are still subject to a minimum five-year ineligibility period if convicted of a listed offence, regardless of extensive remedial measures they may have undertaken. Further, the regime continues to lack the discretionary authority to consider mitigating factors, the level of the employee whose conduct resulted in the criminal charges, or whether the offence was nominal or egregious.

Lessons for Companies Doing Business in Canada

These amendments, while positive for companies doing business in Canada, reinforce the importance of treating any concerns regarding criminal wrongdoing anywhere in the world proactively and swiftly, as such action may minimize the adverse consequences arising from the wrongdoing. Moreover, the implementation of internal controls can help detect activities that might lead to a listed offence and allow a company to take action before the issue arises.

The uncoupling of liability for an affiliate's conduct will also likely be a significant development for many companies, including those companies whose affiliates operate in jurisdictions where there is a greater risk of corruption.

Suppliers should also be aware of the additional costs they are expected to bear under the new regime. To take advantage of the ineligibility exemptions, an otherwise ineligible company will have to hire an independent monitor to either assess its independence from an affiliate or ensure compliance with the terms of an administrative agreement when remedial measures have been implemented.

The introduction of a more flexible Integrity Framework is an encouraging step away from the catch-all policies to which suppliers were previously subjected. Under the new framework, a proactive approach may allow an organization to minimize the long-term effects of criminal wrongdoing and significantly reduce the period it will be ineligible for government procurement contracts.

For further information on these recent amendments, please contact any member of our White Collar Risk Management and Investigations Group.