

## **A HOUSE OF CARDS FALLS: WHY “TOO BIG TO DEBAR” IS ALL SLOGAN AND LITTLE SUBSTANCE**

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“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.*”<sup>1</sup>

Experts in government procurement were disappointed to read *FCPA Sanctions: Too Big to Debar*<sup>2</sup> by Drury D. Stevenson and Nicholas J. Wagoner. Despite its populist appeal, the article’s fundamental premise is legally and factually wrong. In the past decade, as the U.S. government has aggressively enforced the Foreign Corrupt Practices Act<sup>3</sup> (FCPA), companies of every size in nearly every industry have paid considerably for their bribery of foreign officials, demonstrating that no company is immune from potential FCPA liability if they do business abroad. Despite the FCPA’s widespread impact, the article has declared war on one segment of the population: large government contractors. The authors argue that the best way to deter contractors from bribing foreign officials is to debar them from the procurement system—the corporate equivalent of a death sentence.

If FCPA enforcement has touched every industry, why do the authors single out large government contractors? Because they can—large government contractors are not sympathetic characters. Even though nearly all companies, regardless of their size or line of business are exposed to the potential misconduct of rogue employees, government contractors are expected to defy the statistically impossible. While it is reasonable to expect ethical conduct from companies that receive taxpayer dollars (as the

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1. FAR 9.402(b) (2008) (emphasis added).
2. Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar*, 80 *FORDHAM L. REV.* 775 (2011).
3. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3 (2006)).

seemingly limitless Federal Acquisition Regulations (FAR) already do),<sup>4</sup> it is not only self-defeating but also unreasonable to demand debarment,<sup>5</sup> simply because it is “far more crippling to a company’s bottom line.”<sup>6</sup>

#### I. DEBARMENT IS FOR THE GOVERNMENT’S PROTECTION, NOT PUNISHMENT

To experienced government procurement practitioners, one of the most glaring errors in *Too Big to Debar* is its fundamentally flawed characterization of debarment as a punitive regime. Indeed, at least a third of the article’s text is devoted to theories of punishment. To understand why this issue undermines the thesis of the article, a brief overview of the FAR is warranted.

As FAR 9.4 makes clear, the government is required to use administrative suspension and debarment “only in the public interest for the Government’s protection,” to ensure that the government contracts with “responsible” partners.<sup>7</sup> Debarment may last for up to three years,<sup>8</sup> and may be as broad or as limited as the government deems necessary to protect its interests, ranging from the debarment of the entire company to the debarment of a division, facility, or even a single individual.<sup>9</sup> Notably, because the system is *not* designed to punish contractors, debarment only applies to future contracts, task orders, and options to extend current contracts—it does not impact existing contract work with the government.<sup>10</sup>

As the authors aptly demonstrate, an important but frequently misunderstood aspect of the debarment regime is that debarment is to be used *only* for the purpose of protecting the government, *not* to punish past misconduct.<sup>11</sup> As the FAR clearly states, “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.*”<sup>12</sup> This fundamental distinction is crucial to understanding how the process works and why certain debarment determinations are

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4. See Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, BRIEFING PAPERS, Aug. 2011, at 18 n.2 (“The Federal Acquisition Regulations System, consisting of the Federal Acquisition Regulation and agency supplemental acquisition regulations, is a robust set of rules and requirements governing the U.S. Government’s procurement process.”).

5. For purposes of brevity, the use of the term “debarment” will hereinafter signify both “debarment” and “suspension,” unless otherwise indicated.

6. Stevenson & Wagoner, *supra* note 2, at 805.

7. FAR 9.402(a), (b). FAR 9.104-1 outlines the standards used to determine whether prospective contractors and subcontractors are responsible.

8. Contrary to the article’s claim that debarments last for a “standard two-year period,” see Stevenson & Wagoner, *supra* note 2, at 778, 820, FAR 9.406-4(a)(1) expressly states that debarment should not exceed three years, see FAR 9.406-4(a)(1). The origin of this “standard two-year period” is unknown.

9. See FAR 9.406-1(b); see also Tillipman, *supra* note 4, at 9.

10. See FAR 9.405-1.

11. See FAR 9.402(b) (“Agencies shall impose debarment or suspension to protect the Government’s interest and only for the causes and in accordance with the procedures set forth in this subpart.”).

12. *Id.* (emphasis added).

made. Fines and incarceration are prosecutors' tools. Debarment is not a tool of punishment and, therefore, remains wholly independent of the criminal justice system. It is an administrative remedy that permits agencies to exclude contractors from the federal procurement system only to protect the government from imminent harm.

Again, debarment is not an additional layer of punishment. This is a crucial distinction emphasized by the plain language of the FAR, which warns that "[t]he existence of a cause for debarment . . . does not necessarily require that the contractor be debarred."<sup>13</sup> In other words, even if there are potential grounds to debar a contractor because of past misconduct, Suspension and Debarment Officials (SDOs) should not do so until they have considered "any remedial measures or mitigating factors" that may shed light on whether the contractor is presently responsible.<sup>14</sup> Indeed, "where a contractor is determined to be presently responsible despite past misconduct, it presents no threat to the government's interests, making debarment inappropriate."<sup>15</sup>

Although the authors briefly mention the FAR's prohibition against using debarment to punish contractors,<sup>16</sup> their article completely disregards this fundamental tenet of the regime (and the regulation's plain language) by repeatedly referring to debarment as punishment. The limited courtesy provided to the actual text of the FAR demonstrates that the authors are wedded to their own ideas of what the regime *should* be, than to what it actually is.

## II. BAE SYSTEMS: A CASE STUDY IN FLAWED ANALYSIS

*Too Big to Debar* cites the 2010 FCPA enforcement action against BAE as evidence that the Department of Justice is somehow improperly influencing SDOs to refrain from debarring contractors that have allegedly violated the FCPA.<sup>17</sup> The article contends that the DOJ charged BAE with conspiracy to make false statements to avoid triggering the FAR's "discretionary debarment" authority.<sup>18</sup> This statement defies the plain language of the regulation. FAR 9.406-2(a)(3) expressly includes "false statements" as potential grounds for discretionary debarment.<sup>19</sup> Given that a violation of the false statements statute is an enumerated ground for

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13. FAR 9.406-1(a).

14. *Id.* (providing a list of mitigating factors that a debarment official must consider in making a debarment determination).

15. Todd J. Canni & Steven A. Shaw, *Comments on the Wartime Contracting Commission's Recommendations on Suspension and Debarment*, SERVICE CONTRACTOR, Sept. 2011, at 14.

16. *See* Stevenson & Wagoner, *supra* note 2, at 807.

17. *See id.* at 798–802.

18. *See id.* at 800.

19. *See* FAR 9.406-2(a)(3) ("The debarring official may debar a contractor for a conviction of or civil judgment for . . . making false statements . . .").

potential debarment, it is utterly confusing (as well as ironic) as to why the article contains this erroneous statement.<sup>20</sup>

One of the more inflammatory and irresponsible statements in the article is its wholly unsupported claim that the government is “endors[ing]” or “bankrolling” foreign bribery when it “categorically refus[es] to seriously consider suspending or debaring companies” that violate the FCPA.<sup>21</sup> These statements are demonstrably false. In claiming that the government never considered debaring BAE, the authors ignore publicly available information that the Air Force not only fully considered BAE for possible debarment, but may have positively influenced the company’s interactions with the DOJ.<sup>22</sup>

On October 30, 2009, the Air Force issued BAE’s CEO a “Show Cause Letter,” nearly five months prior to BAE’s settlement with the DOJ.<sup>23</sup> The Air Force made clear to BAE that it had serious concerns regarding the bribery allegations and BAE’s lack of cooperation with the DOJ.<sup>24</sup> After receiving the letter, BAE began cooperating with the government, allowing the Air Force to conduct investigations into the company’s “processes, procedures and culture” to ensure its present responsibility, and eventually pleaded guilty to felony charges and agreed to pay a \$400 million fine.<sup>25</sup> The documents demonstrate that the Air Force had grounds to debar BAE, despite the article’s claim to the contrary.<sup>26</sup> Because of the discretion afforded to SDOs, the Air Force was able “to facilitate further ethical transformation throughout BAE that [would] benefit all U.S. government contracts with the company in the future.”<sup>27</sup> While BAE’s misconduct was undeniably egregious, in considering only those facts relating to BAE’s misconduct, rather than those relating to its remediation and cooperation, it is not surprising that the authors draw such brazen and inaccurate conclusions.

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20. What makes this statement even more bewildering is that the authors note “false statements” as grounds for discretionary debarment in other sections of the article. *See Stevenson & Wagoner, supra* note 2, at 806, 813 n.271.

21. *Id.* at 801.

22. *See Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions? Before the H. Comm. on Oversight and Gov’t Reform, Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform* (Oct. 6, 2011) (statement of Steven A. Shaw, Deputy Gen. Counsel (Contractor Responsibility), Dep’t of the Air Force) [hereinafter Shaw Testimony], available at <http://www.safgc.hq.af.mil/shared/media/document/AFD-111006-094.pdf>. Moreover, because agencies do not typically inform the public of matters in which they have considered a company for debarment, but declined to do so, it is equally irresponsible to make such sweeping, uninformed statements. *See generally* Canni & Shaw, *supra* note 15, at 16–17.

23. *See* Letter from Steven Shaw, Deputy Gen. Counsel (Contractor Responsibility), Dep’t of the Air Force to Ian King, CEO, BAE Systems plc 1 (July 19, 2011) [hereinafter Shaw Letter], available at <http://www.safgc.hq.af.mil/shared/media/document/AFD-110801-026.pdf>. A “Show Cause Letter” notifies a contractor that it is being considered for suspension or debarment and affords the opportunity to submit evidence demonstrating that it is a responsible contractor.

24. *See id.* at 1.

25. *See id.*; *see also* Shaw Testimony, *supra* note 22, at 3.

26. *See* Shaw Letter, *supra* note 23.

27. *See* Shaw Testimony, *supra* note 22, at 4.

Because the article incorrectly views debarment as punishment, it regards BAE's post-settlement contract awards as "unfair" and "imprudent." Despite the company's substantial remediation and overhaul of its compliance organization,<sup>28</sup> the authors argue that BAE should have been banished from the procurement system. Yet, because debarment is the corporate equivalent of the death penalty, the system is designed not only to protect the government, but the rights of contractors as well. To agree with the authors is to ignore an entire regulatory regime and its jurisprudence. Debarment has the ability to put a company out of business; therefore, the regime requires an SDO's careful consideration of mitigating factors, the company's present responsibility, and whether the government's interests truly need to be protected. In the world of *Too Big to Debar*, however, a contractor's due process rights are irrelevant.

### III. THE THREAT OF DEBARMENT IS THE ULTIMATE "SWORD OF DAMOCLES"<sup>29</sup>

*Too Big to Debar* argues that because large contractors have "virtual immunity" from debarment, they are not deterred from bribing foreign officials. In this era of heightened FCPA enforcement, the idea that large and sophisticated contractors are traveling the world, actively seeking to bribe foreign officials, belies reality. The government's recent enforcement of the FCPA has been extraordinarily aggressive, and is a primary compliance concern facing most multinational corporations. The costs associated with investigating and settling FCPA enforcement actions are astounding. In addition, the government's focus on individuals has made violating the FCPA a terrifying prospect. For example, the government imposed more than \$2 billion in criminal fines against individuals between 1998 and 2010.<sup>30</sup> Moreover, the government is increasingly seeking lengthy jail time for individuals who bribe foreign officials.<sup>31</sup> Other common collateral costs of an FCPA violation include significant reputational damage, collateral litigation, and substantial blows to a company's financial health.<sup>32</sup> As the article acknowledges, "Executives reportedly spend sleepless nights wondering if their company will be the next target of an FCPA enforcement action."<sup>33</sup> If FCPA enforcement costs

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28. See Sentencing Memorandum at 11–12, *United States v. BAE Sys.*, No 1:10-cr-035 (D.D.C. Feb. 22, 2011).

29. See Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, 13 PUB. PROCUREMENT L. REV. 211, 214 (2004).

30. See ORG. FOR ECON. COOP. & DEV., REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 39 (2010).

31. See, e.g., Press Release, DOJ, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Oct. 25, 2011), <http://www.justice.gov/opa/pr/2011/October/11-crm-1407.html>.

32. See Tillipman, *supra* note 4, at 14–15.

33. Stevenson & Wagoner, *supra* note 2, at 783.

are so substantial that they already keep executives up at night, perhaps their deterrent value has been underestimated.

In addition to arguing that the current FCPA enforcement regime is not aggressive enough, the authors suggest that debarring contractors will somehow stop rogue employees from bribing foreign officials. It is fundamentally unrealistic (not to mention statistically impossible) to assume that debarment will prevent employee misconduct in large multinational companies.<sup>34</sup> There is no evidence that any large entity can be managed, indefinitely, without human transgression.

No matter how sophisticated a company's internal controls, so long as they continue to do business in countries where corruption goes unpunished, the demand for bribes and the pressure to provide them will not cease. Indeed, after settling the largest FCPA-related enforcement action in history, Siemens completely "overhauled and greatly expanded its compliance organization," and now has hundreds of full-time compliance personnel worldwide.<sup>35</sup> The DOJ even noted that the "reorganization and remediation efforts of Siemens have been extraordinary and have set a high standard for multi-national companies to follow."<sup>36</sup> Yet, despite its model compliance program, in October 2011, the media reported that several Siemens employees made improper payments to Kuwaiti officials—improper activity that was, incidentally, detected and reported by Siemens's new compliance regime.<sup>37</sup> If a company with one of the most extensive compliance programs in the world cannot fully prevent misconduct, what company can? Fortunately, even the DOJ recognizes that no company is immune from misconduct, as Assistant Attorney General Lanny Breuer explained: "There will always be rogue employees who decide to take matters into their own hands. They are a fact of life."<sup>38</sup> Accordingly, railing against institutions may be entertaining, but it is neither productive nor instructive.

#### IV. BANKRUPT FIRMS CANNOT AFFORD SOPHISTICATED COMPLIANCE PROGRAMS

*Too Big to Debar* declares that using debarment more frequently will encourage greater compliance efforts within a company. However, in claiming that "a two-year hiatus from all government contracts . . . would

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34. For example, Siemens has 336,000 employees in 190 regions around the world, while BAE has nearly 100,000 employees in over 100 countries. See *Siemens Worldwide*, SIEMENS, <http://www.siemens.com/about/en/worldwide.htm> (last visited Jan. 6, 2012); *Key Facts*, BAE SYSTEMS, <http://www.baesystems.com/AboutUs/FactSheet/index.htm> (last visited Jan. 6, 2012).

35. Sentencing Memorandum at 22, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008).

36. *Id.* at 24.

37. *Police Investigate Alleged Corruption by Siemens Staff*, DEUTSCHE WELLE (June 10, 2011), <http://www.dw-world.de/dw/article/0,,15146789,00.html>.

38. Lanny A. Breuer, Asst. Att'y Gen., Speech at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel (Jan. 26, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html>.

induce more firms to comply with the law,”<sup>39</sup> the authors ignore the reality of debarment. Debarment often results in the literal end to the existence of a company. Once a company is debarred, it is wholly excluded from obtaining new government contracts and subcontracts.<sup>40</sup> In addition, under certain circumstances, a debarred company’s current contracts may also be terminated.<sup>41</sup> The debarment of a contractor is also likely to preclude it from contracting with state and local governments, foreign governments, and international organizations, such as the World Bank and United Nations. The reputational damage caused by debarment often harms a company’s relationship with its commercial partners as well. A debarred contractor is almost (if not, entirely) starved of future revenue.

It belies reality that a company will be debarred, somehow manage to survive up to three years on the sidelines, and then expect to come back to work for the government, stronger and more compliant than ever. Indeed, “most contractors do not normally spend money improving their government-contracts related ethics and compliance structures when their government revenue streams are cut off.”<sup>42</sup> Instead, both FCPA enforcement actions and the administrative suspension and debarment process provide an “incentive for firms to enter into less draconian compliance agreements, and then comply with the terms of those agreements.”<sup>43</sup> This is because the government seeks, through its enforcement and administrative processes, to influence companies’ compliance with the law—not to put them out of business.

Companies that are spared debarment must agree to a tremendous overhaul of their compliance systems and internal controls including regular reporting to the government, third-party monitors, enhanced training for employees, and ongoing cooperation with the government.<sup>44</sup> By imposing mandatory debarment, without consideration of a company’s responsibility or mitigating circumstances, the procurement system “would lose the opportunity to influence and motivate positive corporate behavior.”<sup>45</sup> Moreover, contractors would lack the incentive to work with SDOs “in proactive, creative ways to benefit the entire government.”<sup>46</sup> Increasing the number of debarments would not only discourage companies from continuing to do business with the United States, but would scare off new entrants to the government marketplace. With a broad menu of criminal and civil sanctions, plus an aggressive prosecutorial regime, governments already create enormous barriers to entry that reduce competition for the government’s business. A more aggressive debarment regime would further limit the government’s access to the best firms and increase the taxpayers’ cost for acquiring their services.

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39. See Stevenson & Wagoner, *supra* note 2, at 820.

40. See FAR 9.405(a).

41. See FAR 9.405-1(a).

42. Canni & Shaw, *supra* note 15, at 15.

43. Schooner, *supra* note 29, at 214.

44. Tillipman, *supra* note 4, at 16–17.

45. Canni & Shaw, *supra* note 15, at 17.

46. Shaw Testimony, *supra* note 22, at 5.

V. “*TOO BIG TO DEBAR*” IS A SOUND BITE, NOT A REFLECTION OF REALITY

The authors contend that because the government is so dependent on “favorite” contractors, they are essentially, “too big to debar” and can bribe foreign officials with “virtual immunity.” In making this claim, the article ignores every suspension involving a large contractor that has taken place in the past decade, including Enron,<sup>47</sup> Arthur Andersen,<sup>48</sup> MCI Worldcom,<sup>49</sup> several Boeing Launch Systems divisions,<sup>50</sup> an L-3 Communications’ Special Support Programs Division,<sup>51</sup> IBM,<sup>52</sup> GTSI,<sup>53</sup> and AED.<sup>54</sup> By presenting severely outdated and one-sided statistics,<sup>55</sup> the article paints a wholly inaccurate picture of the current debarment regime.

While the article correctly states that large contractors are less likely to be debarred than their small to mid-sized counterparts, the reasons are not as nefarious as the authors claim. For example, when misconduct occurs in huge multinational corporations, the improper activity often involves a specific division or subset of employees, rather than the entire company. Thus, in responding to the misconduct, large companies are better positioned to sever the diseased sector, remediate, implement robust compliance programs, and move forward. In other words, these companies are often far better equipped to demonstrate their present responsibility. Small companies, however, often lack the resources to respond to and remediate harm and install new and sophisticated compliance programs. More importantly, because misconduct often permeates the entire firm, small companies are often unable to terminate the employees responsible for the misconduct, making full remediation impossible.

In its attack on the debarment regime, the article claims that “officials shy away from debarring entities that violate the FCPA due to the short-term inconvenience of an agency’s inability to transact business with its favorite contractor.”<sup>56</sup> Characterizing the debarment of some of the government’s largest contractors as an “inconvenience” is laughable. In certain fields, only one or two contractors have the capability to perform

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47. See Dorn McGrath, *Misconduct Unrelated to Federal Contracts Could Lead to Suspension or Debarment*, NAT’L DEF. (May 2005), [http://www.nationaldefensemagazine.org/archive/2005/May/Pages/ethics\\_corner5770.aspx](http://www.nationaldefensemagazine.org/archive/2005/May/Pages/ethics_corner5770.aspx).

48. See *id.*

49. See *id.*

50. See Shaw Testimony, *supra* note 22, at 2.

51. See *id.*

52. See Jill R. Aitoro, *IBM Suspended from New Federal Contracts*, GOV’T EXEC. (Mar. 31, 2008), <http://www.govexec.com/dailyfed/0308/033108j1.htm>.

53. See Nick Wakeman, *GTSI Suspended but Vows to Fight*, WASH. TECH. (Oct. 1, 2010), <http://washingtontechnology.com/articles/2010/10/01/gtsi-fights-sba-charge.aspx>.

54. See Dana Hedgpeth & Josh Boak, *Nonprofit Cut Off from New U.S. Contracts as It Faces Investigation*, WASH. POST, Dec. 9, 2010, at A22.

55. Indeed, despite their availability, the article fails to cite to any recent suspension and debarment statistics, relying solely on statistics that are at least 10-30 years old. See Stevenson & Wagoner, *supra* note 2, at 809; see also Council of the Inspectors Gen. on Integrity & Efficiency, Annual Reports to the President, available at <http://www.ignet.gov/randp/arpt1.html> (providing annual suspension and debarment statistics).

56. Stevenson & Wagoner, *supra* note 2, at 775.



contract requirements.<sup>57</sup> The immediate debarment of one of these contractors would leave a monopoly at best, and a vacuum at worst. Moreover, large contracts with firms like BAE, Lockheed Martin, and Boeing are critical to maintaining military superiority and basic government functions.<sup>58</sup> As a result, the debarment regime affords SDOs the flexibility and discretion necessary to protect the U.S. government's diverse interests. The authors advocate for a system in which due process rights are irrelevant, remediation is a fiction, and the government's business partnerships are disposable. However, "[w]ith fewer major, critical contractors available to compete for the government's most sophisticated requirements, it seems disingenuous to bar a key player from future competition," simply for the sake of retribution and arbitrary standards of morality.<sup>59</sup>

#### VI. MORE DEBARMENT ≠ MORE VOLUNTARY DISCLOSURES

*Too Big to Debar* also claims that if the government starts debarring large contractors more frequently, companies will be so scared of potential debarment that they will voluntarily disclose their potential violations of the FCPA in hopes of lenient treatment. Citing the Department of Defense's Voluntary Disclosure program<sup>60</sup> (a regime that was wiped out nearly four years ago by the FAR 52.203-13 Mandatory Disclosure rules<sup>61</sup>) as evidence of such potential leniency, the article contends that "[b]y debarring companies in egregious, highly public cases of foreign corruption, federal prosecutors can leverage the escalated level of risk associated with debarment to incentivize more companies to come forward in exchange for leniency."<sup>62</sup> The idea that companies will be *more* likely to come forward in a system where debarment is used more frequently as a tool of punishment defies logic. Hinging a company's fate not on its remedial measures or present responsibility, but on some subjective (and likely

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57. Many major weapons systems and components were dual-sourced until the early 1990s, when, in an effort to save money, the Department of Defense aggressively embarked upon an effort to consolidate the defense industrial base. See John Deutch, *Consolidation of the U.S. Defense Industrial Base*, ACQUISITION REV. Q., Fall 2001, at 137–38, available at [http://isites.harvard.edu/fs/docs/icb.topic706688.files/Consolidation\\_of\\_the\\_US\\_Defense\\_Industrial\\_Base.pdf](http://isites.harvard.edu/fs/docs/icb.topic706688.files/Consolidation_of_the_US_Defense_Industrial_Base.pdf).

58. See generally Steven S. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J. OF CONT. MGMT., Sept. 2008.

59. Schooner, *supra* note 29, at 214.

60. Stevenson & Wagoner, *supra* note 2, at 809 n.243.

61. The authors surprisingly cite to the defunct Department of Defense Voluntary Disclosure Program as support for one of their arguments. The new mandatory disclosure rules were a "sea change" in procurement law, requiring, among other things, the mandatory disclosure of potential violations of the law, the adoption of stringent internal controls and ethics programs, and new grounds for suspension and debarment for failure to comply with the mandatory disclosure requirements. See FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064 (Nov. 12, 2008) (to be codified at 48 C.F.R. pt. 2, 3, 9, 42, and 52). Notably, potential violations of the FCPA are *not* expressly required under this regime.

62. Stevenson & Wagoner, *supra* note 2, at 809.

politically motivated) determination that a case is “egregious,” would deter any major company from coming forward for fear that their familiar name and U.S. government business would result in their death sentence. Contrary to the authors’ claims, it would give contractors an “incentive to stonewall, deny problems exist, and not make changes for fear of potential liability that would result in a mandatory debarment regardless of their willingness to change.”<sup>63</sup>

#### CONCLUSION

Ignoring the glaring factual errors, selective quotes, and incorrect assumptions, *Too Big to Debar* appears to assert that it is morally wrong to “reward” government contractors that have misbehaved. By injecting theories of morality and punishment into an administrative regime, the article elevates the simple, almost visceral desire for large-scale retribution over the more nuanced best interests of the government.

While there are instances in which corporate misconduct is so egregious, pervasive, and untreatable that debarment may be appropriate, this nuclear sanction should not be utilized simply because it is politically popular. By discounting the actual consequences of debarment, while artificially amplifying its impact on FCPA deterrence, the authors fail to observe a trend that has been occurring over the last few years. As companies adapt to the new era of FCPA enforcement, large and successful government contractors already have sophisticated compliance and internal controls in place.<sup>64</sup> The companies pilloried in the article have already spent substantial sums of money overhauling their FCPA compliance programs—both in response to their own FCPA violations and by observing the violations committed by others. More importantly, putting the philosophy aside, in an era of outsourced government, these large, sophisticated firms permit governments to serve the populations they govern.<sup>65</sup>

*Too Big to Debar* follows a well-trodden populist track by vilifying and bashing contractors without regard for nuance or reality. Experts understand that there is a surefire method for ensuring that there will be no fraud in government contracting: simply stop awarding contracts. Then governments can place their trust directly in politicians and public officials who, as history has proven time and time again, are insulated from temptation, immune to missteps, and endlessly toil with the public’s best interest at heart. If that solution does not set your mind at ease, maybe it is time to return to a more thoughtful, reasoned analysis of this complex, challenging issue.

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63. Shaw Testimony, *supra* note 22, at 5.

64. In fact, most of the largest government contractors voluntarily belong to organizations dedicated solely to the promotion of ethical compliance programs and culture. See, e.g., DII Member Companies 2009–2010, DEF. INDUS. INITIATIVE, <http://www.dii.org/our-companies> (last visited Jan. 6, 2012).

65. See generally Schooner & Greenspahn, *supra* note 58.