AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. Hrg. 112–358

WEEDING OUT BAD CONTRACTORS: DOES THE GOVERNMENT HAVE THE RIGHT TOOLS?

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

NOVEMBER 16, 2011

Available via the World Wide Web: http://www.fdsys.gov/

Printed for the use of the
Committee on Homeland Security and Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE

72–557 PDF WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000001 Fmt 05011 Sfmt 05011 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

JOSEPH I. LIEBERMAN, Connecticut, *Chairman*

CARL LEVIN, Michigan
DANIEL K. AKAKA, Hawaii
THOMAS R. CARPER, Delaware
MARK L. PRYOR, Arkansas
MARY L. LANDRIEU, Louisiana
CLAIRE McCASKILL, Missouri
JON TESTER, Montana
MARK BEGICH, Alaska

SUSAN M. COLLINS, Maine
TOM COBURN, Oklahoma
SCOTT P. BROWN, Massachusetts
JOHN McCAIN, Arizona
RON JOHNSON, Wisconsin
ROB PORTMAN, Ohio
RAND PAUL, Kentucky
JERRY MORAN, Kansas

MICHAEL L. ALEXANDER, *Staff Director*
TROY H. CRIBB, *Senior Counsel*
CARLY A. COVIEO, *Professional Staff Member*
NICHOLAS A. ROSSI, *Minority Staff Director*
J. KATHRYN FRENCH, *Minority Deputy Staff Director*
CLYDE E. HICKS, *Minority Professional Staff Member*
TRINA DRIESSNACK TYRER, *Chief Clerk*
PATRICIA R. HOGAN, *Publications Clerk*
LAURA W. KILBRIDE, *Hearing Clerk*

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000002 Fmt 05904 Sfmt 05904 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

CONTENTS

	Page
Opening statements:	
Senator Lieberman	1
Senator Collins	3
Senator McCaskill	17
Prepared statements:	
Senator Lieberman	33
Senator Collins	35

WITNESSES

WEDNESDAY, NOVEMBER 16, 2011

Hon. Daniel I. Gordon, Administrator, Office of Federal Procurement Policy, Office of Management and Budget	5
William T. Woods, Director, Acquisition and Sourcing Management, U.S. Government Accountability Office	8
David M. Sims, Chairman, Interagency Suspension and Debarment Committee	9
Allison C. Lerner, Inspector General, National Science Foundation	11
Steven A. Shaw, Deputy General Counsel for Contractor Responsibility, U.S. Department of the Air Force	14

ALPHABETICAL LIST OF WITNESSES

Gordon, Hon. Daniel I.:	
Testimony	5
Prepared statement	37
Lerner, Allison C.:	
Testimony	11
Prepared statement	59
Shaw, Steven A.:	
Testimony	14
Prepared statement	68
Sims, David M.:	
Testimony	9
Prepared statement	55
Woods, William T.:	
Testimony	8
Prepared statement	45
Response to hearing question for the Record	73

APPENDIX

Letter from Ethan Treese, VP, Government Solutions, Dun & Bradstreet, dated December 1, 2011	75
GAO report titled "Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved," August 2011	77

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000003 Fmt 05904 Sfmt 05904 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

WEEDING OUT BAD CONTRACTORS: DOES THE GOVERNMENT HAVE THE RIGHT TOOLS?

WEDNESDAY, NOVEMBER 16, 2011

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Pryor, McCaskill, Collins, and Brown.

OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. Good morning. The hearing will come to order. I thank everyone for being here.

Today, we ask two vexing questions about Federal contract spending. One, why are contractors who are known to be poor performers, who have engaged in fraud or other misconduct, not being put on the Excluded Parties List System (EPLS), which would bar them from receiving Federal contracts?

And two, why are some contractors who have been placed on the list of banned contractors still taking in millions of dollars from the Federal Government?

As we show here this morning, the answers to both of these questions are unacceptable and costly for taxpayers, and that has to stop.

Sometimes I think, who was it? Was it Andy Warhol who said 15 percent of life is showing up? It was not Woody Allen, was it?

Senator COLLINS. I believe it was Woody Allen.

Chairman LIEBERMAN. It could have been Woody Allen. Let us have a show of hands. [Laughter.]

Anyway sometimes I think that some of the most effective things that we do in the Committee are to decide to hold hearings because it seems to generate reaction. I am not being critical of that. I appreciate it.

So, that is why I say that perhaps it was a coincidence, but I was very glad to hear yesterday, the Director of the Office of Management and Budget (OMB) indicated that the Office of Federal Procurement Policy was issuing new guidelines to protect taxpayer dollars from waste, fraud, and abuse by Federal contractors. I look forward to hearing more about those guidelines during this hearing.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000005 Fmt 06633 Sfmt 06633 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

Let me give some of the examples that motivates this hearing. These are factual, of course. The report issued by the Department of Defense (DOD) last month shows that over a 10-year period DOD awarded $255 million to contractors who were convicted of criminal fraud, and almost $574 billion to contractors involved in civil fraud cases that resulted in a settlement or judgment against the contractor.

Last year, the Department of Homeland Security's (DHS) Inspector General (IG) found 23 cases where the Department had canceled a contract because of poor performance but in none of those cases did DHS suspend or debar the contractor.

That means not only other DHS component agencies were at risk of entering contracts with these poor performers, but agencies across the government might obviously do the same.

After Hurricane Katrina, the Department of Justice found it necessary to set up a whole task force devoted to Hurricane Katrina fraud, and yet the Federal Emergency Management Agency (FEMA), over at least a 5-year period, never sent one name to the Excluded Parties List for a suspension or debarment. How is that possible?

The Federal Acquisition Regulation gives Federal agencies broad discretion under suspension and debarment procedures to prohibit new contracts from going to companies or individuals who perform poorly, engage in fraudulent behavior or otherwise act, if responsible.

But it is a tool that is used all too rarely, and that means that it enables millions, perhaps billions of dollars of waste, fraud, and abuse to continue.

The Government Accountability Office (GAO) issued a report last month and found that over a 5-year period the Departments of Health and Human Services (HHS), Commerce, Labor, Education, and Housing and Urban Development (HUD), as well as FEMA and the Office of Personnel Management (OPM) initiated no suspensions or debarment actions against a contractor. Zero. Most of the other Federal agencies sent 20 or fewer contractors to the Excluded Parties List.

To me, it strains the imagination to think that these agencies have not encountered more companies that have overbilled the government, engaged in fraud, or failed to perform or carry out their obligations.

But, as I said earlier, even getting on the list does not seem to guarantee that bad contractors are banned from receiving Federal contracts. For example, the U.S. Navy suspended a company after one of its employees sabotaged the repairs of steam pipes on an aircraft carrier. But less then a month later that same company was awarded three new contracts because the Navy contracting officer failed to check the Excluded Parties List.

Just last month the IG at the Department of Justice reported that over a 6-year period that department had issued 77 contracts or modifications to contracts, to six separate suspended or debarred parties.

Following the GAO report that I mentioned, the one that was issued last month, Senator Collins and I sent letters to the agencies identified by GAO as lacking the best practices that are com-

mon for those agencies that do make effective use of suspension and debarment, and we intend to monitor the response of those agencies.

Today, we are going to hear from a panel of witnesses who are advocates of more active and aggressive use of suspension and debarment programs as a way of ensuring American taxpayers are getting their money's worth from these Federal contractors.

Let me move on. This is not the first time this problem has been examined. In 1981, the Subcommittee on Oversight and Government Management, the Federal Workforce, and the District of Columbia of the then Governmental Affairs Committee, chaired by then Senator William Cohen of Maine, held a series of hearings on suspension and debarment and in words that still ring true today, Senator Cohen said, "In this time of economic crisis and huge government deficits when both Congress and the Administration are looking for equitable ways to reduce government spending, we certainly welcome this opportunity to evaluate and propose mechanisms by which the government can protect itself from dealing with proven irresponsible firms. We have to ensure that the government's investment in hundreds of millions of dollars of Federal contracts is not jeopardized because of the failure to debar undesirable contractors."

Very well said by Senator Cohen. I think as I approach my retirement I probably will be citing former Senators more often, hoping that may happen.

But those words were prescient and quite well spoken but not surprisingly because, as some of you may know, Senator Cohen was blessed with an extremely talented staff director who has remained steadfast in her commitment to see that the government takes every action necessary to protect taxpayer dollars and I now turn to that former staff director, the current Senator from Maine, Susan Collins.

OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you, Mr. Chairman.

As the ghost author of those words, I was very pleased to hear them recited today. I want to thank you for holding this hearing on this important issue.

Suspension and debarment are mechanisms by which the Federal Government protects taxpayers by avoiding the award of new contracts or grants to those individuals and businesses who have proven to be bad actors.

Debarment is automatic upon conviction of certain crimes but Federal agencies also have the authority to suspend or debar an individual or business in cases where there has not been a conviction or an indictment but there is, nevertheless, ample evidence of unethical behavior or incompetent performance.

The GAO has found that some agencies have failed for years to suspend or debar a single individual or business. For example, the GAO found that FEMA had no suspensions or debarments from 2006 to 2010, despite the fact that our Committee found numerous instances of contract waste, abuse, fraud, and nonperformance in the aftermath of Hurricane Katrina.

In FEMA's disaster housing program alone, GAO identified approximately $30 million in wasteful and potentially fraudulent payments to FEMA contractors in 2006 and 2007, which likely lead to millions more in unnecessary spending beyond this period.

In another example, the Department of Justice suspended or debarred only eight contractors from 2006 to 2010. Making matters worse, a recent Inspector General audit reveals that from 2005 to 2010, the Department actually issued 77 contracts and contract modifications to some of the exact same entities that the Department itself had suspended or debarred. I would join the Chairman in asking: How could this possibly happen?

Now, the vast majority of individuals and businesses who participate in the Federal marketplace are honest and they do their utmost to fulfill the terms of their Federal contracts. It is not fair or ethical to competent government contractors when they lose government business to those who will not perform effectively and honestly.

Our goal here is not to punish but rather to protect. Taxpayers deserve to know that Federal contracts and grants are awarded not to those who have acted dishonestly, irresponsibly, or incompetently.

Having powerful suspension and debarment tools in our arsenal does little good if they are not being used. GAO found that civilian agencies with the highest numbers of debarment and suspensions shared certain characteristics.

First, they dedicated staff full-time to the suspension and debarment process. Second, they have detailed guidance in place; and finally, they have a robust case referral process.

GAO found that the U.S. Immigration and Customs Enforcement, the General Services Administration, the Navy, and the Defense Logistics Agency are actively protecting the Federal Government from unscrupulous and habitually nonperforming contractors.

On the other hand, as the Chairman has pointed out, GAO found that the Departments of Commerce, State, Treasury, Justice, Health and Human Services, and FEMA must improve.

The failure of agencies to use their suspension authority regrettably is not a new revelation. As the Chairman has mentioned, 30 years ago as the staff director of a Subcommittee of this very Committee, I was extremely involved in oversight hearings on suspension and debarment.

Reading over the transcript of that hearing, I was struck by the exact same problems that were highlighted in GAO's recent report, especially the reluctance on the part of some agencies to exercise their suspension and debarment authority.

Today, there is even less excuse than ever given the new tools available to agencies. One such tool is the Excluded Parties List, which allows for real-time listing of all contractors who have been suspended or debarred. And since that time, the suspension or debarment at one agency generally applies to all agencies.

Since 1986, the Interagency Suspension and Debarment Committee has been established to facilitate the process of determining which agency should take the lead in suspending or debarring an unethical or incompetent entity that is doing business with more than one agency.

This GAO report must be a wake-up call to agencies that are failing to protect the interests of taxpayers. Like the Chairman, I was pleased to see that the GAO report and this hearing prompted the OMB to issue new direction to agencies to strengthen their suspension and debarment procedures.

But let us hope that this time it really will make a difference and that 30 years from now this Committee is not again holding yet another hearing examining why Federal agencies do not act more aggressively to protect taxpayers.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you very much, Senator Collins. Later we can talk about which one of our staff members we think will be a Senator 30 years from now. [Laughter.]

Anyway, I appreciate your support and work on this over the long term.

Our first witness is Dan Gordon, who is the Administrator of the Office of Federal Procurement Policy (OFPP) within OMB. I gather, Mr. Gordon, that you have announced recently that you are leaving OFPP to become an Associate Dean at George Washington University's law school. I want to take the opportunity to thank you for your service at OFPP and for your many years as an attorney at GAO.

You have really worked very hard and pushed the envelope forward in every place you have worked and I appreciate and wish you well and assume that you will be helping to train the coming generations of government contract attorneys in your new position.

Good morning.

TESTIMONY OF HON. DANIEL I. GORDON,[1] ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Mr. GORDON. Thank you, Mr. Chairman. We will be training suspension and debarment officials to be more vigorous in their actions.

Chairman LIEBERMAN. Very good.

Mr. GORDON. Chairman Lieberman, Ranking Member Collins, it is a pleasure to be here to discuss this very important topic of suspension and debarment in the procurement system.

From the start of this Administration, we have focused on being sure that we have more fiscally responsible acquisition practices. I am happy to report that we have made significant progress over these past 3 years in buying less, in buying smarter, and in rebuilding the acquisition workforce.

Our efforts have been reinforced by our commitment to increase the consideration of integrity in the award of Federal contracts and grants so that taxpayer dollars are not put at risk of waste or abuse in the hands of contractors or grantees who disregard laws and regulations and the commitments that have been made in their contracts.

Suspension and debarment, as you have both said, are very important tools in that effort. Your invitation letter asked that I provide a brief overview of the suspension and debarment procedures

[1] The prepared statement of Mr. Gordon appears in the Appendix on page 37.

and I will do that, although I must say I feel like I am speaking to two people who are very much expert and seasoned in the area. Let me try to be brief. But the request that I do a mini explanation is something that someone with somewhat professorial tendencies cannot resist.

Suspension or debarment makes an entity, whether a company or an individual, ineligible for a Federal contract or grant. As Senator Collins said, they are not meant to be punitive. They are not punishment. They are there to protect the public interest if there is a determination made that the entity is not presently responsible, that is to say, there is an intolerable risk of dishonest, unethical, or otherwise illegal conduct or that the entities simply will not be able to satisfactorily perform the responsibilities if they are given a contract or grant.

As you know Subpart 9.4 of the Federal Acquisition Regulation sets out causes for suspension or debarment but the decision to suspend or debar is a discretionary one.

As Senator Collins pointed out, suspension and debarment now apply governmentwide and it is one of the improvements over these past 30 years that we do have the Excluded Party List System that Senator Collins had a role in promoting.

It is a system that works governmentwide when it works appropriately and when we use it appropriately so that when a company or an individual is suspended or debarred by one agency, they cannot get a contract or grant from any agency.

Suspension, as you know, is a preliminary step usually taken during a review or an investigation. Debarment is typically longer, often 3 years, and occurs only after the entity is given appropriate due process, essentially a chance to defend themselves.

If I put this in terms of a cycle, I would point out the stages at which, over the past several decades, problems have developed. If someone engages in the problematic conduct, if you will, the matter may come to the attention of staff in an agency who look into possible suspension or debarment.

Agencies' inspectors general play a key role in referring cases for possible suspension or debarment and that is why I am pleased that you will be hearing from Ms. Lerner, who will be able to speak on behalf of the Council of Inspectors General on Integrity and Efficiency (CIGIE).

But whether that referral takes place has historically been one of the weak links in the system. Too often we have entities that behave illegally or whose performance is absolutely unacceptable so that their contract is terminated for default and yet they are never referred for suspension or debarment.

If there is a referral, the suspension or debarment official (SDO) may ultimately decide to suspend or debar. Where there has been criticism at that stage of the process, it is typically that it has taken us too long to investigate and then to decide so that in the interim the entity continues to get contracts and grants.

Once the entity is suspended or debarred, their name goes into the EPLS, as you have said, which is maintained by the General Services Administration (GSA).

Historically, going back several decades, we have been very bad about sharing information about suspension or debarment so that

you could have one agency award a contract to an entity where another agency had found that entity one that should be debarred or suspended.

Just before making the final decision about a contract or grant, the contracting officer, to use the procurement world's term, is required to check EPLS to see if that entity, which is about to get the contract is actually suspended or debarred.

At that stage of the process, the problem, and there have been a good number of them reported by GAO and by the IGs, is that the contracting officer fails to check EPLS or did not check late enough to get current information or there was some problem with the spelling of the name of the entity, the entity uses a different name in its offer to the government, and the result was that entity that had been suspended or debarred again gets a contract or a grant while they should not be getting them.

Because of the shortage of time, I want to sum up here and say that the bottom line, in our view, is that the procedures and the policies and the legal framework are adequate.

The problem is that the tools are not being used properly. That is why OMB issued the memorandum yesterday. This is the first step in an effort to reinvigorate this process.

We will be working with the Interagency Suspension and Department Committee, and I am pleased that Mr. Sims will be testifying shortly about the work of that committee.

We will be providing much more detailed guidance at OMB to be sure that agencies are taking the steps that GAO pointed out as characteristics of more vigorous programs.

We will be working directly with the agencies to ensure that we do, in fact, have more rigorous and more vigorous suspension and debarment actions.

Thank you. I will be happy to answer questions afterwards.

Chairman LIEBERMAN. Thanks, Mr. Gordon. That is a good beginning.

So, I take it that you are saying that there is not really a need for additional legislation here. This is really a question of implementing the current law.

Mr. GORDON. Precisely, Mr. Chairman. I like the way that the CIGIE's workforce titled their report. They use words like "do not let the tools rust."

We have tools. What we need to be sure is happening is that we are using those tools, and GAO pointed at key steps, key characteristics that we will be pushing from OMB.

Chairman LIEBERMAN. Good.

Next we will go to William Woods, who is the Director of Acquisition and Sourcing Management, a division at the GAO.

Mr. Woods has done really outstanding work for our Committee on many reports including the latest report on suspension and debarment that I referred to.

So, we thank you, Mr. Woods, and welcome you back to the Committee.

TESTIMONY OF WILLIAM T. WOODS,[1] DIRECTOR, ACQUISITION AND SOURCING MANAGEMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. WOODS. Thank you, Mr. Chairman and Senator Collins. It is a pleasure to be invited to appear before the Committee today to talk about the report that we issued on August 31 for this Committee.

Also Senator McCaskill was a co-requester on that in her role as the Chairman of the Subcommittee on Contracting Oversight.

You both have mentioned the report and summarized it accurately. Let me just cover very briefly what our three objectives were.

First of all, you asked us to take a look at the Excluded Parties List System and to see what that list consisted of.

We found that there were some 24,000 cases on that list dating back over the 5-year period that we looked at. Much to our surprise, however, at least to my surprise, not nearly all of those cases are related to Federal procurement.

In fact, a small percentage, only 16 percent, are related to Federal procurement. The other 84 percent are as a result of statutory exclusions.

For example, if someone was found to be in violation of the Clean Air Act or the Clean Water Act, there are statutory provisions that require that the entity be listed on EPLS.

Medicare fraud is another example where the Department of Health and Human Services has a very significant number of exclusions on the EPLS.

Contrast that, however, with Health and Human Services, which does a fair amount of government contracting but, as has been pointed out earlier, had zero suspensions or debarments related to Federal procurement over the 5-year period that we looked at.

You asked us also in your request to take a look at the factors that might contribute to some agencies being relatively active in the area and some agencies being relatively inactive.

And as Senator Collins pointed out, there were three factors that we found. The first was that agencies have dedicated staff. The four agencies that we found to be most active had full-time staff.

That is not necessarily required in all instances, but what we found and what we think is required is that the agencies devote sufficient resources. They can be part time. They can have other responsibilities but people need to know that suspension and debarment is their area of responsibility.

The next thing that contributed to the active programs were detailed policies and procedures. The Federal Acquisition Regulation (FAR) is quite detailed in terms of providing for the causes and the reasons why an entity might be suspended or debarred.

But what we found made a difference at the agencies with active programs is that they went beyond the guidance in the Federal Acquisition Regulation and provided additional detail to the people who were actually responsible for carrying out the functions.

They laid out the roles and responsibilities of those people. They identified the approval process within an agency. They defined the

[1] The prepared statement of Mr. Woods appears in the Appendix on page 45.

role of their counsel in terms of approving suspension and debarment proposals.

It is that kind of detail that we found separated the agencies with the active programs from the agencies with the relatively inactive programs.

And the third area that we found was an active referral process; the suspension and debarment officials worked closely with their inspectors general.

As has been pointed out, very often the contracting officers may take action against a contractor in terms of a termination for default.

In the agencies with active programs, those would get referred rather routinely to the suspension and debarment official for consideration of action at that level.

These were the three factors that separated out the active agencies from the relatively inactive agencies.

We made three recommendations in our report.

First of all, we wanted to see the six agencies with the inactive programs, take a look at those three factors and incorporate those into their programs.

We also made a recommendation to the Office of Federal Procurement Policy within the Office of Management and Budget to make those three factors known governmentwide, to use their forum to provide additional guidance to all agencies to incorporate those three provisions.

And then we also asked OMB and the Office of Federal Procurement Policy to provide some support for the interagency committee in terms of asking all agencies to cooperate with the very good work of that committee.

With that, let me stop there and I will be happy to take any questions.

Chairman LIEBERMAN. Thank you very much for all of your work on the report and your very helpful testimony.

Next we have David Sims, who is before us today as the Chair of the Interagency Suspension and Debarment Committee. He is also the debarment program manager at the Department of the Interior, previously served in the suspension and debarment office of the Environmental Protection Agency (EPA).

Mr. Sims, we welcome you to the Committee this morning.

TESTIMONY OF DAVID M. SIMS,[1] CHAIRMAN, INTERAGENCY SUSPENSION AND DEBARMENT COMMITTEE

Mr. SIMS. Thank you, Chairman Lieberman, Ranking Member Collins, and Members of the Committee. I appreciate the opportunity to appear before you today in my capacity as the Chair of the Interagency Suspension and Debarment Committee (ISDC) to offer observations on the role of the Federal procurement and nonprocurement suspension debarment's system.

I have submitted a full statement for the record, for the written record, but I would like, if I may, to summarize the testimony.

The ISDC is an interagency body that provides support for the implementation of the governmentwide system of suspension and

[1] The prepared statement of Mr. Sims appears in the Appendix on page 55.

debarment. Each of the 24 agencies covered by the Chief Financial Officers Act is a standing member of the ISDC. Also nine independent agencies and government corporations participate.

The ISDC provides an important support structure to help agencies in their debarment and suspension programs. It serves as a forum for agencies to share best practices, lessons learned, and through our monthly meetings which are well attended, to discuss issues of common interest.

We also assist agencies in efficiently identifying the appropriate agency to act as the lead on particular suspension debarment matters.

The ISDC's activities are overseen by OMB, which works closely with the ISDC to identify where refinement of current policies or practices may be needed.

The specific functions for the ISDC include encouraging and insisting Federal agencies to achieve operational efficiencies in the governmentwide, resolving issues regarding lead status and coordination among interested agencies, recommending to the OMB for consideration possible changes to the government suspension and debarment system, and reporting annually to Congress on agency debarment and suspension activities.

As has been said by Mr. Gordon, debarment is a discretionary decision by the government as a consumer of goods and services, serves the purpose of protection, not punishment. The action is forward-looking. It is prospective in application and really serves best to head off participation of problem actors in new Federal awards. It is a potent remedy for the government as a consumer, perhaps one of the most important remedies.

It is my observation, formed from experience in this debarment field spanning more than 20 years, that the rules, as currently stated, provide agencies and departments with a highly effective toolkit for the application of this remedy.

In fact, those agencies with robust programs demonstrate that the current rules provide an effective framework for protection of government procurement and non-procurement award interests. The challenge really is to ensure that all agencies have appropriate programs in place to use these tools effectively.

As chair of the ISDC, I certainly agree with the overall conclusions by GAO in its recent report on the elements necessary for an effective program. The factors that promote an active agency discretion in the suspension and debarment program are having a defined implementing guidance, practices, and procedures that encourage the referral and action-taking process, staff dedicated to do the program and commitment from upper management.

I would just add that I believe hearings such as these, IG program reviews, and efforts by OMB such as the memo that just came out today directed to agency heads are really key tools to encourage and promote effective use of this remedy and focus on it.

Additionally, in addition to commitment from upper management, a collaborative working relationship with the agencies Office of Inspector General is important. So, collectively these factors are relevant to suspension debarment programs whether they are operating under the FAR or the non-procurement rule.

The ISDC has taken a number of actions to assist agencies in suspension to debarment proceedings. Over the past 2 years, ISDC has used its collective expertise to provide to more than 10 agencies example policies and procedures, sample action documents, to aid in the development and implementation of new or strengthened existing programs.

We have also recently created a standing subcommittee to evaluate methods and opportunities for training government personnel on the suspension debarment remedy, to increase awareness of the remedy, promote its use, and provide us practices and assistance to agencies to develop robust programs.

In addition, we have evolved an informal collaborative process for the lead agency which utilizes an email notification, broadcast to the membership, that a particular agency is considering action inquiry whether another agency has an interest and setting a prompt response time.

The ISDC has this month created a workgroup to also explore and evaluate possible practical mechanical alternatives for the existing mechanism. We have also supported governmentwide efforts to enhance information systems designed to protect and strengthen the integrity of the program, particularly the GSA's effort on the Federal Awardee Performance Integrity Information System (FAPIIS), in regard to the terms of debarment program elements and working with GSA on improving the EPLS.

So, as the ISDC chair, it is my observation that the key to successful use of the EPLS is timely and accurate entrance of names on the list and use of the list by contracting and award personnel prior to award to preclude ineligible parties.

The existing rules already imposed these requirements. Compliance can be enhanced through internal management directives stressing the importance of using the list and the training of personnel, both debarment and award officials, to use the list.

We look forward to working with this Committee, other Members of Congress, GAO, and the Council of Inspectors General for Integrity and Efficiency in the ongoing efforts to strengthen the governmentwide debarment and suspension remedy.

This concludes my remarks and I am happy to answer any questions you may have. Thank you.

Chairman LIEBERMAN. Thank you, Mr. Sims. It was very helpful.

Now, we welcome Allison Lerner, IG of the National Science Foundation, and also the co-chair of the working group on suspension and debarment of the Council of the Inspectors General on Integrity and Efficiency. That is quite a title.

We appreciate your being here and helping us to hear the perspective on this problem from the IGs. Please proceed.

TESTIMONY OF ALLISON C. LERNER,[1] INSPECTOR GENERAL, NATIONAL SCIENCE FOUNDATION

Ms. LERNER. Thank you, Mr. Chairman, Ranking Member Collins, and other Members of the Committee. I appreciate this opportunity to discuss the efforts of the suspension debarment working group of CIGIE.

[1] The prepared statement of Ms. Lerner appears in the Appendix on page 59.

Steve Linick, Inspector General at the Federal Housing Finance Agency, and I are co-chairs of that working group as part of the CIGIE Investigations Committee.

As our Nation faces pressing economic challenges, it is imperative that we effectively and vigorously use every tool available to us to ensure that the billions in taxpayer dollars that go to Federal contractors, grantees, and other awardees every year are spent for their intended purposes, that unscrupulous individuals and companies are prohibited from obtaining government funding, and that hard-earned tax dollars are safeguarded.

Suspension and debarment are two key tools the government has to protect public funds. However, too often those tools go unutilized, quietly rusting away, as has been noted, in the government's toolbox.

Since its formation in June 2010, the working group has focused on raising the profile of suspension and debarment by educating the IG community about the suspension and debarment (S&D) process, by busting myths about suspension and debarment that may have impeded their use in the past and by identifying successful practices across the IG community that could be emulated by offices new to S&D so they do not have to reinvent the wheel to develop an effective referral process.

The group is also working to promote an active dialogue between Offices of Inspectors General (OIGs) suspension and debarment officials, and prosecutors as a way to enhance the overall effectiveness of the S&D process.

To increase awareness of suspension and debarment, the working group has provided training to various members within the IG community. With support from the Recovery Accountability and Transparency Board, it has also sponsored two governmentwide S&D workshops attended by approximately 750 OIG and S&D staff from 74 different agencies.

My testimony will focus on the working groups September 2011 report, which built upon information about suspension and debarment practices obtained in an informal survey of the IG community.

Mr. Chairman, the working group survey results reflected a view within the IG community that suspension and debarment could be used more frequently and more effectively.

To further the use of these important tools, our report sought to dispel three common misconceptions about S&D.

With regard to the first, some OIGs and prosecutors resist seeking suspension or debarment under the mistaken belief that pursuing such actions could compromise ongoing civil or criminal prosecutions by requiring the disclosure of sensitive investigative information.

Our report identified many ways in which contemporaneous actions can be protected while suspension and debarment are pursued. Perhaps the best way OIGs, prosecutors, and SDOs can resolve their concerns about the effect of suspension and debarment on ongoing proceedings is to engage in staff-level training and to communicate frankly and continuously regarding all evidence sharing issues.

Second, as the report notes, some agencies and OIGs mistakenly believe that suspensions and debarments must be tied to a prior judicial finding such as an indictment, civil judgment, or conviction.

In reality, actions based on facts developed through investigations, audits, or inspections are a less traveled path that can be followed to exclude non-responsible parties from doing further business with the government and may be viable options in many circumstances.

The third misconception that limits the number of S&D referrals made by OIGs is the idea that an action can only be based on facts developed during an OIG's investigation.

In reality, suspension and debarments can also arise from facts discovered during OIG audits or inspections. Because referrals of this type are uncommon, it is important to lay some groundwork to help ensure their growth and success.

In particular, focused training for auditors and inspectors on how their work can produce and support suspension and debarment opportunities would be beneficial. Our working group is working with the Investigator Training Academy to develop such training.

Our report also highlighted a number of suspension and debarment practices that could help boost the overall use and effectiveness of these tools within the IG community.

Since staffing considerations can affect how S&D referrals are undertaken, several OIGs provided information on staffing approaches they have utilized to promote the use of suspension and debarment.

Another means by which OIGs can contribute to more frequent and effective S&D use is by conducting internal audits or reviews of the efficacy of agency S&D systems, and several of those reviews have already been noted today in the discussion.

Other suggested practices include routinely reviewing investigative audit and inspection reports to identify candidates for suspension and debarment, enhancing OIG referral practices, developing strong OIG suspension and debarment policies, increasing outreach among relevant communities, providing additional training on suspension and debarment and publicly reporting data on S&D actions as a means of encouraging OIG referral and agency action.

Mr. Chairman, an agency's vigorous and appropriate use of suspension and debarment protects not just the integrity of that agency's programs but also the integrity of procurements and financial assistance awards across the Federal Government. As such, suspension and debarment are two of government's most powerful defenses against fraud, waste, and abuse.

These important tools can be used more frequently and effectively if the relevant Federal communities understand them better and are motivated to work together in using them.

Over the coming year, the working group will continue to explore ways to increase understanding of these tools and to promote communication and collaboration between all parties involved in suspension and debarment.

This concludes my statement, Mr. Chairman, and I would be happy to answer any questions you might have.

Chairman LIEBERMAN. Thanks very much, Ms. Lerner. That was very helpful.

Finally, we have Steven Shaw, Deputy General Counsel at the Department of the Air Force, acknowledged as an expert in this area of contractor and business ethics.

The Air Force, in fact, is known for having a robust suspension and debarment program. So, we are very happy you are here today, Mr. Shaw, to share your thoughts on how agencies should carry out their responsibility in this regard. Please proceed.

TESTIMONY OF STEVEN A. SHAW,[1] DEPUTY GENERAL COUNSEL FOR CONTRACTOR RESPONSIBILITY, U.S. DEPARTMENT OF THE AIR FORCE

Mr. SHAW. Thank you very much, Chairman Lieberman, Ranking Member Collins, and other Members of the Committee.

I have been the debarring official at the Air Force for 15 years; and as you noted, we do have a mature program. I recognize that there are some agencies that do not, and I am pleased to have the opportunity to address some of the features that I think make the Air Force's program perhaps unique and not just mature.

At a high level it is really three areas, and that is the referral process that the CIGIE report covers very well and we fully agree with the SDO structure, how an office should be structured to work effectively. GAO and my friend Mr. Woods covered that very well and the OFPP memorandum is welcome in that area.

The SDO policies are the area that I am going to focus more on because I think that is what makes us a little bit unique.

We, in the Air Force, do have a dedicated staff as was mentioned by the GAO report. We have three full-time attorneys at headquarters and some 10 full-time attorneys in the field that provide counsel on fraud cases and work with our office in the coordination of fraud remedies, including suspension and debarment.

We feel that we are very aggressive in the area of dealing with bad actors. But there is a flip side to that, the carrot and stick approach that we have taken, and that is, to be aggressive on the bad actors but to be proactive at the front end with the leverage that we have with this tool of suspension and debarment to encourage contractors to have risk management programs and other ethics programs to prevent fraud from happening in the first place.

So, on the aggressive side of this region, we did 367 suspensions and debarment actions last year, and so there is an average over my 15 years of perhaps 4,000 actions that I have signed in this area.

Only 5 percent of our cases last year—and that is anecdotal, it is not our data base that establishes this. But roughly 5 percent of our cases are interestingly enough from referrals.

We do 95 percent of our cases by reaching out and actively working with the field in working groups and with the Inspectors General reviewing case status reports from the Office of Special Investigations and from the DOD IG so that when we see that a case is ready for debarment, we do not wait for somebody to refer to us. We do not wait for the Justice Department to return an indictment.

[1] The prepared statement of Mr. Shaw appears in the Appendix on page 68.

We look at the case status report and we make a determination that this looks like it is ready for debarment and we will ask for the full file and then do a debarment.

Sixty-two percent of our cases are fact-based where we do not wait again for the Justice Department to make a decision. There are plenty of cases dealing with defense contractors and government contractors where there are serious problems but where the Justice Department has not finished their investigation or where the problems are below their threshold so the Department of Justice declines to intervene.

Those cases are still cases that we in the Air Force care about. Just because it is below the threshold of the Justice Department should not mean that we do not care about protecting ourselves from such contractors.

There are four broad themes that I think really defined our program and I will go over those briefly.

One is our broad view of the types of misconduct that would qualify for consideration of suspension or debarment. It is not just fraud in any government contract, and a lot of agencies focus only on that.

We are concerned with any crime that relates to business integrity, and that might be a crime that has nothing to do with a government contract. But we care about it because it is an Air Force contractor that does something wrong and that could be tax violations. It could be Foreign Corrupt Practices Act, commercial fraud.

If it is an Air Force contractor and they are committing some misconduct outside of the realm of Air Force contracting, we are still concerned about it.

Another area is contract performance as was mentioned earlier. That can be mere negligence. It does not have to have anything to do with fraud at all.

So, negligent performance of a contract can qualify for debarment, and we do debar contractors for negligent performance of contracts.

The next theme is early fact-based actions. Not only are 62 percent of the cases that we do fact-based that have nothing to do with Justice Department cases, but we do them very early. We do not wait for the Justice Department to get to the point where they are declining.

When there is a preponderance of evidence we take action. By doing that, we protect further losses to the government as well as flight safety issues. And frankly, it gets beyond the point of present responsibility determination if we wait 5 years for the Justice Department to determine at the point of the running of the statute of limitations that they are not going to take any action.

The next theme is the independence of the contracting chain. I feel very strongly about this. We are very successful in the Air Force because we are a separate entity that does not require the gatekeeper of the contracting community to refer cases to us.

We coordinate with the contracting and the acquisition community certainly, but we are independent of them and that is a result of a DOD IG report in the early 1990s that suggested that was the best way to proceed, and the Defense Department has been doing it that way since that time.

The final area is the discretion. I think it is very important to maintain the discretion of the debarring officials so that we can do such things as leverage what I mentioned earlier and help companies prevent fraud from happening in the first place.

If there are mandatory debarments that some are suggesting, then we lose the ability to be proactive and to prevent fraud from happening at the front end.

In my final moments, if I could, with the Senate's indulgence, talk about the right tools. That is a headline here of this hearing and it is slightly different from debarment and suspension but I would say in the debarment area we do have the right tools.

The FAR Subpart 9.4 is broadly worded, if debarring officials will look at it and understand how broadly worded it is. In the fraud area frankly, there are a couple of more tools that would help in this area.

One is the proceeds of fraud recoveries. This is something that has come up in the past. As you know, under current fiscal laws, the proceeds of most fraud recoveries go to the U.S. Treasury.

And that is so because the contracts are closed, are over at that point, the investigation is over and we get to look at them. So, at that point, they cannot go back to the victimized program.

So, it is very difficult to get the acquisition communities and the contracting officers excited about referring cases to us when they have to spend all of that time and effort putting together a package and finding an alternate source, and then they do not get the money to fix the problem that was caused by the bad contractor.

So, if there is a way to legislate some exception that would return the funds to the victimized agency, then we could fix the problems that were caused by the bad contractors.

The other area is the Program Fraud Civil Remedies Act (PFCRA), which was passed in 1986. I am sure you know about it. It is not used in the Defense Department. It is, frankly, not used, with maybe one exception, anywhere in the government, and that is because it is hugely cumbersome.

And it could be a great resource that would enable the agencies to recover funds that are below the Justice Department's threshold. So, there would be no way to recover those funds or impose penalties against bad contractors unless there is a mechanism like the PFCRA.

And the Defense Department has submitted as part of its next cycle legislative package a proposal to revise the PFCRA to make it workable. And I would ask your support on that.

Finally, we would look for some way, and this is probably a way that we can work out with the Justice Department, to get information about indictments that are not related to government contracts.

As I mentioned, I care about Air Force contractors committing fraud that doesn't relate to a government contract; but in many ways, many times we are not even aware of that. Export violations, Foreign Corrupt Practices Act cases.

If the agencies can be made aware of those types of violations that would not happen in a normal IG chain because the IGs are focusing on fraud in the government contract, then that would be helpful too.

That would conclude my remarks. I apologize for being over my time.

Chairman LIEBERMAN. Not at all. Thanks, Mr. Shaw. Thank you for setting the standard here and for giving some very practical suggestions. Your testimony has been excellent.

Senator McCaskill has been a real leader in this area. In fact, your name has been mentioned here, not in vain but in praise, earlier. Senator McCaskill has an urgent meeting she has to go to.

So, Senator Collins and I are happy to let her go first. We have not consulted with Senator Pryor and Senator Brown but they are both so widely acknowledged as being good guys that I am sure they will not object.

Senator McCaskill.

OPENING STATEMENT OF SENATOR MCCASKILL

Senator MCCASKILL. They are good guys, and thank you both very much.

It came to my attention, the scope and breadth of this problem, when I found out about a soldier that was killed in Iraq by a negligent truck driver for one of our contractors. He was run over and killed. No question it was negligence on the part of the truck driver of the company.

There was a lawsuit brought by his family to try to have their day of justice in the United States, and this contractor fought jurisdiction and refused to submit to the jurisdiction of the United States of America even though they were being paid by the United States of America and had killed one of our soldiers through their negligence.

That obviously made me angry, but I will tell you what really upset me is that we kept doing business with them.

And so, that is when I realized we had a real problem with suspensions and debarment; and the Wartime Contracting Commission looked at this extensively.

It seems to me, and if anybody disagrees with any of these four reasons, I would love to get your input, that suspension and debarment officials are afraid of litigation; that it is, second, too much trouble; that third, some of these contractors are "too big to fail"; and four, it is not clear who is accountable for failure to suspend or ban from contracting.

Does anybody disagree with those four as the primary reasons that we are so bad at suspensions and debarments?

[No response.]

Senator MCCASKILL. OK.

Mr. SHAW. Well, I would disagree as applied to the Air Force. But I think your questioning is about why we are bad at other agencies in suspension and debarment; and I really do not have an opinion about other agencies. But I do not think any of those are the case for the Air Force certainly.

Senator MCCASKILL. And you are good at contracting and you are good at suspensions and debarment. We have to figure out what the deal is there because the Air Force is also much better at contract oversight.

We have used you extensively to try to cross-pollinate any other branches. So, my congratulations to the Air Force.

What about mandatory suspension for criminal activity. The Wartime Contracting Commission backed off of this recommendation. I think deterrence for other contractors is really important, and I understand that it allows leverage to get better behavior out of contractors.

But should we not, just as a matter of character of our Nation, say if you are indicted—like Halliburton was for bribery in Africa—for criminal activity in connection with your government contracting activities, that you are done with us?

Should we not just make that a rule? Is that not just a good standard for us to have?

Mr. Gordon.

Mr. GORDON. Senator McCaskill, we very much want to keep bad actors from getting contracts. We agree with that. There are, as Mr. Woods pointed out, mandatory triggers, statutory violations—like the Clean Air Act and the Clean Water Act—that do make you ineligible.

But it seems to us that it undermines the role of the suspension and debarment official to say we are taking away your discretion. We are deciding that no matter what you have done to correct the problem, no matter what remedial measures you have taken you are going to be automatically suspended or debarred. That does not strike us as a good solution.

Senator MCCASKILL. Well, I get the point you are making, Mr. Gordon, but I guess my problem is if that is criminal activity? I do not mean just indicted but convicted of criminal activity in association with contracting, to me it seems like if we do not send the word out that if you do not work hard enough on your internal controls, because I get it that, at large, the company may not know that they have a bad guy working for them in some country across the ocean.

On the other hand, they have not exercised controls adequately and should there not be an ultimate penalty if somebody is actually conducting criminal activity because there are lots and lots, I mean, if you look at the Project on Government Oversight (POGO) database on all of the misdeeds, most of those falls short of criminal activity.

So, there is plenty of room for discretion in debarment without criminal activity. But we are drafting legislation to enact all of the Wartime Contracting Commission recommendations. They backed off on this mandatory suspension issue, as you all know.

I think it is a mistake to back off on the mandatory suspension. Is there not enough discretion with all the hundreds of other cases that are not being addressed right now that we could easily deal with the ones where there is criminal convictions?

Anybody else besides Mr. Gordon? Mr. Shaw.

Mr. SHAW. I wonder whether a good balancing on that might be a mandatory referral of such cases to the debarring official perhaps within a designated period of time.

I mean, any case like that certainly should be looked at by a suspending and debarring official. Any termination for default, frankly, should be looked at by the debarring and suspending official.

But I really think you have to continue to have that discretion. What if it is entirely a new management? What if the conviction

is misconduct that happened 7 or 8 years ago and there is an entirely new structure now?

I mean, you need to be able to encourage companies to fix the problem; and if there is mandatory debarment, I do not know that you have that encouragement.

Senator MCCASKILL. Well, to me, if we are going to overreach, it seems to me we should overreach by cleaning this problem up. I am sympathetic to the discretion argument but having seen so many instances where no one even lifted a finger to go after these folks, it is just hard for me to think that we are going to get serious about this if we do not have some lines in the sand. It seems to me criminal activity is a logical place to begin that.

Mr. GORDON. If I could suggest, Senator McCaskill, there was a provision in some of the appropriations bills right now that would talk about mandatory suspension or debarment, and we in the Administration made a suggestion that might address your concern.

And that is, there would be automatic suspension or debarment unless the agency made a determination that there were particular circumstances so that there would be a presumption. It would address your concern but you would still retain the ability for the agency to say this is a special case.

Senator MCCASKILL. I want to thank all of you, and I want to particularly thank the two Senators for allowing me to do this. It is very nice of you to defer.

This is a great hearing and we have to stay on this because this is part of the contracting debacle that is a lack of accountability. I mean, some of these folks that were bad actors got performance bonuses as you well know in Iraq and Afghanistan, which is really enough to make a taxpayer lose the top of their head from anger. Thanks.

Chairman LIEBERMAN. Thanks, Senator McCaskill. Thanks for your leadership in this area.

We talked earlier about the guidance that OMB Director Jack Lew issued yesterday and it included the direction that each agency appoint a senior official to review the agency's program.

But one matter that the guidance did not address is where the suspension and debarment function should be placed in an agency, and we just heard Mr. Shaw describe how being independent from the acquisition chain, he feels, empowers him to make the right decisions to protect the Air Force.

As I hear it, I think in essence it removes a conflict of interest—the kind of situation where there may be a natural reluctance by an acquisition person to take action against someone to whom they have just rewarded a contract.

So, I wanted to ask the other witnesses what they think. Should the suspension and debarment official in each of the agencies, under the guidance of Director Lew yesterday, be separate from the acquisition functions? Mr. Gordon.

Mr. GORDON. Several thoughts, Mr. Chairman. One, I should say right away that the Air Force has what in many ways is a role model of a suspension and debarment program and much of that credit goes to Mr. Shaw and his staff.

I appreciate the point about independence. I would approach it with care. I would point out, for example, that the GAO's report did

not cite independence as a criterion, and they did point, as you know, to three other characteristics. So, they did not actually say that independence is needed to get an effective program.

The issue of conflict of interest, I can understand the point but I am a little bit skeptical. Contracting officers make responsibility determinations, as you know, before they award every single contract.

They have to decide—it is their job—whether the contractor is responsible. I do not understand why they would be allowed to do that if it was viewed as a conflict of interest. I think it is their job to protect taxpayer funds. I think that there may be agencies where independence works.

But as we in OMB work to put together much more guidance because that is our next step in this, as we work to put together more detailed guidance, I want to carefully consider independence and see if it makes sense as a step that could help this process work better. We need to find steps to make this process work better.

Chairman LIEBERMAN. Do any of the others, Mr. Woods?

Mr. WOODS. Well, as Mr. Gordon pointed out, we did not find the organizational placement of the suspension and debarment officials to make a difference; and in fact, we found a wide range of situations.

Some of the suspension and debarment officials were part of the acquisition organization and that seemed to work well at some agencies, and some had more remote connection to the acquisition functions and that seemed to work just as well as those that had connection with the acquisition community.

Chairman LIEBERMAN. Mr. Sims.

Mr. SIMS. I would also agree and speaking personally from my experience over 20 years in the field that I think the critical thing is that agencies—and all agencies are organized differently—have a structure in place and the positioning of the function in such a way that information can be gathered efficiently and sent forward to the debarring official and the debarring official has sufficient objectivity.

It can work in many fashions. At EPA, for example, where I was before the Department of the Interior, we had a separate debarring official. At Interior, we have a robust problem that we have put in place. The debarring official is the Senior Procurement Executive; but as the senior procurement executive, the debarring official has responsibility not just for procurement debarments but also for non-procurement debarments. I know some other agencies have multiple debarring officials keyed to their various programs.

But I think the critical point is not so much where it is located but rather that there is a structure in place for an active, effective program.

Chairman LIEBERMAN. Ms. Lerner.

Ms. LERNER. Our CIGIE report did not assess this issue; but as an Inspector General, I certainly know that the independence that I have to do my work enables me to do my best work.

So, I recognize, based on what these three gentlemen to my right have said, that there is not likely a one-size-fits-all answer to this. But, I would certainly commend studying independence as a factor, as OMB moves forward in this area.

Chairman LIEBERMAN. That is interesting. Mr. Shaw, do you want to respond because there is some respectful dissent from what seems to work at the Air Force, or part of what works?

Mr. SHAW. Yes. I think it is important at the Air Force, and frankly I do not see why it would not be important elsewhere. There is one department that comes to mind that had no debarment or suspensions last year and the debarring official was a contracting person, and the reason for no debarment or suspensions was stated as being that there were not any bad contractors, that they do a good job of selecting the contractors at the front end.

And I think that is what I meant about the independence. It is not truly a legal conflict of interest but, as you said, it is a conflict of interest type of issue where in the gray areas you are going to be viewing the contractor in a more favorable light.

Certainly, contracting officers, when there is clear fraud, are going to refer it but it is not so clear in the gray areas.

Chairman LIEBERMAN. Understood. I thank you for that.

Ms. Lerner, I wanted to ask you this question. One of the interesting takeaways from the survey that CIGIE of IGs was that audit findings rarely form the basis of suspensions and debarments.

I was surprised by that because obviously audits often uncover a pattern of overbillings to the government. Was there discussion or has there been discussions in your CIGIE working group of coming up with guidance for the IGs on when they should make referrals to the suspension and debarment officials based on audits?

Ms. LERNER. We have not talked about establishing guidance per se. We have certainly recommended, as the best practice, the idea of examining all audits; and, in fact, some of the offices that we cited as having strong practices look at all audit, inspection, and investigation reports to see if there is evidence to refer.

So, one of the areas that we did focus on was strengthening the process for reviewing our own work and making appropriate referrals to agencies.

Chairman LIEBERMAN. Were you surprised about this result?

Ms. LERNER. About the fact that there are so few audit referrals?

Chairman LIEBERMAN. Yes.

Ms. LERNER. Not really. I think this goes back to education and understanding the tool. This tool has really been viewed as something in the investigator's toolkit.

Chairman LIEBERMAN. Right.

Ms. LERNER. And when you read the regulations, it is obvious that it is not something that is limited to investigators.

Chairman LIEBERMAN. Sure.

Ms. LERNER. So, that is one of the reasons that we are very strong on more training for the IG community because the more our people understand the elegance of the suspension and debarment process the more opportunities that I think they will see for it. And that will increase the number not just of investigative referrals, but of audit and inspection referrals.

Chairman LIEBERMAN. I urge you to continue that emphasis on that education. My time is up on this round. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

Mr. Woods, in your report you found that six out of the ten agencies reviewed lacked the characteristics of a successful suspension and debarment program.

Of those six, which responded the most favorably to your recommendations and which agency was the most negative as far as adopting your recommendations?

Mr. WOODS. Well, the one that comes most readily to mind in terms of a favorable response would be the Department of Homeland Security, generally.

We picked two subcomponents at DHS specifically, one with an active program, Immigration and Customs Enforcement (ICE), and also FEMA, which, as you pointed out, had virtually no suspension and debarment activities.

But the Department of Homeland Security took our findings to heart as well as the findings of their own Inspector General, which had recently concluded some work in the area. They have elevated the suspension and debarment function to the department level and they have a senior official who is now in charge overall of making those decisions.

So, the Department of Homeland Security really stands out in that area.

Senator COLLINS. And the low-lying departments?

Mr. WOODS. I am not sure there is any particular agency that stands out.

Senator COLLINS. Let me help you. [Laughter.]

It is my understanding that the Department of Justice initially responded to your reports saying that it did not plan to make changes. Is that accurate?

Mr. WOODS. That is correct. We pointed out that we thought that their policies and procedures were not nearly as robust as we found at some of the other agencies and they frankly disagreed with that.

And we pointed out that, although they believe that their policies and procedures were adequate, when one looks at them they merely mirror what is in the Federal Acquisition Regulation, and that is not enough to really invigorate the process and to have people understand what their roles and responsibilities are.

So, we disagree with the Department of Justice on that point.

Senator COLLINS. Do you believe that the Department of Justice is operating under the impression that there needs to be a conviction before they can proceed with a suspension and debarment?

Mr. WOODS. We did not get that sense from the department.

Senator COLLINS. I am trying to figure out why the department is the laggard in this area. Let me ask you another question. If the department does not improve its procedures and does not adopt the recommendations, what impact do you believe it will have on the department's ability to ensure that it is not doing business with bad actors?

Mr. WOODS. We think having good policies and procedures is critical to the process. So, we would be concerned about their ability to really step up in this area absent sound policies and procedures.

Senator COLLINS. Thank you.

Mr. Shaw, an issue that has been brought to my attention is that at times an entity will be suspended or debarred, but then it will change its corporate form or its corporate name and attempt to do

business as a new kind of business but it has the same principals and the same bad actors.

Is there a way that we can guard against a suspended firm simply changing its shape, adopting a new name, and then being able to secure Federal work?

Mr. SHAW. That is the most difficult problem in this area frankly, and we are very aggressive on that when we learn about it. The contracting community is usually very helpful. They figure that out. Often times they will see a bid coming in from the same fax number with a different name or something like that.

When we learn about it obviously we debar them again with a much longer period of time but we also refer it to the Justice Department for criminal prosecution because that kind of case, I mean, if somebody is going to totally ignore the system, that is the only remedy.

And we have been successful and the Justice Department has been successful in getting convictions in those areas.

Senator COLLINS. If you have any suggestions for us on how we can do a better job of preventing that from happening—it sounds like you are on the alert for it and because you follow up aggressively with the Justice Department and with a longer debarment, you send out a message of deterrence.

And the other entity that we found has been trying to do those is the Recovery Accountability and Transparency Board, which is working with Dun & Bradstreet to try to prevent this from happening.

But if you have suggestions, I would welcome them. I think the Committee would welcome them because I do believe this is a problem.

Mr. SHAW. Yes, I would be happy to provide follow-up with that.

Senator COLLINS. Thank you. That would be very helpful.

Ms. Lerner, I wanted to ask you a question about your report. You stated that 69 percent of the respondents to your survey reply that their IG never made referrals based on audits and inspections.

Now, I realize that not every IG office has an inspection component, but that still seems like an extraordinarily high number. I would think the IGs would be a very common source of referrals toward suspension and debarment.

So, in your judgment, what is the cause of this? Is it due to a lack of knowledge or concern that it is going to take too many resources? What is the problem here?

Ms. LERNER. As we noted in our report, I think there are multiple causes. As I mentioned to the Chairman, education is the first. People do not understand these tools.

There are misconceptions about them that I outlined and that we are trying to work against. They think that they are only for investigators and that they can only come as a result of prior judicial action. That is not the case.

So, we are working to make sure that our broader community understands, and we have done training for the principals at CIGIE. We have trained Assistant Inspectors General for investigators.

We went to the Federal Audit Executive Council, which is all of our audit executives, and we are talking about suspension and de-

barment and making sure that they understand that it is for them too.

I took my head of audits with me to the Federal Law Enforcement Training Center (FLETC) and took the week-long course there so that he would understand and he could push out to his folks that this is something that not just the investigators can do, but auditors can do also.

So, we are really working to educate and motivate our broader community on how this tool can be used.

Senator COLLINS. Thank you.

Chairman LIEBERMAN. Thanks, Senator Collins. I have a few more questions.

Mr. Woods, let me ask you, since the GAO report effectively recommended the guidance Mr. Lew issued yesterday, if you have any specific reaction to that guidance.

Mr. WOODS. We have not had a chance to study that yet.

Chairman LIEBERMAN. Good enough. When you do let me ask you for the record if you could submit a reaction to it.

Mr. WOODS. We would be delighted to look at it and submit that for the record.[1]

Chairman LIEBERMAN. Good.

I want to pick up on a question from the DHS IG report that you referred to which found that DHS seemed to be reluctant to use suspension and debarment against poorly performing contractors because they feared it would negatively impact the size of the contract or pool.

So while that is a practical result, it seems totally unacceptable to allow bad performers to continue to bid just so you increase the size of the contract pool.

Mr. Gordon, have you seen that at all in your work in other departments?

Mr. GORDON. I am not sure if I know of specific examples, Mr. Chairman, but I will tell you that it is, in my opinion, intolerable that a company gets, for example, terminated for default but yet they are not immediately referred for potential suspension or debarment. That should be as obvious a referral as a conviction for a crime.

We need to crack down on the poor performers. That is this fact-based area where you do not actually have a conviction but they are performing terribly.

We need to go beyond just waiting to see if there is a criminal action against the company and take action. I have not seen good data so I cannot tell you how widespread the problem is but I will tell you that for most of these problems, and my colleagues on the panel have pointed it out, training is often the biggest gap, whether it is training for contracting officers, for the people in the IG shop, or other investigators, we need to improve training, and that is why we have been working both with the Defense Acquisition University and the Federal Acquisition Institute to be sure that we are getting better training about these tools.

[1] Mr. Woods' response to the question from Chairman Lieberman appears in the Appendix on page 73.

Chairman LIEBERMAN. Let me ask you about the use of information technology. Earl Devaney, who I am sure most of you know, was appointed to lead the Recovery Accountability and Transparency (RAT) Board—which has really one of the most noteworthy acronyms in my long involvement, the RAT Board—set up to do oversight of the spending under the American Recovery and Reinvestment Act—the stimulus spending.

They have been aggressive users of data put together by Dun & Bradstreet to find connections between companies that have received the stimulus money and companies that had been debarred, and I was struck. I thought about it because of the reference to some cases where contracts were let to companies that had been suspended or debarred simply because the contracting officer had not checked the list.

Is there not a way we can fit this into the system so that it does not happen, that they have to go through some kind of information technology (IT) filter before a contract is awarded?

Mr. Gordon.

Mr. GORDON. Mr. Chairman, it is interesting that the IT systems, which were meant to be helping us, sometimes actually are not helping us as much as they should.

In terms of Dun & Bradstreet and the Data Universal Numbering System (D-U-N-S) Numbers, we are in the midst right now of exploring the whole issue of the way D-U-N-S Numbers work.

The unfortunate thing is that if an entity has been suspended or debarred under one D-U-N-S Number but they submit a bid with a different D-U-N-S Number, we are liable not to know about it when we check EPLS.

We just worked with GSA who issued a "sources sought" to see if there might be a different way to do the contractor identification. And we at OMB are looking into a broader review because we have situations where, whether it is checking for suspension or debarment or for that matter past performance, you need to be able to get a full picture of what is going on and not one artificially limited by these numbers.

Chairman LIEBERMAN. Senator McCaskill referred briefly to the too-big-to-fail syndrome. In this case presumably that agencies are reluctant to suspend or debar large companies because even though there is a risk to the government in having money in the hands of those contractors based on their records, the agencies are dependent on them for goods and services.

And I just wanted to invite any of you to add on to that. First off, is that real? And second, what can we do about it? I mean, you used the word "intolerable" in the situation I described a moment ago and I might add the same adjective to this.

If somebody is a proven bad actor, no matter how big they are, they ought to suffer some punishment. I correct myself that the purpose here is not punishment but to protect the government and the taxpayers, and it is hard to protect against somebody who has already cheated you once.

Mr. Gordon, do you want to start it?

Mr. GORDON. Sure. I am happy to start although I am sure my colleagues on the panel will have further thoughts.

I have never seen good data but it is certainly the word on the street that if you look at EPLS you are going to find companies and individuals you have never heard of, and you will not see the very big corporations there.

I do not know that the cause of that is what it sounds like. I am not sure it is a too-big-to-fail. It could well be that large sophisticated contractors, (A) in fact have systems in place to protect their behavior, but (B) when there are problems, they address the problems promptly, or (C) they reach settlements with suspension or debarment officials like Mr. Shaw so they never end up on the EPLS.

It does not mean that we are not paying attention. I would want to see much better data before I drew conclusions that someone was too big to fail and, therefore, we did not pay attention to their problem.

Chairman LIEBERMAN. That is interesting. Mr. Woods, what do you think?

Mr. WOODS. There are some examples of large contractors appearing on the suspension and debarment list but frankly they are few and far between.

Chairman LIEBERMAN. Right.

Mr. WOODS. But I think Mr. Gordon put his finger on some of the reasons why that happens. We have other work under way looking at some of the internal audit activities of the large contractors, and one walks away from that work being somewhat impressed, actually very impressed, with the level of oversight, internal oversight that major corporations have. They do not want to be suspended and debarred and they want to take every step to make sure that their procedures are working at the largest contractors.

Chairman LIEBERMAN. Right. So they have their resources also obviously to afford to do that.

Mr. WOODS. Absolutely. And they have their own robust procedures in place to guard against this because they know the consequences.

And based on some work we did a number of years ago, companies of that size will often enter into administrative agreements with the agencies, with the suspension and debarment officials, who very much want to bring these companies in line, not necessarily because they are dependent on them but they want to maintain competition. They want companies that are interested in serving the government, and it is in their interest to have the companies reform themselves and to enter into administrative agreements short of a suspension and debarment to make sure that happens.

Chairman LIEBERMAN. Thanks. Mr. Sims, do you want to add anything?

Mr. SIMS. Yes. I would also agree with what was said by Mr. Gordon and Mr. Woods, and would like to build on that. Problems are caused by people. Large corporations have the capacity to deal with that. One of the factors in terms of looking whether debarment is appropriate, whether the respondent has distanced himself from the problem is have you taken appropriate disciplinary action.

Large corporations can certainly do that in addition to institutionalizing appropriate corporate governance provisions.

I think it is important certainly to take actions against people, individuals as well as the businesses, when you are entering into debarment action because you can certainly, under the rules, impute conduct; for example, to individuals who are the problem. You can act in that way to isolate them from going out on their own, going to other organizations.

But beyond that, in terms of individuals, smaller entities, mom and pop organizations, tend to be where the closer the problem person is to the control of the organization the harder it is for that business or the individual—where they continue to be in control of the organization—the harder it is for them to demonstrate that they have done something to say that they should not now be considered a risk to the government.

Chairman LIEBERMAN. It make sense. Ms. Lerner.

Ms. LERNER. Because our work was looking at the IG community, we did not see any impact of the too-big-to-fail issue on the IG community as a whole.

Chairman LIEBERMAN. Thank you. Mr. Shaw.

Mr. SHAW. Thank you, Mr. Chairman.

I have a little bit of a problem with the premise because the Air Force has, of course, suspended Boeing. We had Boeing's three launch units suspended for a 20-month period.

We suspended it for some period of time due to its improper conduct under an Air Force contract. We have engaged with BAE Systems, which is the second-largest defense contractor, in a proactive way that helped them fix the company. It was not a debarment because I did not have sufficient evidence at that time.

So, we do address that. There are fewer big companies than there are small companies so in some sense an analysis of the EPLS is going to kick out more small companies than large companies.

But I think the important point here is that I am really able to do that with another level of independence I think not just independence from the contracting community but I am independent from the waiver authority that determines whether a company or a widget that is made by a company is essential for national security. And I think that is a terrific set up in the Air Force.

There are a lot of other agencies that do it differently. But because of that, I am empowered to do the right thing, to debar or suspend a company if that is necessary to protect the government's interest without considering, we coordinate, but without being hung up on whether we really need that product because I know there is somebody else in the Air Force that will make that judgment.

Chairman LIEBERMAN. Excellent. Thank you. Senator Collins.

Senator COLLINS. Thank you, Mr. Chairman.

Mr. Gordon, you mentioned that you thought that legislation is not necessary because the tools are out there. On the other hand, if we have a major department like the Department of Justice refusing to follow GAO's recommendations and adopt more effective means to go after contractors who should be debarred or suspended it raises the question in my mind about whether there should be a legislative mandate.

I will also say that my experience of having had a very similar 2-day hearing 30 years ago with exactly the same kinds of issues makes me wonder if we should have acted back then to pass legislation.

So, I guess I would ask you. What would be the harm, as long as we kept debarment and suspension discretionary, with requiring that every agency of a certain size have dedicated staff, have agency-specific policies, and an active referral process? In other words, statutorily mandate the GAO recommendations.

Mr. GORDON. Senator, I will say that in preparing for this hearing, I got a chance to read through some of the materials about your work back then in the MCI, Inc., matter and others.

And I was, on the one hand, impressed; on the other hand, it is somewhat discouraging to see that we have not made enough progress. So, I certainly share your points there.

I would want to see the draft legislation. We would want to look at the draft legislation. I do think that what GAO described was actually not recommendations because they also made recommendations that we will be considering.

But what they described were characteristics and the characteristics are a bit tricky. From my point of view, what you need is a push from the top and a push from the center that this is serious and needs to be done.

If I could share with you, we have had conversations with the agencies including, I should tell you, the Department of Justice about this matter. I have personally engaged in those conversations.

We need to make progress. I do not want to be at that hearing 30 years from now, I do not know about everybody else here, but we need to make progress.

I will tell you also that the Department of Justice reported to me that there has been an increase in their cases over the last 12 months. It did not yet get picked up in the GAO report because of the period they were looking at.

But they fully understand that the Office of Management and Budget will pursue this. That said, if there were draft legislation, obviously we would be happy to look at it especially if it were along the lines of GAO's described characteristics.

Senator COLLINS. Thank you. I think that is something that we should take a look at because it is discouraging to see such uneven progress over the years.

Mr. Shaw, another blast from the past for me was when you mentioned the Program Fraud Civil Penalties Act because I was involved in writing that also as a staffer. I think it passed in the mid-1980s, as I recall. I think you said 1986.

Mr. SHAW. I think so.

Senator COLLINS. And I remember Senators Carl Levin and Bill Cohen being the primary authors of that.

I just want to tell you that I look forward to your recommendations on how we could make it work better because that was intended to be a vigorous tool that could be used with administrative law judges, as I recall, and to avoid having to go through the judicial system on some of these small dollar cases where the Justice Department is just never going to pursue them.

So, I just, on a personal note, wanted to tell you that while I am discouraged to learn that we did not fix the problem, I look forward to your recommendations on how we might do so.

Mr. SHAW. Maybe by way of a preview of coming attractions, I mean, the concept would be that the debarring officials would be the deciding people in a DOD test program because the debarring officials would have the fact pattern for other reasons and we would have focused on it and it would be then a more streamlined approach.

Senator COLLINS. Thank you.

You know, when we are talking about debarment and suspension, the other aspect which I think is not well understood is that its purpose is to protect the taxpayer. It is to protect government. It is to ensure that we are not doing business with bad actors, whether they are unethical or unable to perform.

It is not really to punish the contractor. I am sure contractors feel punished as a result, but it really is to protect the integrity of the procurement system.

And one part of this that is so frustrating to me is when an unethical or an incompetent contractor wins a bid that means that the honest, good performer did not get the bid. And that is what is really frustrating in this. That is one reason this is so important.

Ms. Lerner, since you are an Inspector General with the National Science Foundation (NSF), I want to end my question period with a question to you.

When people think about debarment and suspension to the extent that they know about it, they think in terms of contracts for goods and services. They do not think in terms of grants.

And since you are the IG for the National Science Foundation, which issues a lot of grants, I think it is important that we talk about that aspect of that because there are grant recipients that runaway with the money or fail to perform or default on their obligations too. It is not just the contractor.

People think in terms of defense contractors. They might think in terms of Medicare fraud, but they do not think in terms of grants. So, are we doing enough in the area of grants?

Ms. LERNER. Well, I can speak for NSF, and we have had a pretty robust process for suspending and debarring our recipients, who are primarily grantees.

I looked back through the year 2000, and we have actively pursued debarment. Since the year 2000, we have racked up a total of close to 60 debarments in that timeframe, which for an agency of our size is substantial.

As I pointed out, we have learned, and I have learned a lot since taking on the leadership role on the Council, and one of the things I learned was that we should be out there suspending people more.

Since we have started doing this work, we have racked up nine suspensions last year alone, and that is an active tool that we are using.

I also lead the research misconduct working group for CIGIE, and that is one of the tools that we will use to get word out to the grant community that this is something that we can do as well. Again more education, more outreach, better understanding, and better results.

Senator COLLINS. I suspect that your experience is unusual because you personally are so committed and I think we need to look at the National Institutes of Health (NIH), at other agencies that do major grant awards to see whether there really is the kind of accountability that is necessary, and again here it is a matter if a grant goes to a researcher who turns out to be a fraud, that is money that could have gone to a researcher who would advance our knowledge of how to cure Alzheimer's, diabetes, or cancer, and that is why I feel so strongly that we need to be taking a harder look at the grant side too, and I suspect that it is due to your personal commitment and leadership that you have such an extraordinary record at the NSF. But that is something I hope we can look a little more into.

Mr. Sims, you were nodding during this so I might give you the last word.

Mr. SIMS. I would certainly agree with the observations, Senator Collins, that it is important to use the non-procurement rule as well.

I think one thing to remember, though, because these are really procedure rules and due to reciprocity when you act under the contract rule, you also protect for purposes of debarred persons being rendered ineligible for non-procurement purposes as well and vice versa.

Some agencies elect to act under the non-procurement role because, in many respects, it has some advantages over the FAR and more flexibility.

Some agencies use both. At the Interior Department we used both rules as it appears appropriate with the understanding that when we do that we are actually providing protection, in both directions, procurement and non-procurement.

Senator COLLINS. Thank you.

Mr. Chairman, thank you so much for holding this hearing. It is a very long-held interest of mine and now that you have pointed out how long I had been around working on this issue I hope we can work on some legislation with the help of OFPP and our wonderful panel here and look forward to seeing the program fraud civil remedies amendments as well and also look at the grant side.

Chairman LIEBERMAN. Well said. Thank you, Senator Collins. I do want to state for the record that when you worked for Senator Cohen you were extremely young.

Senator COLLINS. I wish. [Laughter.]

Chairman LIEBERMAN. This has been an excellent hearing. This is not only a panel that is informed and has helped to inform the Committee but, you are on the job and—I was about to be pejorative, Mr. Gordon—except for Mr. Gordon, who is leaving, the rest of you are going to continue on the job in your various capacities and I know you will continue to pursue aims that are shared by this Committee.

We really do wish you good luck and thank you again, Mr. Gordon, for your service.

Mr. GORDON. Thank you.

Chairman LIEBERMAN. I agree with Senator Collins. We are going to take a look at whether additional legislation is necessary along the lines that she has discussed.

In the meantime, the implementation of existing law is critically important, and you are there to make that happen. We are not going to let this one go. We really intend to continue very active oversight.

So, we thank you for your testimony today and for your continuing work in this area, which is really important to confidence in the government, not to mention the specific saving of taxpayer dollars.

We are going to keep the record of the hearing open for 15 days for any additional questions and statements.

With that, we thank you.

The hearing is adjourned.

[Whereupon, at 10:43 a.m., the Committee was adjourned.]

APPENDIX

United States Senate
Committee on Homeland Security and Governmental Affairs
Chairman Joseph I. Lieberman, ID-Conn.

Opening Statement of Chairman Joseph Lieberman
"Weeding Out Bad Contractors: Does the Government Have the Right Tools?"
Homeland Security and Governmental Affairs Committee
November 16, 2011
As Prepared for Delivery

Good morning, the hearing will come to order. Today we ask two vexing questions about federal contract spending.

One: Why are contractors known to be poor performers or who have engaged in fraud or other misconduct not being put on the Excluded Parties List, which would bar them from receiving federal contracts?

And two: Why are some contractors who have been placed on the list of banned contractors still taking in millions of dollars from the federal government?

As we shall hear this morning, the answers to both of these questions are unacceptable and costly for taxpayers and that has to stop.

Woody Allen said 90 percent of life is showing up and sometimes I think that one of the most effective things we do in the Committee is to hold hearings that generate attention. Perhaps it was a coincidence, but I was very glad to hear yesterday the Director of OMB indicate that the Office of Federal Procurement Policy (OFFP) was issuing new guidelines to protect taxpayer dollars from waste, fraud, and abuse by federal contractors and I look forward to learning more about those guidelines during this hearing.

Let me give some examples that motivated this hearing.

A report issued by the Department of Defense just last month shows that over a 10-year period, DOD awarded $255 million to contractors who were convicted of criminal fraud; and almost $574 billion to contractors involved in civil fraud cases that resulted in a settlement or judgment against the contractor.

Last year, the Department of Homeland Security's Inspector General found 23 cases where the Department had cancelled a contract because of poor performance, but in none of those cases did DHS suspend or debar the contractor.

That means that not only were other DHS component agencies at risk of entering contracts with these poor performers, but agencies across the government might obviously do the same.

After Hurricane Katrina, the Department of Justice found it necessary to set up a whole task force devoted to Katrina fraud. And yet FEMA, over at least a five-year period, never sent one name to the Excluded Parties List for suspension or debarment.

340 Dirksen Senate Office Building, Washington, D.C. 20510
Tel: (202) 224-2627 Web: http://hsgac.senate.gov

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000037 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.001

How is that possible?

Federal Acquisition Regulation gives federal agencies broad discretion under suspension and debarment procedures to prohibit new contracts from going to companies or individuals who perform poorly, engage in fraudulent behavior, or otherwise act irresponsibly.

But it is a tool that is used all too rarely and that enables millions– perhaps billions – of dollars of waste, fraud or abuse to continue.

The Government Accountability Office issued a report last month that found that over a five year period, the Departments of Health and Human Services, Commerce and Labor, Education, Housing and Urban Development, as well as FEMA and Office of Personnel Management initiated no suspensions or debarment actions against a contractor – zero!

Most other federal agencies sent 20 or fewer contractors to the Excluded Parties List.

To me, it strains the imagination to think that these agencies have not encountered more companies that have overbilled the government, engaged in fraud, or failed to perform or carry out their obligations.

But, as I said earlier, even getting on the list doesn't seem to guarantee that bad contractors are banned from receiving federal contracts. For example, The U.S. Navy suspended a company after one of its employees sabotaged the repairs of steam pipes on an aircraft carrier.

But less than a month later, that same company was awarded three new contracts because the Navy contracting officer failed to check the Excluded Parties List.

Just last month, the IG at the Department of Justice reported that over a six-year period, that Department had issued 77 contracts, or modifications to contracts, to six separate suspended or debarred parties.

Following the GAO report that I mentioned, Senator Collins and I sent letters to the agencies identified by GAO as lacking the best practices that are common to those agencies that do make effective use of suspension and debarment and we intend to monitor the response of those agencies.

Today we will hear from a panel of witnesses who are strong advocates of more active and aggressive use of suspension and debarment programs as a way of ensuring American taxpayers are getting their money's worth from these federal contractors.

This isn't the first time this problem has been looked at. In 1981, the Subcommittee on Oversight of Government Management of this Committee, then the Governmental Affairs Committee, chaired by then Senator William Cohen of Maine, held a series of hearings on suspension and debarment and in words that still ring true today, said:

"In this time of economic crisis and huge Government deficits, when both Congress and the administration are looking for equitable ways to reduce Government spending, we certainly welcome this opportunity to evaluate and propose mechanisms by which the Government can protect itself from dealing with proven irresponsible firms.

"We have to insure that the Government's investment in hundreds of millions of dollars in Federal contracts is not jeopardized because of the failure to debar undesirable contractors."

Very well said by Senator Cohen. I think as I approach my retirement I will be quoting former senators more often. Those words were prescient and well-spoken, but not surprising, because as some of you may know Senator Cohen was blessed with an extremely talented staff director, who has remained steadfast in her commitment to see that the government takes every action necessary to protect taxpayer dollars. And I now turn to that former staff director, the current Senator from Maine, Susan Collins.

Opening Statement of Senator Susan M. Collins

Weeding Out Bad Contractors:
Does the Government Have the Right Tools?

Committee on Homeland Security
and Governmental Affairs
November 16, 2011

★ ★ ★

Suspension and debarment are mechanisms by which the federal government protects taxpayers by avoiding the award of new contracts or grants to those individuals and businesses who have proven to be bad actors. Debarment is automatic upon conviction of certain crimes, but federal agencies also have the authority to suspend or debar an individual or business in cases where there hasn't been a conviction or an indictment, but there is, nevertheless, ample evidence of unethical behavior or incompetent performance.

The GAO has found that some agencies have failed for years to suspend or debar a single individual or business. For example, the GAO found that FEMA had no suspensions or debarments from 2006 to 2010, despite the fact that our Committee found numerous instances of contract waste, abuse, fraud, and non-performance in the aftermath of Hurricane Katrina.

In FEMA's disaster housing program alone, GAO identified approximately $30 million in wasteful and potentially fraudulent payments to FEMA contractors in 2006 and 2007, which likely led to millions more in unnecessary spending beyond this period.

In another example, the Department of Justice suspended or debarred only eight contractors from 2006 to 2010. Making matters worse, a recent Inspector General audit reveals that, from 2005 to 2010, the Department actually issued 77 contracts and contract modifications to some of these same entities the Department itself had suspended or debarred. I join the Chairman in asking, "How could this possibly have happened?"

The vast majority of individuals and businesses who participate in the federal marketplace are honest and do their utmost to fulfill the terms of their federal contracts. It is not ethical or fair to competent government contractors when they lose government business to those who will not perform effectively and honestly.

Our goal here is not to punish, but rather to protect. Taxpayers deserve to know that federal contracts and grants are not awarded to those who have acted dishonestly, irresponsibly, or incompetently.

Having powerful suspension and debarment tools in the arsenal does little good if they are not being used. GAO found that civilian agencies with the highest numbers of suspensions and debarments shared certain characteristics. First, they dedicated staff full-time to the

72557.003

suspension and debarment process. Second, they have detailed guidance in place. And finally, they have a robust case referral process.

GAO found that the U.S. Immigration and Customs Enforcement, the General Services Administration, the Navy, and the Defense Logistics Agency are actively protecting the federal government from unscrupulous and habitually non-performing contractors. On the other hand, as the Chairman pointed out, GAO found that FEMA, HHS, Commerce, State, Treasury, and Justice must improve.

The failure of agencies to use their suspension authority regrettably is not a new revelation. As the Chairman mentioned, thirty years ago, as the Staff Director of a subcommittee of this very Committee, I was extremely involved in oversight hearings on suspension and debarment. Reading over the transcript of those hearings, I was struck by the exact same problems highlighted in GAO's recent report, especially the reluctance on the part of some agencies to exercise their suspension and debarment authority.

Today, there is even less excuse than ever, given the new tools available to agencies. One such tool is the Excluded Parties List which allows for a real-time listing of all contractors who have been suspended or debarred. And, since that time, the suspension or debarment at one agency generally applies to all agencies. And since 1986, the Interagency Suspension and Debarment Committee has been established to facilitate the process of determining which agency should take the lead in suspending or debarring an unethical or incompetent entity that does business with more than one agency.

This GAO report must be a wake-up call to agencies who are failing to protect the interests of the taxpayers. Like the Chairman, I was pleased to see that the GAO report and this hearing prompted OMB to issue new direction to agencies to strengthen their suspension and debarment procedures. Let us hope that this time, it will make a difference and that, thirty years from now, this Committee is not holding yet another hearing examining why federal agencies are not acting more aggressively to protect taxpayers.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

STATEMENT OF
THE HONORABLE DANIEL I. GORDON
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

November 16, 2011

Chairman Lieberman, Ranking Member Collins, and members of the Committee, I appreciate the opportunity to appear before you today to discuss the role of suspension and debarment in our federal acquisition system. As guardians of the taxpayers' dollars, our agencies have an ongoing responsibility to make every possible effort to do business with contractors who place a premium on performance and quality and not do business with firms who are proven bad actors. Having an effective suspension and debarment program is one of a number of tools that agencies must have at their disposal in order to maximize the return on every dollar spent and deliver a higher quality of service to the American people.

From the start of the Administration, it has been a priority to make sure agencies apply fiscally responsible acquisition practices that cut contracting costs and better protect taxpayers from cost overruns and poor performance. During the prior Administration, contract spending exploded but contract management and oversight capacity were not strengthened to keep up with that demand. As a result, agencies struggled to hold contractors accountable. The President's March 2009 mandate to improve federal procurement practices has instilled a new sense of accountability in agencies. While the work must continue, there has been a sharp turn toward increased accountability and there are clear signs of progress.

- **We have stopped uncontrolled contract spending**. In FY 2010, spending on federal contracting decreased for the first time in 13 years – by nearly $15 billion when compared to the amount spent in the prior year and $80 billion less than what would have been spent had contract spending continued to grow at the same rate it had under the prior Administration. As agencies complete the validation of their contract data covering the past fiscal year, we expect it will show that FY 2011 spending remained near the FY 2010 lower levels.

- **We are buying smarter**. As part of the White House Campaign to Cut Waste, we have reformed the way the government buys everyday commodities, such as office supplies and overnight delivery services, so that we are – finally – leveraging the federal government's purchasing power as the world's largest customer to deliver a better value for the American taxpayers. Increased use of government-wide contracts for these requirements saved nearly $30 million for domestic delivery services and $18 million for office supplies in FY 2011.

Our savings from strategic sourcing will grow larger as agencies across the government pool their resources for print management services, wireless plans, and software licenses.

- **We are buying more from small businesses.** In FY 2010, the federal government awarded nearly $100 billion in government contracts to small businesses, which is equivalent to 22.7% of total eligible dollars. This marks the largest two-year increase in over a decade and the second consecutive year of increases after three years of decline. Even more opportunities will open up as we unveil new small business buying tools and modernize existing ones. These actions are enabling agencies to reap the benefits of the innovations and skill that small businesses bring to the federal marketplace. And when we do buy from small businesses, we are making sure that they get paid faster. Earlier this fall, the Office of Management and Budget (OMB) issued a memorandum directing agencies to begin accelerating payments to small business contractors. Agencies have already begun to implement this policy, cutting the time in which they pay small businesses by up to half in many cases. This is getting money back in the hands of small businesses faster, improving their cash flow and allowing them to reinvest funds in their business.

- **We are paying closer attention to our large and complex projects, particularly in the IT sphere.** Consistent with our "Myth-Busters" campaign to increase and improve communication with vendors, agencies are working to conduct more open communication with industry before a solicitation is issued to better understand how the marketplace can meet our needs. In addition, new guidance issued by the Office of Federal Procurement Policy (OFPP) has provided agencies with a roadmap to establish specialized acquisition cadres that can concentrate on information technology buys and the challenges unique to this critical class of acquisitions. OMB and the agencies have conducted "TechStats" to diagnose the causes of underperforming IT projects and get them back on track, and "AcqStats" to identify opportunities for systemic improvements in the acquisition process for IT and other investments.

- **We are stepping up accountability.** We have given our contracting officers a new tool – the Federal Awardee Performance and Integrity Information System (FAPIIS) – to provide them with broadened access to information about the integrity of contractors – including suspensions and debarments, contract terminations, and contractor disclosure of adverse criminal, civil and administrative actions – so that they can more easily determine whether a company is playing by the rules and has the requisite integrity to do business with the government. Additionally, we have continued to make concerted efforts to address the issue of contractors receiving federal contracts notwithstanding tax delinquencies, and have increased the amount collected from contractors owing tax debt – more than $110 million in FY 2010. And, we are tracking spending at the subcontractor level on USASpending to ensure unprecedented transparency.

Each of these steps is being reinforced by an overall strengthening of the acquisition workforce, the foundation of our acquisition system. For too long, federal agencies focused so much on the process of awarding contracts that they neglected what must come before and after

contract awards, good acquisition planning and effective contract management. Agency human capital plans for the acquisition workforce have been developed to give particular attention to acquisition planning and contract management skills and now, after years of inattention, we are restoring the capacity of contracting staff to plan effectively and negotiate aggressively, and building the capability of those responsible for contract management, including program and project managers and contracting officer's representatives (CORs), to ensure vendors meet their contractual promises.

We are now on a path for achieving real and sustained improvement – but there is more we must do to rebuild confidence in our acquisition system and achieve consistently good results for our taxpayers. In order to take accountability to the next level, we must focus on strengthening our suspension and debarment procedures so that taxpayer dollars are not put at risk in the hands of bad actors. We must ensure that agencies are properly positioned to give appropriate consideration to suspension and debarment as tools to fight waste and abuse. Suspending or debarring entities can help to protect taxpayers from the risk of awarding contracts to entities that are not presently responsible, whether because of having been convicted of fraud or other criminal or civil offenses indicating a lack of business honesty or integrity, or otherwise behaving unethically, or of having a track record of poor performance of government-funded work. The system works, however, only if we are willing and able to suspend or debar entities when we shouldn't be doing business with them, and if all agencies check to be sure they are not awarding a contract to an entity that has been suspended or debarred.

This morning, I would like to briefly review the policy framework for suspension and debarment. I will then discuss efforts by OMB to help agencies take more effective advantage of these tools.

Understanding the role of suspension and debarment in contracting

The Federal Acquisition Regulation (FAR) has, for many years, laid out policy and procedures for suspension and debarment. The FAR specifies numerous causes for suspension and debarment, including fraud, theft, bribery, tax evasion, or lack of business integrity. At the same time, the FAR makes clear that the existence of one or more of these causes does not require an agency to suspend or debar the contractor and cautions that suspension and debarment are to be used only to protect the public's interest in ensuring that taxpayers do business with contractors who are presently responsible (that is, contractors that have the integrity and business ethics to work for our taxpayers), and not to punish prior contractor misconduct. Accordingly, an agency must consider the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors, such as disciplinary action taken by the contractor or new or stronger internal control procedures that it has instituted. The FAR further cautions that agency actions must be consistent with principles of fundamental fairness, which includes providing notice and an opportunity to respond before a debarment is imposed.

These basic policies and procedures remain sound. The discretion that the FAR provides to agencies in deciding if suspension and debarment are necessary and appropriate enables the

agency's suspension and debarment official to consider mitigating circumstances and encourages contractors to change their business processes to prevent future misconduct. Ensuring administrative due process – that is, notice and an opportunity to respond – promotes fairness and has been a key reason why courts have shown deference to the decisions of agency suspension and debarment officials in response to legal challenges.

That said, for too long many agencies failed to maintain the most basic program capabilities required to suspend or debar non-responsible contractors and grantees, or fail to adequately utilize the suspension and debarment tools that are placed at their disposal. The FAR holds each agency responsible for prompt reporting, investigation, and referral to the suspension and debarment official of matters appropriate for that official's consideration, and the FAR anticipates each agency establishing procedures for these purposes that suit the specific agency's situation, including, for example, the extent of contracting that the agency conducts. Without appropriate action by each contracting agency, the suspension and debarment process cannot adequately protect taxpayer funds.

Under this Administration, we have brought long overdue improvements to the suspension and debarment function at agency after agency, as detailed below. This reflects our concern, as noted by GAO in the report it issued recently, that a good number of agencies still lack the characteristics common among active and effective suspension and debarment programs – namely, dedicated staff resources, well-developed internal guidance, and processes for referring cases to officials for action. Clearly, we cannot allow inaction and inattention put our taxpayers at unnecessary risk of waste, fraud, and abuse.

To address these concerns, this Administration has taken a series of concrete steps, of which I would like to highlight two here: (1) OMB is requiring agencies to increase management attention on suspension and debarment and review internal policies and practices in this area and (2) we are strengthening the Interagency Suspension and Debarment Committee (ISDC). In both of these efforts, OFPP has been working closely with the Office of Federal Financial Management (OFFM), and the actions described below apply to both the procurement and non-procurement communities.

Requiring agencies to increase management attention on suspension and debarment

As a next step in our accountability efforts, OMB is asking agencies, in particular those subject to the Chief Financial Officers Act, to take a number of actions consistent with suspension and debarment policies in Subpart 9.4 of the Federal Acquisition Regulation (addressing procurement activities) and 2 CFR Subtitle A, Part 180 (addressing non-procurement activities) to establish and/or maintain active suspension and debarment programs. These actions include the following:

- Appointing a senior accountable official, if one has not already been designated, to be responsible for assessing the agency's suspension and debarment program, the adequacy of available resources (including, where appropriate, full-time staff) and training, and

maintaining effective internal controls and tracking capabilities, taking into consideration the agency's mission, organizational structure, and level of procurement and grant-making activities. The accountable official may be the agency's suspension and debarment official.

- Reviewing internal policies, procedures, and guidance as necessary to ensure that suspension and debarment are being considered and used effectively, whenever appropriate, to protect the Government's interests and taxpayer funds, and have been coordinated with other remedies available to the government that are designed to ensure potential recipients have the requisite business integrity to receive Federal funds before an award is made.

- Ensuring that relevant databases and other information sources are reviewed by the agency award official(s) prior to the award of any Federal grants, contracts, or benefits.

- Where the agency learns that a Federal contract or grant was improperly awarded to a suspended or debarred entity, taking prompt corrective action, including appropriate action regarding the specific award and establishment of systemic controls and procedures to prevent recurrence.

This direction adopts – and goes beyond – the recommendations in GAO's report. We should point out that what we are doing government-wide is consistent with steps that a number of agencies have already taken to strengthen their suspension and debarment functions. For example:

- The Department of the Interior (DOI) has implemented a debarment program with dedicated positions in its Office of Inspector General and a full-time debarment program manager in the Office of Acquisition and Property Management to assist the suspension and debarment official. The new program has developed and implemented enhanced program practices and procedures for case initiation and resolution and created an electronic case management tracking system for tracking suspension and debarment actions. From FY 2009 through FY 2011, DOI took 115 suspension and debarment actions, including the Department's first use of administrative agreements to resolve exclusions while providing the Department with effective oversight over a contractor's performance.

- The United States Agency for International Development (USAID) has ramped up its efforts to root out contractors who waste valuable agency resources needed to support our foreign assistance programs. The agency has established a new Compliance and Oversight for Partner Performance ("COPP") Division of dedicated staff who work in close coordination with the agency's Office of Inspector General and Office of General Counsel to track partner performance and ensure that appropriate and timely action is taken by both headquarters offices and field missions when non-compliance or ethical violations are identified. USAID has also created a Suspension and Debarment Task Team, led by the Deputy Administrator, to provide senior-level guidance on high-profile administrative actions. In FY 2011 alone, USAID has taken more than 60 suspension or debarment actions – more than double the number of actions taken in the prior seven years combined.

- In recent years, the National Aeronautics and Space Administration (NASA) has significantly increased its suspension and debarment actions, as a result of its Acquisition Integrity Program in the Office of the General Counsel, which addresses issues and potential remedies related to procurement and non-procurement fraud. Between 1996 and 2007, NASA debarred 18 contractors. Since 2008, NASA has proposed for debarment over 50 contractors and debarred, suspended, or voluntarily excluded 40 contractors during this time period. This past August, NASA updated its agency regulatory procedures regarding suspension and debarment in its FAR Supplement. This action was taken to ensure that suspension and debarment is being considered and used effectively to protect the Government's interests, to simplify the process for making a referral for possible suspension and debarment action to the NASA Suspending and Debarring Official, to ensure quality and consistency in the consideration of entities for suspension and debarment, to outline the roles and responsibilities of the Acquisition Integrity Program attorneys and the Office of Procurement personnel in the suspension and debarment process, and to address the review process for eligibility determinations when prospective contractors certify or represent the existence of indictments, convictions, or judgments.

- The Department of Transportation (DOT) put a new framework in place that requires the operating administrations to take action within 45 days of notification of an action that would warrant possible suspension or debarment, and implements a new data collection system that will help the senior management of the Department monitor the performance of suspension and debarment offices.

- The Small Business Administration (SBA) has ramped up efforts to remove bad actors from its small business programs and ensure that the benefits of small business contracting programs go to the intended communities. The agency has devoted greater staff resources and employee training to promote suspension and debarment actions, and, working in close coordination with the Office of Inspector General, has significantly increased suspension and debarment of dishonest contractors. Some of the results have been publicly reported, and we are confident that contractors have taken note. For example, pending full investigation by the Agency's Office of Inspector General, SBA suspended a major government contractor and two small businesses based on evidence that they had knowingly violated small business contracting laws.

We recognize that these instances of progress need to be replicated government-wide. That is why, as recommended by GAO, OMB will be issuing government-wide guidance to help agencies bolster their suspension and debarment practices as they review their current programs to ensure that taxpayer dollars are protected.

Strengthening the ISDC

The ISDC, which is overseen by OMB, serves as a forum for agencies with respect to policy and procedure regarding suspension and debarment actions taken in connection with

either procurement or non-procurement activities. It provides an important support structure to help agencies implement their debarment and suspension programs and facilitates sharing of best practices and lessons learned. In addition, the ISDC assists in coordinating suspension and debarment actions among agencies to facilitate their government-wide effect when two or more agencies have an interest in initiating suspension or debarment proceedings pertaining to the same contractor. This coordination process enhances the efficiency of the suspension and debarment process by helping agencies avoid needlessly expending funds for duplicative actions or working at cross-purposes.

As GAO noted, the ISDC's effectiveness as a support structure and coordinating body is tied to the willingness of agencies to support its activities. For this reason, we are directing each CFO Act agency to actively participate in the ISDC. The new Chairman of the ISDC, David Sims, also serves as the Suspension and Debarment Program Manager at DOI and, in this capacity, as noted above, he built an active debarment program at the Department that can serve as one possible blueprint for other agencies to follow.

In a special OMB-led session of the ISDC last month, OMB and agencies exchanged ideas for how the ISDC can better leverage its resources and talents, and a number of suggestions were raised at that meeting that have led to decisions about actions going forward. In addition to supporting OMB in the development of government-wide guidance, the ISDC will now take a more active role in ensuring effective training. A new standing subcommittee will focus on reviewing available training courses and creating new training as necessary. They will seek to ensure that training is delivered in a manner that meets the different needs of contracting agencies and the various stakeholders who have roles in the suspension and debarment process, including personnel in suspension and debarment offices, contracting offices, inspector general offices, and legal offices. A separate ISDC subcommittee will continue to address the tracking and reporting of information so the procurement and grants communities can better understand how suspension and debarment are being used and identify where refinement of current policies or practices might be beneficial. This past summer, the ISDC issued the first comprehensive government-wide report on suspension and debarment activities. The new Chairman has already begun working with ISDC members to improve the type of information collected from agencies for future reports, in order to create a better baseline against which to measure progress, with respect to the important issues of resources, internal agency controls, and training efforts.

Conclusion

As stewards of the taxpayers' dollars, we are responsible for ensuring that agencies are achieving the best results possible from their contractors. As my tenure as OFPP Administrator draws to a close, I look back with great pride on the achievements of the acquisition workforce over the past two years in eliminating waste and getting better value for our taxpayers – by buying less, buying smarter, reducing unnecessary risk from contracts, increasing opportunities for small business contractors, and strengthening the workforce's ability to negotiate better deals and hold contractors to their promise of delivering on time and on budget. I have great

confidence that my OFPP colleagues, along with our colleagues in OFFM, our agency acquisition professionals, and grants officers, will sustain and build on this progress, by strengthening their suspension and debarment programs to deal with non-responsible contractors and grantees.

I thank the Committee for its leadership and support during my tenure and look forward to seeing the continued improvements that will be made to our federal acquisition system through the collaborative efforts of this Committee, other members of Congress, OMB, and our procuring agencies.

This concludes my remarks. I am happy to answer any questions you may have.

United States Government Accountability Office

GAO

Testimony
Before the Committee on Homeland Security and Governmental Affairs, U.S. Senate

For Release on Delivery
Expected at 9:00 a.m. EST
Wednesday, November 16, 2011

SUSPENSION AND DEBARMENT

Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved

Statement of William T. Woods, Director
Acquisition and Sourcing Management

U.S. Government Accountability Office
GAO 90 YEARS 1921-2011
ACCOUNTABILITY * INTEGRITY * RELIABILITY

GAO-12-245T

Mr. Chairman and Members of the Committee:

I am pleased to be here to discuss the Federal government's use of suspensions and debarments. In 2010, spending on contracted goods and services was more than $535 billion. To protect the government's interests, federal agencies are required to award contracts only to responsible sources—those that are determined to be reliable, dependable, and capable of performing required work. One way to do so is through the use of suspensions and debarments, which are actions taken to exclude firms or individuals from receiving contracts or assistance based on various types of misconduct. The Federal Acquisition Regulation (FAR) prescribes overall policies and procedures governing the suspension and debarment of contractors by agencies and directs agencies to establish appropriate procedures to implement them. This flexibility enables each agency to establish a suspension and debarment program suitable to its mission and structure.

Even though the FAR specifies numerous causes for suspensions and debarments, including fraud, theft, bribery, tax evasion, or lack of business integrity, the existence of one of these does not necessarily require that the party be suspended or debarred. Agencies are to establish procedures for prompt reporting, investigation, and referral to the agency suspension and debarment official. Parties that are suspended, proposed for debarment, or debarred are precluded from receiving new contracts, and agencies must not solicit offers from, award contracts to, or consent to subcontracts with these parties, unless an agency head determines that there is a compelling reason for such action.

On October 6, 2011, we publicly released a report that addresses (1) the nature and extent of governmentwide exclusions reported in the Excluded Parties List System (EPLS) maintained by the General Services Administration (GSA); (2) the relationship between practices at selected agencies and the level of suspensions and debarments under federal acquisition regulations; and (3) governmentwide efforts to oversee and coordinate the use of suspensions and debarments across federal

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000050 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.014

agencies.[1] My statement will highlight the key findings and recommendations of our report.

We analyzed data for fiscal years 2006 through 2010 for all agency actions reported in EPLS to identify (1) suspension and debarment actions taken under the FAR; (2) suspension and debarment actions taken under the Nonprocurement Common Rule (NCR), which covers grants and other assistance; and (3) other exclusions. To provide information on the level of agency activity, we aggregated related actions, such as those involving affiliates and related parties, to identify the number of cases. We used cases to provide a common comparison among the agencies, even though a case may include separate actions for an individual, a business, and each affiliate and entail dedication of resources and the potential for separate representation by a party's counsel and separate resolution. We assessed the reliability of EPLS data by performing electronic testing, reviewing system documentation, and interviewing knowledgeable officials about data quality and reliability. We determined that the data were sufficiently reliable for the purpose of this review.

We also reviewed a mix of 10 agencies from among all agencies having more than $1 billion in contract obligations in fiscal year 2009. These agencies included the Defense Logistics Agency (DLA), the Department of the Navy (Navy), GSA, and the Department of Homeland Security's (DHS) U.S. Immigration and Customs Enforcement (ICE)—all of which had relatively more cases involving actions taken under the FAR than other agencies—as well as the Departments of Commerce (Commerce), Health and Human Services (HHS), Justice (Justice), State (State), and the Treasury (Treasury), and DHS's Federal Emergency Management Agency (FEMA)—all of which had relatively few or no suspensions or debarments under the FAR. At these 10 agencies, we focused on certain attributes of the suspension and debarment process, including the organizational placement of the suspension and debarment official, staffing and training, guidance, and the referral process, including triggering events.

[1] GAO, *Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved*, GAO-11-739 (Washington, D.C.: Aug. 31, 2011).

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000051 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.015

In addition, we met with officials from the Office of Federal Procurement Policy which provides overall direction of governmentwide procurement policies, including suspensions and debarments under the FAR; officials at the Interagency Suspension and Debarment Committee (ISDC); the Council of the Inspectors General on Integrity and Efficiency's (CIGIE) Suspension and Debarment Working Group; and GSA. We also met with or obtained information from suspension and debarment and inspector general officials at the 10 selected agencies. Our work was performed in accordance with generally accepted government auditing standards.

Suspension and Debarment Cases Make Up a Small Percentage of All Exclusions in the Govermentwide Database

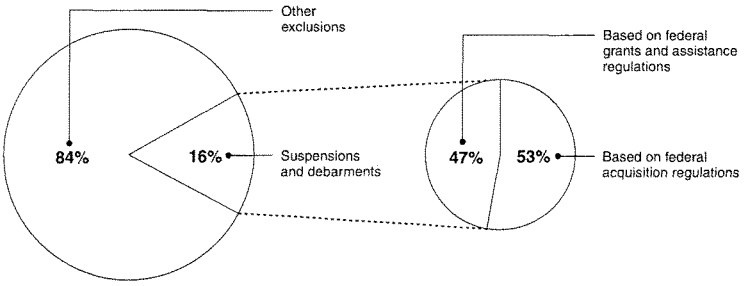
For fiscal years 2006 through 2010, about 4,600 cases—about 16 percent of all cases in EPLS—involved suspension and debarment actions taken at the discretion of agencies against firms and individuals based on any of the numerous causes specified in either the FAR or NCR, such as fraud, theft, or bribery or history of failure to perform on government contracts or transactions. Such cases generally result in exclusion from all federal contracts, grants, and benefits. About 47 percent of suspension and debarment cases were based on the NCR, which covers federal grants and assistance, with the Department of Housing and Urban Development accounting for over half of these grant and assistance–related cases. The other 53 percent of suspension and debarment cases were based on causes specified in the FAR and related to federal procurements.

During this same time period, about 84 percent—or about 24,000 of the approximately 29,000 total cases reported in EPLS—were other exclusions based on a determination that the parties had violated certain statutes or regulations. For example, prohibited conduct, such as health care fraud, export control violations, or drug trafficking, can result in an EPLS listing. In these types of cases, once an agency with the designated authority has determined that a party has engaged in a prohibited activity, such as fraudulently receiving payments under federal health care programs, or violating export control regulations, the law generally requires that the party be declared ineligible for specified government transactions or activities. Although most other exclusions are based on violations that are not related to federal procurements or grants, the party is excluded from some or all procurement and nonprocurement transactions as set out in the statute. HHS, Justice, and Treasury recorded the most other exclusion type cases. Figure 1 shows the basis of all EPLS cases for fiscal years 2006 through 2010.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000052 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.016

Figure 1: Basis of EPLS Cases, Fiscal Years 2006 through 2010



Source: GAO analysis of EPLS data.

The number of suspension and debarment cases related to federal procurement varied widely among departments or agencies over the last 5 fiscal years as shown in Appendix I. DOD accounted for about two-thirds of all suspension and debarment cases related to federal procurements with almost 1,600 cases. Of all the agencies, almost 70 percent had fewer than 20 suspension and debarment cases related to federal procurements. Six agencies—HHS, Commerce, and the Departments of Labor, Education, and Housing and Urban Development and the Office of Personnel Management—had no such cases over the last 5 fiscal years.

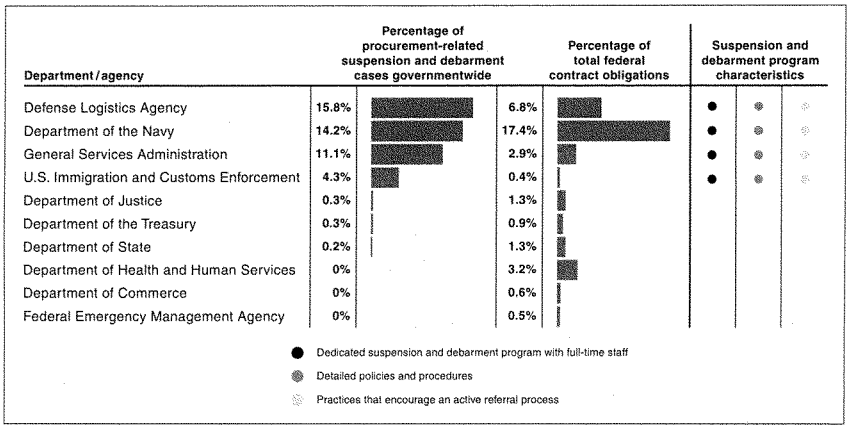
Agencies with Most Suspension and Debarment Cases Share Common Characteristics Missing at Agencies with Few Cases

While each agency suspension and debarment program we reviewed is unique, the four with the most suspension and debarment cases for fiscal years 2006 through 2010—DLA, Navy, GSA, and ICE—share certain characteristics. These include a dedicated suspension and debarment program with full-time staff, detailed policies and procedures, and practices that encourage an active referral process, as shown in figure 2.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000053 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.017

Figure 2: Analysis of Selected Agency Contract Obligations, Procurement-Related Suspension and Debarment Cases for Fiscal Years 2006 through 2010, and Program Characteristics



Source: GAO analysis of Federal Procurement Data System-Next Generation, EPLS data, and agencies' procedures and guidance.

Officials from the four agencies stated that having dedicated staff cannot be accomplished without the specific focus and commitment of an agency's senior officials. ISDC officials also stated that without dedicated staff, none of the other essential functions of an agency suspension and debarment program can be carried out.

Each of the top four agencies has also developed agency-specific guidance that goes well beyond the suspension and debarment guidance in the FAR. This generally included guidance on things such as referrals, investigations, and legal review. Several of the reports we reviewed by inspectors general and others regarding agency suspension and debarment programs cited the importance of agency-specific, detailed policies and procedures to an active agency suspension and debarment program.

In addition, each of the four agencies engages in practices that encourage an active referral process. The FAR directs agencies to refer

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000054 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.018

appropriate matters to their suspension and debarment officials for consideration, and it allows agencies to develop ways to accomplish this task that suit their missions and structures. According to agency officials when senior agency officials communicate the importance of suspension and debarment through their actions, speeches, and directives, they help to promote a culture of acquisition integrity where suspension and debarment is understood and utilized by staff.

The remaining six agencies we studied—HHS, FEMA, Commerce, Justice, State, and Treasury—do not have the characteristics common to the four agencies with the most suspension and debarment cases. Based on our review of agency documents and interviews with agency officials, none of these six agencies had dedicated suspension and debarment staff, detailed policies and guidance other than those to implement the FAR, or practices that encourage an active referral process. These agencies have few or no suspensions or debarments of federal contractors.

Governmentwide Efforts to Oversee Suspensions and Debarments Face Challenges

ISDC, established in 1986, monitors the governmentwide system of suspension and debarment. More recently, the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009[2] strengthened the committee's role by specifying functions ISDC was to perform.

When more than one agency has an interest in the debarment or suspension of a contractor, the FAR requires ISDC to resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension or debarment by any agency. According to ISDC officials, ISDC relies on voluntary agency participation in its informal coordination process, which works well when used. However, not all agencies coordinate through ISDC.

Likewise, in part because it could not compel agencies to respond to its inquiries, ISDC took almost 2 years to submit its required annual report to Congress on agencies' suspension and debarment activities. According to ISDC representatives, only about half of the member agencies responded to the initial request for information needed for the report. These officials also noted that their limited resources to devote to

[2]Pub. L. No. 110-417, § 873 (2008).

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000055 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.019

committee responsibilities further delayed the report. Consequently, ISDC issued its first report on June 15, 2011, covering both of the reports required for 2009 and 2010.[3]

ISDC's coordination role concerning the governmentwide suspension and debarment system also has faced other challenges. ISDC holds monthly meetings for members as a forum to provide information and discuss relevant issues, but according to ISDC representatives, agencies without active suspension and debarment programs generally are not represented at these meetings. In addition, ISDC officials noted that the committee does not have dedicated staff and depends on limited resources provided by member agencies, particularly the agencies of the officials appointed as the Chair and Vice-Chair. According to the Chair and Vice-Chair, they do committee work in addition to their primary agency responsibilities, using their own agencies' resources.

Other efforts are under way across government to improve coordination of suspension and debarment programs. CIGIE's Suspension and Debarment Working Group—formed in the summer of 2010—promotes the use of suspension and debarment as a tool to protect the government's interest. The CIGIE working group is taking steps to raise awareness, including sponsoring training and advising the inspector general community about other training opportunities. GSA has begun an effort to improve EPLS by consolidating and simplifying the codes agencies use to identify the basis and consequences of exclusions, referred to as cause and treatment codes. According to a GSA official, the goal of the EPLS effort is to consolidate the codes into categories that clearly define the effect of a listing.

[3]Interagency Suspension and Debarment Committee, *Report on Federal Agency Suspension and Debarment Activities* (Washington, D.C.: June 15, 2011).

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000056 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.020

GAO Recommends that Agencies Take Actions to Improve Suspension and Debarment Programs and Government Oversight

Suspensions and debarments can serve as powerful tools to help ensure that the government protects its interests by awarding contracts and grants only to responsible sources. Some agencies could benefit from adopting the practices we identified as common among agencies that have more active suspension and debarment programs. Because agency missions and organizational structures are unique, each agency must determine for itself the extent to which it can benefit from adopting these practices. However, one point is clear: agencies that fail to devote sufficient attention to suspension and debarment issues likely will continue to have limited levels of activity and risk fostering a perception that they are not serious about holding the entities they deal with accountable. Additionally, the suspension and debarment process could be improved governmentwide by building upon the existing framework to better coordinate and oversee suspensions and debarments. As acknowledged by officials at the Office of Federal Procurement Policy, agencies would benefit from guidance on how to establish active suspension and debarment programs and how to work more effectively with ISDC.

In summary, we recommend that several agencies take steps to improve their suspension and debarment programs ensuring that they incorporate the characteristics we identified as common among agencies with more active programs, including

- assigning dedicated staff resources,
- developing detailed implementing guidance, and
- promoting the use of a case referral process.

We also recommend that the Administrator of the Office of Federal Procurement Policy issue governmentwide guidance to ensure that agencies are aware of the elements of an active suspension and debarment program and the importance of cooperating with ISDC.

Overall, the agencies concurred or generally concurred with our recommendations. In its comments, Justice stated that its existing guidelines are sufficient, but we do not agree. Several other agencies noted that they are taking actions to incorporate the characteristics we identified as common among agencies with more active programs.

Mr. Chairman and Members of the Committee, this concludes my statement. I would be pleased to respond to any questions that you or other members of the Committee may have.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000057 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.021

Appendix I

Table 1: EPLS Suspension and Debarment Cases by Agency and Contract Obligations, Fiscal Years 2006 through 2010

Department/agency[a]	Contract obligations (in billions of dollars)	Suspension and debarment cases related to[b]		Total suspension and debarment cases
		Federal procurement	Grants and other assistance	
Department of Defense	$1,776.20	1,592	24	**1,616**
Department of Energy	129.70	82	0	**82**
Department of Health and Human Services	80.15	0	29	**29**
General Services Administration	73.44	269	0	**269**
National Aeronautics and Space Administration	72.56	41	1	**42**
Department of Homeland Security	70.79	116	8	**124**
Department of Veterans Affairs	69.00	4	11	**15**
Department of State	33.20	6	1	**7**
Department of Justice	31.97	8	3	**11**
Department of Agriculture	25.55	3	105	**108**
U.S. Agency for International Development	24.36	18	18	**36**
Department of the Treasury	23.67	8	1	**9**
Department of Transportation	23.41	11	193	**204**
Department of the Interior	23.04	94	10	**104**
Department of Commerce	14.10	0	0	**0**
Department of Labor	9.76	0	0	**0**
Environmental Protection Agency	7.81	1	332	**333**
Department of Education	7.59	0	163	**163**
Department of Housing and Urban Development	5.38	0	1,141	**1,141**
Social Security Administration	5.30	1	0	**1**
Office of Personnel Management	4.89	0	0	**0**
National Science Foundation	2.08	40	1	**41**
All other agencies	9.83	124	136	**260**
Total		**2,418**	**2,177**	**4,595**

Source: GAO analysis of Federal Procurement Data System–Next Generation and EPLS data.

[a]This table list departments and agencies with over $2 billion in contract obligations for fiscal years 2006 through 2010. "All other agencies" includes those agencies with less than $2 billion in contract obligations.

[b]Agencies may suspend or debar federal contractors utilizing the NCR, and such suspensions and debarments would be listed in EPLS as cases related to grants and other assistance.

(121031)

GAO-12-245T

STATEMENT OF
DAVID M. SIMS
CHAIR OF THE INTERAGENCY SUSPENSION AND DEBARMENT COMMITTEE
BEFORE THE
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

"WEEDING OUT BAD CONTRACTORS: DOES THE GOVERNMENT HAVE THE RIGHT TOOLS?"

November 16, 2011

Chairman Lieberman, Ranking Member Collins, and members of the Committee, I appreciate the opportunity to appear before you in my capacity as Chair of the Interagency Suspension and Debarment Committee (ISDC) to offer observations regarding the role of the Federal procurement and non-procurement suspension and debarment system.

The debarment remedy is one of the government's most powerful tools to protect taxpayers from entities who engage in dishonest, unethical or otherwise illegal conduct or are unable to satisfactorily perform their responsibilities under Federal funded awards. The basic Federal policies and procedures governing suspension and debarment in procurement and nonprocurement activities are sound. However, reports issued in recent years by agency Inspectors General, and others, serve as important reminders of the heightened attention that agencies must continually give to how these processes are managed. Such attention is essential for ensuring that agencies are able to apply these tools whenever necessary to protect taxpayers from non-responsible parties.

The ISDC is an interagency body, comprised of Executive Branch organizations that work together to provide support for the implementation of the government-wide system of suspension and debarment. The ISDC was created in 1986, initially to monitor implementation of Executive Order 12549, which established a suspension and debarment system for non-procurement matters. The ISDC has evolved to serve today as both a forum for agencies to discuss policy and procedure regarding suspension and debarment actions taken in connection with either procurement or non-procurement activities and a coordinating body when two or more agencies have an interest in initiating suspension or debarment proceedings pertaining to the same contractor or non-procurement participant (known as the "lead agency" coordination process).

The role of the ISDC was amplified by Section 873(a) (7) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417. Section 873 requires the ISDC to report to Congress on the Federal suspension

72557.023

and debarment process on: (1) progress and efforts to improve the suspension and debarment system; (2) agency participation in the Committee's work; and (3) a summary of each agency's activities and accomplishments in the government-wide debarment system.

The specific functions for the ISDC enumerated in section 873 include:

(1) resolving issues regarding which of several Federal agencies is the lead agency having responsibility to initiate suspension or debarment proceedings and coordinating actions among interested agencies with respect to such action;

(2) encouraging and assisting federal agencies in entering into cooperative efforts to pool resources and achieve operational efficiencies in the government-wide suspension and debarment system;

(3) recommending to the Office of Management and Budget (OMB) changes to the government suspension and debarment system and its rules, if such recommendations are approved by a majority of the Interagency Committee; and

(4) reporting to Congress.

Each of the 24 agencies covered by the Chief Financial Officers Act (CFO Act) is a standing member of the ISDC. In addition, nine independent agencies and government corporations participate on the ISDC. A few agencies are represented by multiple members. For example, the Department of Defense is represented by each of the military services (i.e., Air Force, Army, and Navy) as well as by several of the larger defense agencies, including the Defense Logistics Agency, Defense Contract Management Agency, and the Office of the Secretary of Defense.

The ISDC provides an important support structure to help agencies implement their debarment and suspension programs. It serves as a forum for agencies to share best practices and lessons learned, and to assist in coordinating suspension and debarment actions among agencies to facilitate their government-wide effect. The ISDC's activities are overseen by OMB, which works closely with the ISDC to identify where refinement of current policies or practices may be needed.

Debarment is a discretionary decision by the Government as a consumer of goods and services, which serves the purpose of protection not punishment. The focus is on business risk where the Government learns of information indicating that a potential contractor or award participant lacks business honesty, integrity, or has evidenced poor performance. The action is forward looking. It is prospective in application. It serves best to head off the participation of problem actors in Federal funded activities rather than to remediate misconduct after occurrence of misconduct.

It should be noted that for purposes of cause, the misconduct in question need not have actually occurred under a Federal contract or assistance agreement. The rules factor into the decision process an assessment of whether there are remedial factors or mitigation measures present that show that notwithstanding the existence of misconduct in the past, the contractor or participant has responsibly and effectively dealt with the problem to preclude recurrence, and consequently a period of debarment is unnecessary. The rules build in the flexibility and discretion to permit decisions by suspending and debarring officials which are in the best interests of the Government as a consumer.

In terms of framework, the discretionary debarment and suspension programs operate under either of two rules. Under the Federal Acquisition Regulation (FAR), debarment rules are set out at 48 CFR 9.4. For Federal discretionary assistance, loan and benefit programs (non-procurement), departments and agencies adopted OMB Guidelines at 2 CFR Part 180 through implementing regulations. These rules, by specific enumerated action bases and broad "catch all" cause provisions, set forth a comprehensive spectrum of action bases in terms of conduct indicating a lack of business honesty, integrity, or poor performance. The rules are similar, if not identical, in terms of due process provisions for notice issuance, contest steps, and the decision process. Whether action is under the FAR or Part 180, it serves through reciprocity of effect to protect both contracts and grants.

It is my observation, formed from experience in the debarment field spanning more than 20 years, that the rules as currently stated provide agencies and departments with a highly effective tool kit for application of the remedy. Those agencies with robust programs show that the tool kit is effective when used. The tool kit needs employment by more agencies and departments, rather than modification.

I strongly agree with the Government Accountability Report's (GAO) assessment of the factors that promote an active agency discretionary suspension and debarment program: defined implementing guidance, practices and procedures that encourage the referral process, and staff dedicated to the program. I believe that the following additional factors also strongly contribute to robust, successful program: commitment from upper management; and a collaborative working relationship with the agency's Office of Inspector General. Collectively, the above factors are relevant to all suspension and debarment programs, whether operating under the FAR or the nonprocurement rule.

Under both the FAR and the nonprocurement debarment rule where more than one agency has an interest in the debarment or suspension of a contractor, the ISDC is to "resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency." The lead agency coordination process enhances the efficiency of the suspension and debarment process, by helping agencies from needlessly expending funds for duplicative actions or from working at cross purposes, and by furthering the collaboration needed to support a government-wide system designed to address systemic problems.

The ISDC has evolved an informal collaborative process for the lead agency utilizing email notifications broadcast to the membership that an agency is considering action and inquiring whether any other agency has an interest. The ISDC alerts agencies to actions planned by other agencies and helps to focus the lead for action in the agency with the most direct and appropriate interest. Lead coordination can also continue beneficially after action initiation. For example, if an administrative agreement is being considered by the lead agency, coordination can allow other agencies to contribute useful information regarding agreement terms beneficial to the larger government award community. This allows the lead agency to understand the steps being taken by the contractor or nonprocurement award participant so that the agency can determine if such steps represent appropriate risk mitigation to help the entity qualify as a presently responsible source. The ISDC has this month created a workgroup to explore and evaluate possible alternatives for the existing mechanism for the lead agency coordination.

As noted previously, one element of a robust program is the existence of a collaborative working relationship with an agency or department's Office of Inspector General (OIG). The prevention of fraud, waste, and abuse is a central element of the OIG's mission. The debarment remedy is a proactive tool for that effort. OIG has access to information data bases which can provide information supportive of and often critical to the prompt taking and ultimate success of debarment or suspension actions. At the Department of the Interior for example the debarment and suspension action development and referral process is located in the OIG.

Over the past two fiscal years, the ISDC has focused much of its attention on contributing its collective expertise in support of government-wide efforts to enhance information systems designed to protect and strengthen the integrity of procurement and nonprocurement award activities. The ISDC in the past year worked with the General Services Administration on an ongoing project to improve the Excluded Parties List System (EPLS), which identifies the names and addresses of parties excluded from receiving contracts, certain subcontracts, and Federal financial and non-financial assistance by simplifying and streamlining the large number of cause and treatment codes to boil down displayed information to the essential information needed by contracting officers and award officials who must by regulation check the list for award eligibility prior to making an award.

The EPLS provides a real time listing of ineligible persons. The key to its successful use is timely and accurate entrance of names onto the list by program personnel and compliance by contracting and award personnel with regulatory requirements to check the list prior to award to preclude award to listed parties. Existing rules already impose these requirements. Compliance can be enhanced through internal directives from agency management stressing the importance of using the list and training of personnel required to use the list. As an example of policy enhancement, at the Department of the Interior we issued a directive defining the FAR requirement that contracting officers check the EPLS "immediately prior to award" to mean "the day of" the proposed award decision, to guard against an award where a party appears on the list after bid or proposal submission.

This concludes my remarks. I am happy to answer any questions you may have.

72557.026

Statement of Allison C. Lerner

Inspector General, National Science Foundation

Committee on Homeland Security and Governmental Affairs

United States Senate

"Weeding Out Bad Contractors: Does the Government Have the Right Tools?"

November 16, 2011

Chairman Lieberman, Ranking Member Collins, and members of the Committee, I appreciate this opportunity to discuss the efforts of the Suspension and Debarment Working Group of the Council of Inspectors General for Integrity and Efficiency. Steve Linick, Inspector General at the Federal Housing Finance Agency, and I chair this group as part of the CIGIE Investigations Committee.

Establishment of the Council of the Inspectors General on Integrity and Efficiency Suspension and Debarment Working Group

Both Congress and the IG community have a continuing interest in ensuring that scarce federal funds are spent responsibly. Suspension and debarment are two key tools the government has to protect public funds, but, as then-Committee Chair Edolphus Towns noted in a March 2010 House Oversight and Government Reform Committee hearing on S&D, too often those tools go unutilized, quietly rusting away in the procurement toolbox. In June of 2010, the Council of the Inspectors General on Integrity and Efficiency (CIGIE)[1] Investigations Committee formed a working group to examine ways to increase the use of suspension and debarment. The Working Group is focused on raising the profile of suspension and debarment by educating the IG community about the S&D process, "busting" myths about S&D that may have impeded their use in the past, and identifying existing practices across the IG community that could be emulated by offices new to S&D, so they don't have to "reinvent the wheel" to create an effective S&D referral process. The Group is also working to promote an active dialogue between agency Suspension and Debarment Officials (SDOs), OIGs, Department of Justice attorneys, and others involved in S&D as a way to enhance the overall effectiveness of the process. Staff from thirteen Offices of Inspectors General, as well as the Recovery Accountability and Transparency Board and the Federal Law Enforcement Training Center,

[1] The Inspector General Reform Act of 2008 created the Council of the Inspectors General on Integrity and Efficiency, which is comprised of the 73 Offices of Inspectors General. The CIGIE's mission is to address integrity, economy, and effectiveness issues and to develop policies, standards, and approaches to promote a well-trained and highly skilled OIG workforce. To this end, CIGIE maintains seven committees: audit, information technology, inspections and evaluations, integrity, investigations, legislation, and professional development.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000063 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.027

participate in the working group. Among the OIG representatives are a mix of Inspectors General, investigators, auditors, and attorneys.

As reported in CIGIE's annual *Progress Report to the President,* OIG efforts resulted in 4,485 suspension and debarment actions in FY 2009, and 5,114 such actions in FY 2010.

Suspension and Debarment Working Group Activities

The Working Group has provided training on S&D at two CIGIE annual conferences, at the 2011 annual conference for Assistant Inspectors General for Investigations, and to the Federal Audit Executive Committee. With support from the Recovery Accountability and Transparency Board, it has also sponsored two government-wide workshops aimed at increasing the knowledge and use of suspension and debarment to protect government funds against fraud. The first of these, in October 2010, was attended by over 300 investigators, SDOs, attorneys and auditors representing nearly 60 federal agencies and OIGs. The second, held in October 2011, was attended by almost 450 representatives from over 60 agencies and OIGs. These training events have been important educational tools and have helped to raise awareness of S&D, create effective collaborations across the OIG and SDO communities, and enable OIGs and agencies to share their challenges and experiences in utilizing S&D.

In coordination with the Recovery Board, the Working Group also conducted a short survey of the 28 agencies that received Recovery Act funds to gather baseline information about suspension and debarment use in the ARRA context. The results of that survey were shared with the Recovery Act agencies and their OIGs. The Working Group found that active dialogue between the SDO and OIG communities, education about S&D for those who handle Recovery Act awards, and outreach about S&D to Recovery Act recipients would help to advance the Act's total accountability mandate. The Working Group chose to focus on S&D in this context because if progress is made here, the lessons learned will continue to pay off long after the Recovery Act money is expended.

The Working Group also informally surveyed the IG community to gather basic information on S&D use and practices within the various OIGs, with an eye toward identifying ways to facilitate greater consideration and use of these tools. In general, respondents indicated their belief that S&D could be used more frequently and more effectively. The survey highlighted a need for OIG staff, SDOs and DOJ attorneys to communicate and collaborate on suspension and debarment issues, and noted potential benefits from providing training on S&D and from implementing effective referral practices.

***Don't Let the Toolbox Rust: Observations on Suspension and Debarment, Debunking Myths, and Suggested Practices for Offices of Inspectors General* (CIGIE Suspension and Debarment Working Group, September 2011)**

My testimony will focus on the Working Group's September 2011, report, *Don't Let the Toolbox Rust: Observations on Suspension and Debarment, Debunking Myths, and Suggested Practices for Offices of Inspectors General*, which built upon the OIG survey information. The

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000064 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.028

overarching purpose of this report was to raise the profile of suspension and debarment within the IG community and to identify practices that could assist OIGs in utilizing these tools. To this end, the report features three sections: a basic background section, which briefly describes the S&D process; a second section that seeks to debunk misconceptions about the use of S&D; and a final section that contains suggested practices for the IG community.

The IG community is committed to its mission of detecting and preventing fraud, waste, and abuse. The robust use of suspension and debarment, in appropriate circumstances, is a valuable tool in pursuit of this mission. As our nation faces pressing economic challenges, it is imperative that we effectively and vigorously use every available tool to ensure that the billions in taxpayers dollars that go to Federal contractors, grantees, and other awardees every year are spent for their intended purposes; that unscrupulous individuals and companies are prohibited from obtaining government funding; and that hard-earned tax dollars are safeguarded.

The Working Group's report is one step toward facilitating a broad understanding of suspension and debarment within in the IG community; it also offers practical suggestions to promote the use of these remedies. I will briefly discuss each of the report's three sections, beginning with the background summary.

Background on Suspension and Debarment

As the report explains, government-wide suspensions and debarments are administrative remedies that Federal agencies may take to protect taxpayer dollars from fraud, waste, abuse, poor performance, and noncompliance with contract and grant provisions or applicable law. Debarment ensures that, for a defined period of time, the Federal government will not do additional business with individuals and organizations that are not "presently responsible"-- i.e., those that have engaged in criminal or other improper conduct of such a compelling and serious nature that it would lead one to question their honesty, ethics, or competence. Suspension is a preliminary action taken where there is a need to act immediately to protect the public interest and before there is enough evidence to support a debarment proceeding.

S&D actions have government-wide reciprocal effect, meaning that if a company is suspended or debarred from doing additional business with one federal agency, it is also suspended or debarred from doing additional business with all other federal agencies. The prohibition on doing business with a suspended or debarred entity or individual applies to future business transactions (such as new contracts or non-procurement awards, including grants or cooperative agreements); agencies may decide to continue existing awards or to terminate performance.

There are essentially two types of suspensions and debarments: those which an agency may elect to pursue ("discretionary") and those which are automatic under law ("statutory"). Our report focused on discretionary S&D activity.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000065 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.029

"Myth busting": Addressing Misconceptions about S&D

As mentioned, the Working Group's survey results reflected a view within the IG community that S&D could be used more often. Factors that seem to adversely influence the pursuit of suspension and debarment include a general lack of awareness or full understanding about these tools and concerns about their potential impact on contemporaneous civil or criminal proceedings.

As a step toward addressing these challenges, the second section of the report discusses and attempts to dispel some common misconceptions about suspension and debarment, namely --

(1) that contemporaneous civil or criminal proceedings will be compromised if suspension or debarment is pursued,

(2) that suspension and debarment actions must be tied to judicial findings (conviction, civil judgment, or indictment), and

(3) that referrals may not be based on OIG audits or inspections.

Impact on Civil or Criminal Proceedings

Some OIGs and prosecutors may resist seeking suspension and debarment, believing that doing so could result in the disclosure of sensitive investigative information or case theories developed in contemporaneous criminal or civil proceedings. However, action can be taken to protect contemporaneous proceedings while suspension and debarment actions are pursued. The Working Group's report outlines some of these safeguards. As a practical matter, OIG referrals need only provide enough evidence to satisfy the applicable evidentiary standard: adequate evidence in the case of suspensions, and a preponderance of the evidence in the case of debarments. In addition, while a notice of proposed debarment or suspension must inform the subject of the agency's stated ground(s) for taking the action, nothing in the applicable rules requires disclosure of all of the agency's evidence. Indeed, courts have held that the suspension notice must contain only enough information regarding the time, place and nature of the alleged misconduct to permit the subject to meaningfully contest the action. Finally, while the applicable regulations allow fact-finding hearings when material facts are in dispute, those rules also *require* that requests for such hearings be denied if the Department of Justice advises that contemporaneous proceedings would be prejudiced by disclosing evidence publicly.

The report notes that perhaps the best way the relevant communities (OIGs, DOJ, SDOs, and others) can resolve their concerns about the effect of suspension and debarment on ongoing civil or criminal matters is to engage in staff-level training and to communicate frankly and continuously regarding all evidence-sharing issues.

Judicial Findings

As the report notes, suspension and debarment actions are often, and appropriately, based on judicial findings such as indictments, convictions or civil judgments. Indeed, some agencies and OIGs mistakenly believe that suspensions and debarments *must* be tied to a predicate judicial finding. In reality, fact-based actions are a less-traveled path that can be followed to exclude a non-responsible individual or entity from doing further business with the government. Such

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000066 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.030

actions, which rest solely on the strength of facts discovered through investigations, audits, or inspections, without an associated conviction, judgment, or indictment, can be viable options in many circumstances. Governing rules permit (among other causes) suspension or debarment based on any cause "of such compelling and serious nature that it affects present responsibility." This category is especially broad and permits the SDO to suspend or debar an individual or entity for a wide variety of conduct indicating, for example, a lack of integrity or competency to handle federal funds.

Referrals from Audits and Inspections

Another misconception that limits the number of S&D referrals is the idea that such an action can only be based on facts developed through OIG investigations. In fact, suspensions and debarments can also arise from facts uncovered during OIG audits or inspections. While many audits and inspections focus on internal agency operations and therefore may not surface S&D opportunities, externally-focused audits and inspections, which assess the actions of recipients of federal funds, can identify information related to those recipients' present responsibility and thus be a prime source of material for S&D referrals. Despite this fact, the survey found that very few of the respondents' suspension and debarment referrals arose from non-investigative activities in FY 2010. Simply put, there seems to be room for more suspension or debarment activity stemming from this type of work. An audit, for example, might document cause for suspension or debarment by showing significant or recurring internal control deficiencies which place federal funds in danger of misuse or misallocation.

Because non-investigative referrals are uncommon, groundwork must be laid to help ensure their growth and success. In particular, communication with SDOs, who might not be used to seeing referrals based on audits, would be beneficial, as would focused training for auditors and inspectors on how their work can produce and support suspension or debarment opportunities. Working Group members are currently collaborating with the Investigator Training Academy to develop such training.

Suggested Practices to Increase the Use of Suspension and Debarment

The survey responses identified a number of suspension and debarment practices that could help boost the overall use and effectiveness of these tools within the IG community. A brief description of these practices follows.

Assigning Dedicated Personnel within OIGs

The amount of OIG staff resources focused on S&D can affect the frequency with which suspension and debarment referrals are undertaken. As part of the survey, some OIGs provided information about staffing approaches they have utilized to promote the pursuit of S&D. The Department of Interior (DOI) OIG, for example, has a full-time debarment manager assigned only to S&D issues who has case-specific duties, provides training to DOI staff, and fits into a larger DOI/DOI OIG policy on S&D. The Department of Homeland Security OIG has designated two in-house S&D experts, one who coordinates referrals and one who focuses on policy matters. A third agency responded that it has designated one investigator to serve as the OIG's

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000067 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.031

primary liaison on S&D matters and that this agent is responsible for making referrals to the agency.

Given the different sizes and structures of the various OIG offices, there is no standard approach to staffing that could be applied across the IG community. The report suggested that, insofar as resources permit, OIGs consider emulating some of the staffing arrangements described above to support their S&D efforts. Such arrangements contribute to success by building in-house expertise on S&D and promoting stable relationships with agency suspension and debarment staff.

Identifying and Recommending Improvements to Agency Suspension and Debarment Programs

Another means by which OIGs can contribute to more frequent and effective suspension and debarment use is by conducting internal audits or reviews of the efficacy of agency suspension and debarment systems. Such examinations provide a straightforward way to focus attention on S&D programs; identify deficient (or, in some cases, non-existent) processes; and, when necessary, effect positive change.

The report notes that several OIGs have conducted such reviews within their agencies and that additional reviews are underway. Examples of such audits and reviews include those undertaken by the Nuclear Regulatory Commission OIG, in which the OIG found that the agency had no regulation governing the suspension or debarment of grant recipients; by the Department of Transportation OIG, which found timeliness and internal control issues in the agency's S&D program that limited the protection of government funds; and by the Department of Commerce OIG, which identified weaknesses in Commerce's program and highlighted them in a memorandum to the Department's Acting Deputy Secretary.

Using Investigative, Audit, and Inspection Reports to Identify Suspension and Debarment Candidates

Investigative, audit and inspection reports frequently contain information that can form the basis for suspension and debarment actions. The Working Group identified two ways in which members of the OIG community seek to promote S&D activity through the use of traditional OIG work products. Several OIGs—those for SBA, DHS, DOI and DCIS (a component of the Department of Defense OIG)—assign a staff person to periodically review all OIG investigative, audit, and inspection reports for convictions, pleas, and other information that might merit consideration of suspension or debarment. If information that would support such an action is found, a designated office within the OIG makes a formal referral to the agency. Other OIGs—including the OIGs for the Departments of Agriculture and Housing and Urban Development, the Tennessee Valley Authority, the Social Security Administration and the Environmental Protection Agency-- regularly provide reports of indictments, convictions, or other court actions to the agency offices responsible for S&D determinations.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000068 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.032

Enhancing OIG Referral Practices

The report also identified two ways in which OIGs could enhance their referral practices. First, it identified different actions OIGs have taken to motivate staff to make such referrals. Such actions included:

-Requiring that cases be referred for suspension or debarment within 7 days of an indictment or conviction;

-Issuing an OIG Bulletin that requires investigative regions to refer for possible suspension all subjects that are charged via criminal complaint, indictment or information, and for possible debarment all subjects that are convicted and sentenced;

-Evaluating statistics on S&D during performance appraisals;

-Issuing annual investigative priorities, goals and objectives that emphasize the coordination of remedies, including suspension and debarment; and

-Issuing policies and procedures that include assessment of opportunities for suspension and debarment as part of the office's ongoing case review process.

These actions primarily apply to investigative staff. In keeping with the goal of increasing audit- and inspection-based referrals, similar actions could be considered for non-investigative staff.

The report also noted that some OIGs have established systematic processes for preparing and tracking OIG S&D referrals in order to facilitate suspension and debarment actions. With regard to preparing referrals, at the Small Business Administration OIG, the Counsel Division, in coordination with the Investigation Division, prepares detailed S&D recommendation packages (including a proposed notice of debarment or suspension setting forth the relevant facts, and a tabbed index of evidentiary materials), which are simultaneously transmitted to the SDO and the agency's Office of General Counsel. The Department of Justice OIG's Investigative Division and Office of General Counsel work together to develop referral memoranda, coordinate with prosecutors, and provide the referral memoranda and investigative support to the SDO. At the United States Postal Service OIG, the Counsel's Office receives referrals from the OIG Contract Fraud Program Manager and prepares suspension or debarment referrals for the SDO which summarize all relevant facts, set forth the specific grounds for suspension or debarment, and contain an administrative record supporting the action. With respect to tracking referrals, the OIGs for SBA, the National Science Foundation and the Department of Transportation reported that they have developed systems to monitor the status of S&D referrals made to their agencies.

The Working Group included examples of referral memoranda as appendices to the report and suggested that other OIGs consider implementing routine processes such as these in order to facilitate the development, submission and tracking of referrals once they are made to the agency.

Developing Strong OIG Suspension and Debarment Policies

According to the OIG survey, 59% of respondents had a written policy for handling S&D referrals to the agency, most of which are contained in investigative manuals. No respondent's

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000069 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.033

policy expressly included auditors, although one OIG noted that it has informal audit-focused procedures. The report highlighted DOI OIG's policy as being particularly comprehensive. That document describes the roles and responsibilities of both agency and OIG staff; provides for a program manager on both the agency and IG sides, each of whom is responsible for the day-to-day administration of suspensions and debarments at DOI; and establishes protocols for, among other things, identifying potential candidates for S&D, drafting referral memoranda, and responding to legal challenges to S&D determinations.

For maximum efficiency, the Working Group suggested that offices distill their S&D practices into suitably comprehensive policies and that those policies, as appropriate, cover both investigative and non-investigative activities.

Increasing Outreach among Relevant Communities

Effective suspension and debarment practices require regular communication and collaboration among all parties involved: OIGs, who often provide information that serves as the basis for the action, SDOs (and other agency officials) who take the action, and DOJ attorneys, who may be handling parallel proceedings. Active communication and collaboration among these parties is essential and can serve to alleviate concerns and correct misunderstandings and misconceptions that impede the S&D process. Among other things, preliminary conversations between OIGs and agency S&D staff may be particularly important to lay the groundwork for non-investigative referrals.

The Working Group noted that often OIGs, based upon their relationships with DOJ and agency S&D staff, can serve as important liaisons to promote communication and coordination among these parties. It also noted that OIGs could encourage agencies that have not actively pursued S&D to participate in the Interagency Suspension and Debarment Committee and utilize that group's experience to develop a robust program.

Providing Additional Training Presentations

When asked what additional tools their OIG needed to increase the number of successful S&D referrals, the majority of respondents identified a need for more training. Formal training of investigative staff, as well as auditors, attorneys, and others, can play a central role in increasing S&D use within OIGs. The Working Group suggested that OIGs encourage wide participation in the S&D course offered by the Federal Law Enforcement Training Center (FLETC) and in other FLETC courses that have suspension and debarment components, such as the grant fraud course. The Working Group is working with the CIGIE Training Director to enhance current courses and identify additional courses that could be directed in this area.

As noted previously, the Working Group has also provided training in S&D itself. In addition to training focused on internal OIG groups (including CIGIE and the Federal Audit Executive Committee), the day-long S&D workshops sponsored by the Working Group in October 2010 and October 2011, were attended by a total of approximately 750 OIG and agency staff from 74 different agencies. The workshops have proven to be an effective means of enhancing the skills of OIG and agency staff involved in S&D and in improving collaboration between those communities.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000070 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.034

Leveraging Semiannual Reports

The report noted that some OIGs include statistics and discussions of OIG-initiated suspension and debarment referrals in their *Semiannual Reports to Congress (SARs),* and suggested that other OIGs might want to emulate this practice. Including statistics on the number of investigative and audit suspension and debarment referrals made and the outcome of those referrals in SARs and in CIGIE's *Annual Report to the President* would serve to keep the Congress and other interested parties informed about suspension and debarment activities across the government. Tracking and publicizing such statistics could also provide an incentive for OIGs to make suspension and debarment referrals, and for agencies to take action on those referrals.

Conclusion

Mr. Chairman, an agency's vigorous and appropriate use of suspension and debarment protects not just the integrity of that agency's programs, but the integrity of procurements and financial assistance awards across the entire federal government. As such, suspension and debarment are two of the government's most powerful defenses again fraud, waste, and abuse. Through its various efforts, the Working Group has actively sought to raise the profile of suspension and debarment as integral tools to help protect taxpayer dollars.

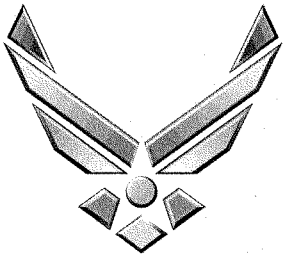
These amazing tools can be used more frequently and effectively if the relevant federal communities understand them better and are motivated to work together in using them. One of the Working Group's primary objectives is to facilitate an ongoing dialogue among the OIG community, S&D officials, and DOJ about how best to utilize these protective remedies. Over the coming year, the Working Group will continue to explore ways to increase communication and collaboration between all parties involved in suspension and debarment.

This concludes my statement. I would be happy to answer any questions you or other Members have.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000071 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.035

United States Air Force



Presentation

Before the Committee on Homeland Security and Governmental Affairs, United States Senate

Weeding Out Bad Contractors: Does the Government Have the Right Tools?

Statement of Mr. Steven A. Shaw
Deputy General Counsel
(Contractor Responsibility)
Department of the Air Force

November 16, 2011

NOT FOR PUBLICATION UNTIL RELEASED
BY THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

Chairman Lieberman, Ranking Member Collins, and members of the Committee, it is a great pleasure to be called before you to testify concerning the adequacy and effectiveness of the suspension and debarment framework and the factors that make the Air Force's program successful. If it pleases the Committee, I will address these issues by focusing on three themes that I believe are central to the Air Force's effective suspension and debarment program, and I would be happy to answer any questions about any of the other areas of interest to the Committee.

I am the Air Force Deputy General Counsel (Contractor Responsibility), and a member of the Senior Executive Service. I have served as the Air Force Debarring Official for the last 15 years. I firmly believe that the existing suspension and debarment apparatus affords debarring officials like me the tools to not only address allegations of procurement fraud, misconduct and poor contractor performance, but also to be proactive and creative in ways that protect the government, improve our contracting process, and reduce the instances of procurement fraud at the front end. The following key themes are vital to a vibrant suspension and debarment apparatus that not only protects the government from non-responsible contractors, but also proactively reduces the instances of procurement fraud.

- **THEME 1: INDEPENDENCE FROM THE ACQUISITION CHAIN**

The first theme is independence from the acquisition chain of command. The Air Force's suspension and debarment program is effective because it has a full time, senior career Suspending and Debarring Official who is supported by a dedicated staff, is separate from the acquisition chain, and is empowered to do the right thing to protect the Government. This structure has allowed me in every instance to do what I believe is the right thing to protect the Government. I have never once felt political or acquisition-driven pressure to influence my decision making. On the contrary, I have been completely supported and empowered by senior Defense and Air Force leadership to act as I deem necessary.

Let me give you two very brief examples of what I mean:

- **Boeing suspension:** First, several years ago I suspended Boeing's three Launch Systems business units from Government contracting for nearly two years after some of its employees were found to have improperly taken significant, proprietary data from a competitor. That was a contractor of immense importance to the Air Force, but the unethical conduct called into question the business units' ability to deal fairly, honestly, and ethically with the U.S. Government. There was no question in my mind at the time that the Boeing business units should be suspended, and senior Air Force and Department of Defense leadership supported that view.

- **L-3 suspension:** Second, and more recently, after receiving a referral from the U.S. Special Operations Command, the Air Force suspended L-3 Communications' Special Support Programs Division (which I understand had the company's largest Government contract at the time) when some of its employees were caught secretly segregating Government email for L-3's review. As with the

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000073 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.037

Boeing case, L-3 was an important contractor which performed vital work for SOCOM's Bluegrass Station, Kentucky facility. Yet, the suspension received full support from SOCOM, Air Force, and DoD leadership.

I note that the Air Force's involvement with Boeing and L-3 did not stop with these suspensions. I terminated the suspensions when Boeing and L-3 entered into Administrative Agreements with the Air Force that committed the entire companies (not just the business units, but the entirety of these major, global defense contractors) to very specific undertakings to become best-in-class ethical business operations. Those corporate changes are still in effect, and the Agreements are available on my office's public web page.

- **THEME 2: DEBARRING OFFICIAL DISCRETION IS VITALLY IMPORTANT**

The second theme is that Debarring Officials must have discretion in deciding what is necessary to protect the Government. We all know that debarment and suspension are not forms of punishment, but are imposed to protect the government. But, given recent suggestions by some that debarments should be mandatory, and a growing (and incorrect) sentiment that debarment should be "punishment," I think the following example might be helpful to this Committee.

- **BAE show cause letter:** We had been monitoring for some time news reports of allegations of corruption with respect to sales of military equipment by BAE Systems, plc, to foreign Governments. In late 2009, we received information from the U.S. Department of Justice ("DoJ") that raised the level of my concern. Because of the restricted nature of the information, we were not privy to certain documents from the investigation that would have afforded the Air Force sufficient basis to suspend or debar BAE. However, I sent BAE's CEO a "Show Cause Letter" which expressed the Air Force's concern about the allegations and offered the company a chance to respond. Not only did the company respond, but within weeks they reversed their reported history of non-cooperation with DoJ, pled guilty to a felony, and paid a $400 million fine. And, over the next year, the company cooperated with me and my staff as we conducted a deep dive into BAE's processes, procedures and culture. BAE also accepted our recommendations for ethical change, company-wide. Documents relating to this review are also available on our website.

I share this BAE case with you for two reasons. First, I want to make clear how important freedom and discretion to do the right thing is for Suspending and Debarring Officials. The Air Force's approach to the BAE case is unconventional when compared with many other programs in the Government that might wait for a final conviction or a final contract action like a termination before acting – or not acting at all, because the misconduct in this case did not relate to a US government contract. But, the freedom I have to do the right thing not only enabled me to engage early, but also to facilitate further ethical transformation throughout BAE that will benefit all U.S. Government contracts with the company in the future. And second, I raise this case because I want to highlight for the Committee that we are not limited to taking action for misconduct relating only to U.S. Government contracts. None of us in this room would welcome

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000074 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.038

a contractor into our home to do work for us when, on another project, they did shoddy work or engaged in unethical or illegal behavior. We should be, and the Air Force is, similarly concerned with misconduct committed by Air Force contractors – even if that misconduct is unrelated to an Air Force or any U.S. Government contract.

For full time, independent Suspending and Debarring Officials, this freedom to maneuver and craft creative and forward looking ways to protect the Government is of utmost importance. This freedom is based largely upon my ability to exercise discretion. Because I am free to either debar or not debar a contractor, I am able to both fashion creative remedies in response to misconduct, and to proactively influence contractors to prevent misconduct from happening in the first place.

Some have suggested that debarment should be mandatory—that is, that it should be imposed automatically following a triggering event such as an indictment or a conviction. I believe that such an approach would be ill-advised. Respectfully, Suspending and Debarring Officials already have all the tools we need to protect the Government and effect meaningful change. And many of the tools that I use (such as the show cause letter in the BAE case), derive their power to effect meaningful change in the cultures of our contractors from my discretion to debar if I am unsatisfied with the contractor's answer. If debarments became mandatory (rather than permissive and subject to the Debarring Official's discretion), contractors would no longer have an incentive to work with me in proactive, creative ways to benefit the entire Government. Instead, they would have every 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.

- **THEME 3: MISCONDUCT MUST BE VIEWED BROADLY**

The third theme is that Debarring Officials must take a broad view of misconduct. Debarring officials who analyze only specific legal definitions of government contract-related misconduct, or limit their actions only to misconduct proven by convictions, in my opinion are not protecting the government. Recalling my earlier example, if a plumber who engaged in unethical behavior on a job down the street swears to you "I would never do that in your house," there is no way you would let that person in your home. Government contracting should be no different. There is no logical basis to conclude that a corrupt corporate culture that leads government contractors to engage in unethical behavior abroad or in their commercial businesses would not also lead to misconduct in their government businesses. This is precisely why we engaged with BAE—and why we engage with many other contractors for misconduct that is not related to Government contracting.

It is also important to understand that Debarring Officials can exclude contractors for negligent conduct. We demand more of our contractors than the mere requirement that they obey the law. For example, the FAR permits debarment for a history of failing to perform on contracts or a significant performance failure. This is an important tool for protecting the Government. We can, and the Air Force does, protect the Government by debarring contractors who continue to bid for work they cannot perform, obtain contracts, and leave the Government

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000075 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.039

holding the bag with unfinished or poor quality work. We also save the government the time and expense of evaluating new proposals from contractors who are unable to perform the work.

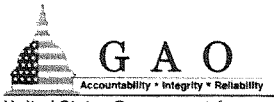
Finally, debarring officials must be willing to take fact-based actions. Many part-time debarring officials may only have time to debar contractors who have been indicted or convicted of fraud. The Air Force regularly suspends or debars contractors as soon as the evidence exists to do so. Sixty-two (62) percent of our 367 actions last year were these types of fact-based actions. Prosecutions generally take years to complete. In that time, countless new awards and millions in new funds can go to non-responsible contractors. Debarring officials have the ability to shut off the flow of dollars to these contractors well before final conviction, and we should do so whenever the facts require such an action.

It has been a pleasure to testify before you today. I thank you for your time and attention and I would be happy to answer any questions.

# # #

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000076 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.040



United States Government Accountability Office
Washington, DC 20548

December 20, 2011

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

On November 16, 2011, we testified before the committee on agency use of suspensions and debarments. During the hearing, you requested that we provide our reaction to a November 15, 2011, memorandum that the Office of Management and Budget provided directing the departments and agencies to implement a robust suspension and debarment program. Our attached response to this question is based on our previous work and our knowledge of the subject.

If you have any questions or would like to discuss our response, please contact me at (202) 512-4841 or woodsw@gao.gov

W. T. Woods

William T. Woods
Director
Acquisition and Sourcing Management

Enclosure

Response to Question for the Record
Committee on Homeland Security and Government Affairs
United States Senate
Hearing held on November 16, 2011
Weeding Out Bad Contractors: Does the Government Have the Right Tools?

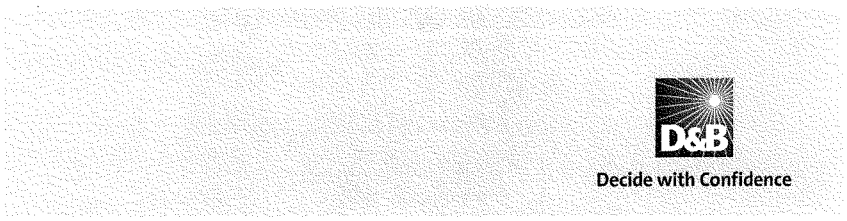
Question for William T. Woods, Director
Acquisition and Sourcing Management
U.S. Government Accountability Office

Question asked by Chairman Joseph I. Lieberman

1. **Mr. Woods, let me ask you, since the GAO report recommended the guidance, effectively recommended the guidance Mr. Lew issued yesterday, if you have specific reactions to that guidance?**

In our August 2011 report, (GAO-11-739), we recommended that the Administrator of the Office of Federal Procurement Policy issue governmentwide guidance that (1) describes the elements of an active suspension and debarment program, and (2) emphasizes the importance of cooperating with the Interagency Suspension and Debarment Committee (ISDC) in terms of helping to resolve lead agency issues, providing required reporting information in a timely manner, and designating existing resources as needed to enable the committee to function effectively. In reviewing the guidance that the Office of Management and Budget issued on November 15, 2011, providing direction to the departments and agencies that are subject to the Chief Financial Officers Act on implementing a robust suspension and debarment program, we believe that the actions listed implement our recommendations. The guidance specifically cites the characteristics common among active suspension and debarment programs and directs agencies to take steps to review their programs and make them more effective. It also directs agencies to regularly participate on the ISDC. We note, however, that there is no mention in the guidance about following-up with agencies to ensure that the departments and agencies implement the guidance, and nothing to ensure that the ISDC reports to OMB or the Congress on agency progress in developing effective suspension and debarment programs.

72557.042



December 1, 2011

The Honorable Joseph I. Lieberman, Chairman
The Honorable Susan M. Collins, Ranking Member
Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building, Washington, DC 20510

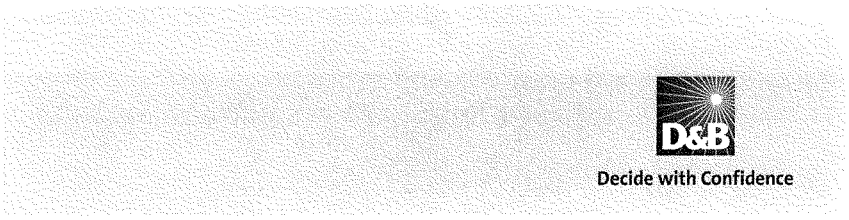
Dear Chairman Lieberman and Ranking Member Collins:

We are writing to you in regards to the recent Committee hearing entitled: "Weeding Out Bad Contractors: Does the Government Have the Right Tools?" Dun and Bradstreet (D&B) would like to take this opportunity to add our voice, and echo the comments of both Chairman Lieberman and Ranking Member Collins, that the issue of suspended and debarred contractors and grantees is a critical problem for the operation of an efficient, effective, and secure government. While progress has been made in the area of "weeding out bad contractors" over the last thirty years, ultimately, some form of this problem has persisted, unsolved, for decades.

While no system will ever be absolutely perfect, we should be encouraged that solutions exist today to ensure that the government only enters into business relationships with responsible entities, fully aware of their relevant associations to other parties or events. Moreover, suspended or debarred entities can be monitored by the government throughout their lifetime in order to mitigate their unauthorized reentry into the government contract, grant, or loan communities. While these capabilities are provided for under existing government and D&B relationships, this would still require an effort by the government to modify both its information technology (IT) systems and policies. Doing so would lead to a more sophisticated and efficient approach to identifying potential problem contractors (and other government funding recipients), therefore stemming the tide of "bad actors."

We felt that it was important, following the hearing, to address points raised in the testimony given by the Honorable Daniel I. Gordon. Specifically, Mr. Gordon's testimony seemed to suggest that the government's reliance on the D-U-N-S® Number artificially limits the ability to see a complete picture of what is going on with an entity. We would respectfully challenge Mr. Gordon's assertion about the capabilities, utilization, and

4350 N. Fairfax Drive Suite 650
Arlington, Virginia 22203
www.dnb.com/gov



effectiveness of the D-U-N-S Number and relevant D&B data for the purposes of suspension, debarment and past performance determination.

Through the use of the D-U-N-S Number and the authoritative information that it "unlocks" for the government, we are able to generate significant, real-time, insight on the entities for which taxpayers' dollars are committed. The D-U-N-S Number, and the data to which it is connected, enables D&B and the government to understand the exact nature of the legal relationship of one entity to another, on a global basis. Aggregating locations and separate legal components of an entity (business, school, government, etc.), is a simple matter of using the D-U-N-S Number in a new way for suspension and debarment. We currently use this same type of process to roll up government spending under a single entity, albeit at a higher level of aggregation, for systems such as USAspending.gov and the Federal Procurement Data System (FPDS).

Changes made to the Excluded Parties List System (EPLS) in recent years fall short of what we believe will be necessary to make systemic improvements. The D&B information provided under currently licensed agreements to the government for EPLS, Federal Awardee Performance and Integrity Information System (FAPIIS), and other government systems, is underutilized in this area. While there is always an opportunity for improvement in data, the unique identifier that supports these systems is not inhibiting progress; it will help enable it. We need to move away from the underutilization of existing data sources within government and embrace new applications of this information such as those referenced at the RATB. We are confident that with the appropriate changes to policy and IT (to EPLS and FAPIIS); substantial improvements will be made in identifying "bad actors".

We sincerely support the hearing on this topic and believe strongly that the government is poised to dramatically improve its oversight and decision-making for contracts, grants, and loans if it embraces the data and data-insights available to it today.

We look forward to working with GSA, OFPP, and also with the Congress and this Committee in a collaborative effort to improve the Government's ability to contract most successfully with its vendors and other funding recipients.

Sincerely,

Ethan Treese
VP, Government Solutions
Dun & Bradstreet

2/2

United States Government Accountability Office

GAO

Report to Congressional Committees

August 2011

SUSPENSION AND DEBARMENT

Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved

U.S. Government Accountability Office
GAO 90 YEARS 1921-2011
ACCOUNTABILITY * INTEGRITY * RELIABILITY

GAO-11-739

GAO
Accountability * Integrity * Reliability
Highlights

Highlights of GAO-11-739, a report to congressional committees

August 2011

SUSPENSION AND DEBARMENT

Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved

Why GAO Did This Study

The federal government spent more than $535 billion on contracted goods and services in fiscal year 2010. One tool for ensuring that agencies are only awarding contracts to responsible sources is the use of suspensions and debarments—actions taken by agencies to exclude firms or individuals from receiving federal contracts or assistance based on various types of misconduct. This report analyzed (1) the nature and extent of governmentwide exclusions reported in the Excluded Parties List System (EPLS) maintained by the General Services Administration; (2) the relationship, if any, between practices at various agencies and the level of suspensions and debarments under federal acquisition regulations; and (3) governmentwide efforts to oversee and coordinate the use of suspensions and debarments across federal agencies. GAO reviewed EPLS data and suspension and debarment programs at 10 federal agencies, including those with relatively more suspensions and debarments and those with few or none to identify differences between the two groups.

What GAO Recommends

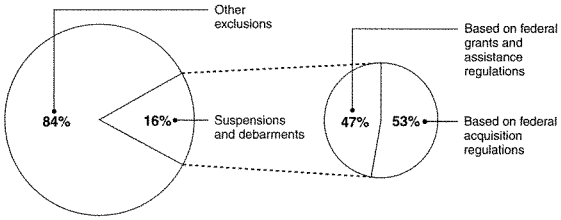
GAO recommends that the six agencies it examined that did not have the characteristics associated with active suspension and debarment programs incorporate those characteristics, and that the Office of Management and Budget (OMB) improve its governmentwide efforts and enhance governmentwide oversight. Five of the six agencies and OMB generally concurred with the recommendations. The Department of Justice believes its existing guidelines are sufficient, but GAO does not agree.

View GAO-11-739 or key components. For more information, contact William T. Woods at (202) 512-4841 or woodsw@gao.gov.

What GAO Found

Suspensions and debarments made up about 16 percent of exclusions in EPLS for fiscal years 2006 through 2010. These are discretionary exclusions taken by agencies based on causes specified in regulations for acquisitions or grants and assistance, including fraud, bribery, or a history of failure to perform on government contracts. The remaining 84 percent were exclusions based on violations of statutes or other regulations, including health care fraud or illegal exports. In these cases, agencies are generally required to exclude the party from participating in specified government transactions or activities. More than half of the governmentwide suspensions and debarments were based on acquisition regulations. Several agencies did not report any such cases.

Basis of EPLS Cases, Fiscal Years 2006 through 2010



Source: GAO analysis of EPLS data.

The four agencies GAO reviewed with the most suspensions and debarments based on acquisition regulations shared certain characteristics that were not present at agencies with relatively few or no such cases. These agencies had staff dedicated to the suspension and debarment program, detailed implementing guidance, and practices that encourage an active referral process. The six agencies without such characteristics had virtually no suspensions or debarments, regardless of the dollar level of their contract obligations. For example, the Department of Health and Human Services, the civilian agency among those GAO reviewed with the highest amount of contract obligations, had no suspensions and debarments based on acquisition regulations. U.S. Immigration and Customs Enforcement had considerably less in contract obligations, but was one of the top four agencies of those GAO reviewed.

The interagency committee responsible for governmentwide oversight and coordination of suspensions and debarments faces challenges as it relies on voluntary agency participation and only the limited resources of member agencies to fulfill its mission. For example, the committee took almost 2 years to submit a required annual report to Congress on agencies' suspension and debarment activities because agencies had been slow in providing needed information and it had limited resources to devote to the report.

United States Government Accountability Office

Contents

Letter		1
	Background	4
	Suspension and Debarment Cases Make Up a Small Percentage of All Exclusions in the Governmentwide Database	7
	Agencies with Most Suspension and Debarment Cases Share Common Characteristics Missing at Agencies with Few Cases	11
	Governmentwide Efforts to Oversee Suspensions and Debarments Face Challenges	19
	Conclusions	22
	Recommendations for Executive Action	23
	Agency Comments and Our Evaluation	24
Appendix I	Scope and Methodology	26
Appendix II	Causes for Suspension or Debarment	32
Appendix III	Comments from the Department of Commerce	34
Appendix IV	Comments from the Department of Health and Human Services	35
Appendix V	Comments from the Department of Homeland Security	37
Appendix VI	Comments from the Department of Justice	39
Appendix VII	Comments from the Department of State	42
Appendix VIII	Comments from the Department of the Treasury	44

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000083 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.047

Appendix IX GAO Contact and Staff Acknowledgments 45

Tables

Table 1: EPLS Other Exclusions Cases for Fiscal Years 2006 through 2010 9
Table 2: EPLS Suspension and Debarment Cases by Agency and Contract Obligations, Fiscal Years 2006 through 2010 10
Table 3: Description of the Staffing at Four Agencies 13
Table 4: Description of Detailed Policies and Procedures at Four Agencies 15
Table 5: Sample of Practices Encouraging Referrals at Four Agencies 16
Table 6: Department or Agency Actions Reported in EPLS and Cases, Fiscal Years 2006 through 2010 27
Table 7: Departments or Agencies with Contract Obligations Greater Than $1 Billion, Fiscal Year 2009 29
Table 8: Causes for Debarment Listed in FAR § 9.406-2 33

Figures

Figure 1: Basis of EPLS Cases, Fiscal Years 2006 through 2010 8
Figure 2: Analysis of Selected Agency Contract Obligations, Procurement-Related Suspension and Debarment Cases for Fiscal Years 2006 through 2010, and Program Characteristics 12

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000084 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.048

Abbreviations

CIGIE	Council of the Inspectors General on Integrity and Efficiency
DHS	Department of Homeland Security
DLA	Defense Logistics Agency
DOD	Department of Defense
EPLS	Excluded Parties List System
FAR	Federal Acquisition Regulation
FEMA	Federal Emergency Management Agency
GSA	General Services Administration
HHS	Department of Health and Human Services
ICE	U.S. Immigration and Customs Enforcement
ISDC	Interagency Suspension and Debarment Committee
NCR	Nonprocurement Common Rule
OIG	office of inspector general
OMB	Office of Management and Budget

This is a work of the U.S. government and is not subject to copyright protection in the United States. The published product may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000085 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.049

United States Government Accountability Office
Washington, DC 20548

August 31, 2011

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Darrell E. Issa
Chairman
The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable Claire McCaskill
Chairman
Subcommittee on Contracting Oversight
Committee on Homeland Security and Governmental Affairs
United States Senate

Federal government spending on contracted goods and services was more than $535 billion in 2010. To protect the government's interests, federal agencies are required to award contracts only to responsible sources—those that are determined to be reliable, dependable, and capable of performing required work. One way to protect the government's interests is through suspensions and debarments, which are actions taken to exclude firms or individuals from receiving contracts or assistance based on various types of misconduct. A suspension is a temporary exclusion pending the completion of an investigation or legal proceeding, while a debarment is for a fixed term that depends on the seriousness of the cause, but generally should not exceed 3 years. These exclusions are reported in the Excluded Parties List System (EPLS),[1] maintained by the General Services Administration (GSA), along with violations of certain statutes and regulations, such as health care fraud.

[1]EPLS is an electronic database containing the list of all parties suspended, proposed for debarment, debarred, declared ineligible, or excluded or disqualified by agencies. It is available for agency and public access at www.epls.gov.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000086 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT
72557.050

Given your interest in ensuring that the government only does business with responsible contractors, we analyzed (1) the nature and extent of governmentwide exclusions reported in EPLS; (2) the relationship, if any, between practices at selected agencies and the level of suspensions and debarments under federal acquisition regulations; and (3) governmentwide efforts to oversee and coordinate the use of suspensions and debarments across federal agencies. Based on discussions with your staff, we particularly focused on agency practices for suspensions and debarments under federal acquisition regulations.

To determine the nature and extent of governmentwide suspensions and debarments, we analyzed data for fiscal years 2006 through 2010 from EPLS. We analyzed the various codes used by agencies entering data into EPLS that specify the cause of the action and the effect of the listing to identify (1) suspension and debarment actions taken under the Federal Acquisition Regulation (FAR); (2) suspension and debarment actions taken under the Nonprocurement Common Rule (NCR), which covers grants and other assistance; and (3) other exclusions.[2] To provide information on the level of agency activity, we aggregated related actions, such as those involving affiliates and related parties, to identify the number of cases.[3] We used cases to provide a common comparison among the agencies. A case may include separate actions for an individual, a business, and each affiliate, and it may entail dedication of resources and the potential for separate representation by a party's counsel and separate resolution. Analysis of agency activity included all agencies. We assessed the reliability of EPLS data by performing electronic testing, reviewing system documentation, and interviewing knowledgeable officials about data quality and reliability. We determined

[2]For purposes of this report, "other exclusions" are based on violations of certain statutes or regulations other than the FAR or are required under executive orders. These are also known as declarations of ineligibility. These exclusions can relate to such matters as health care fraud, export control violations, or drug trafficking, which may render a party ineligible for specified government transactions or activities. These violations may be unrelated to federal contracts, grants, or assistance but may include sanctions that preclude the party from some or all procurement and nonprocurement transactions as set out in the statute or regulation.

[3]EPLS provides reports showing the number of agency actions, but multiple actions may be recorded for the same case because agencies may exclude multiple individuals associated with a firm or list the firm under different firm names and include affiliates. In addition, a listed firm or individual may have multiple related actions, such as suspension, proposed debarment, or debarment, which are reported as separate actions in EPLS.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000087 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.051

that the data were sufficiently reliable for the purpose of this review. To identify agency practices for suspension and debarment taken under the FAR, we reviewed a mix of 10 agencies from among all agencies having more than $1 billion in contract obligations in fiscal year 2009.[4] These agencies included the Defense Logistics Agency (DLA), the Department of the Navy (Navy), GSA, and the Department of Homeland Security's (DHS) U.S. Immigration and Customs Enforcement (ICE)—all of which had relatively more cases involving actions taken under the FAR than other agencies—as well as the Departments of Commerce (Commerce), Health and Human Services (HHS), Justice (Justice), State (State), and the Treasury (Treasury), and DHS's Federal Emergency Management Agency (FEMA)—all of which had relatively few or no suspensions or debarments under the FAR.[5] At these 10 agencies, we focused on certain attributes of the suspension and debarment process, including the organizational placement of the suspension and debarment official, staffing and training, guidance, and the referral process, including triggering events. To identify governmentwide efforts to oversee and coordinate the suspension and debarment system, we met with officials from the Office of Management and Budget (OMB), which through its Office of Federal Procurement Policy provides overall direction of governmentwide procurement policies, including suspensions and debarments under the FAR; officials at the Interagency Suspension and Debarment Committee (ISDC);[6] the Council of the Inspectors General on Integrity and Efficiency's (CIGIE) Suspension and Debarment Working Group;[7] and GSA. We also met with or obtained information from

[4]Fiscal year 2009 was the most current full year of data available at the beginning of our review.

[5]We included two components for the Department of Defense and DHS because each had its own suspension and debarment official as well as its own guidance and procedures.

[6]The ISDC was established as the Interagency Committee on Debarment and Suspension by Executive Order 12549 on February 18, 1986.

[7]The Inspector General Reform Act of 2008, Pub. L. No. 110-409, established CIGIE as an independent entity within the executive branch to address integrity, economy, and effectiveness issues that transcend individual government agencies and increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in establishing a well-trained, highly skilled workforce in the offices of the inspectors general. The Suspension and Debarment Working Group was formed in summer 2010 as part of the CIGIE Investigations Committee to raise the overall profile and expand the use of suspension and debarment.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000088 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.052

suspension and debarment and inspector general officials at the 10 selected agencies.

We conducted this performance audit from September 2010 to August 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. For more information on our scope and methodology, see appendix I.

Background

Suspensions and debarments are tools that may be used at the discretion of agencies to protect the government's interest. The FAR prescribes overall policies and procedures governing the suspension and debarment of contractors by agencies and directs agencies to establish appropriate procedures to implement them. This flexibility enables each agency to establish a suspension and debarment program suitable to its mission and structure. The FAR specifies numerous causes for suspensions and debarments, including fraud, theft, bribery, tax evasion, or lack of business integrity.[8] (See app. II for a list of potential causes listed in the FAR.) The existence of one of these causes does not necessarily require that the party be suspended or debarred; agencies are directed to consider the seriousness of the act and any remedial measures or mitigating factors. Agencies are to establish procedures for prompt reporting, investigation, and referral to the agency suspension and debarment official. A suspension or debarment action may also include related business entities or individuals associated with the business. Parties that are suspended, proposed for debarment,[9] or debarred are precluded from receiving new contracts, and agencies must not solicit offers from, award contracts to, or consent to subcontracts with these parties, unless an agency head determines that there is a compelling reason for such action.

[8]FAR §§ 9.406-2 and 9.407-2.

[9]The debarring official issues a notice of proposed debarment to advise a party that a debarment is being considered and to provide the contractor an opportunity to respond. A proposed debarment has the same effect as a suspension and is listed in EPLS.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000089 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.053

The NCR[10] provides a suspension and debarment process, which is parallel to the suspension and debarment process specified by the FAR, for nonprocurement transactions, such as grants or other assistance.[11] The FAR and NCR provide for reciprocity—that is, a suspension or debarment under either the FAR or the NCR is recognized under the other, and a party precluded from participating in federal contracts is also excluded from receiving grants, loans, and other assistance and vice versa. Suspensions and debarments apply governmentwide—one agency's action precludes all executive agencies from doing business with the excluded party.

Additionally, violations of certain statutes and regulations other than the FAR and NCR also exclude a party from specified government transactions. The prohibited behavior could involve, for example, fraudulently receiving payments under federal health care programs or violating export control regulations. These statute- and regulation-based exclusions are often mandatory, while those taken under the FAR and NCR are discretionary. Although the violations that led to the exclusions may be unrelated to federal contracts, grants or assistance, they may result in sanctions that exclude the party from some or all procurement or federal financial and nonfinancial assistance and benefits as set out in the statute or regulation.

OMB provides overall direction of governmentwide procurement policies, including those on suspensions and debarments under the FAR, and has the authority to issue guidelines for nonprocurement suspensions and debarments. ISDC, established in 1986, monitors the governmentwide system of suspension and debarment.[12] The committee consists of representatives from agencies designated by the Director of OMB.[13] ISDC

[10]The NCR was adopted under the rule-making authority of the respective agencies after OMB issued guidelines, as provided for in Exec. Order No. 12549 (1986), *OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)*, found at 2 C.F.R. Part 180.

[11]Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

[12]51 Fed. Reg. 6370 (Feb. 21, 1986).

[13]Standing members include each of the 24 agencies covered by the Chief Financial Officers Act. Nine independent agencies and government corporations also participate.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000090 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.054

provides support to help agencies implement their suspension and debarment programs. It serves as a forum for agencies to share ideas and assists in coordinating suspension and debarment actions among agencies.

To facilitate the identification of parties that have been suspended or debarred and are excluded from receiving federal contracts, certain subcontracts, and certain federal financial and nonfinancial assistance and benefits, GSA operates the web-based EPLS. The FAR requires agencies to enter information about a firm or individual that has been suspended, proposed for debarment, or debarred by the agency, including the party's name and address, the cause for the action, the effect of the action, and the end date of the debarment action.[14] Other exclusions are also entered into EPLS, generally by the agency with designated enforcement authority.[15] Contracting officers are responsible for checking EPLS to ensure that they do not award contracts to these firms or individuals.

In 2005, we reported that federal agencies may not be consistently identifying suspended or debarred contractors when awarding new contracts.[16] In 2009, we found that some contractors nevertheless received federal funds during their period of ineligibility.[17] We made recommendations for improving EPLS to enhance agencies' confidence that they can readily identify these contractors, which GSA subsequently addressed by making system modifications. More recently, several agencies' offices of inspector general (OIG) have reported on challenges in their agencies' suspension and debarment programs and made recommendations to improve the programs, including developing procedures for documenting decisions and metrics for timely processing of suspension and debarment referrals. The Department of Defense (DOD) OIG recently reported that the services and DLA had an effective

[14]FAR § 9.404.

[15]Some agencies with regulatory authority, including HHS, Justice, and Treasury, maintain their own ineligibility listings that are electronically transmitted into EPLS.

[16]GAO, *Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process*, GAO-05-479 (Washington, D.C.: July 29, 2005).

[17]GAO, *Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds*, GAO-09-174 (Washington, D.C.: Feb. 25, 2009).

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000091 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.055

suspension and debarment process, but recommended that DOD develop a working group to review and improve the process for referring poorly performing contractors for potential suspensions or debarments, develop a training program to inform contracting personnel of the suspension and debarment program and the process for referring poorly performing contractors, and conduct training for contracting personnel on checking the EPLS before awarding contracts.[18]

Suspension and Debarment Cases Make Up a Small Percentage of All Exclusions in the Govermentwide Database

The governmentwide database on excluded parties includes suspension or debarment actions taken under the FAR or regulations pertaining to federal grants and other financial assistance, as well as exclusions related to other laws and regulations. Over the past 5 fiscal years, about 16 percent of cases included in EPLS were suspensions or debarments, while the remaining 84 percent of cases were other exclusions based on violations of laws and regulations resulting from certain prohibited conduct.[19] (See fig. 1.) DOD accounted for most of the suspension and debarment cases. Slightly more than half of the governmentwide suspension and debarment cases involved actions taken under the FAR. Several civilian departments and agencies had few or no such cases.

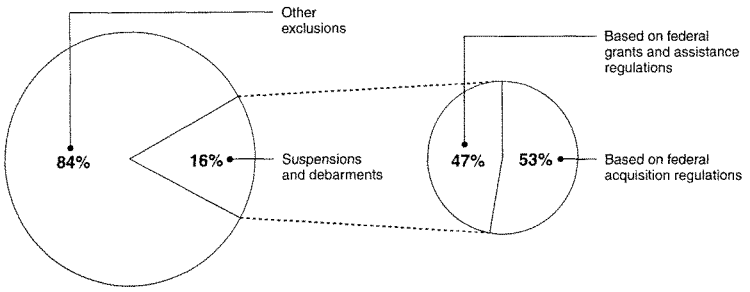
[18]Department of Defense Office of Inspector General, *Additional Actions Can Further Improve the DOD Suspension and Debarment Process*, D-2011-083 (Arlington, Va.: July 14, 2011).

[19]A case in EPLS results in multiple actions when agencies exclude multiple individuals associated with a firm, list the firm under different names, or include affiliates. In addition, a listed firm or individual may have multiple related actions, such as suspension, proposed debarment, or debarment, which are reported as separate actions in EPLS. Therefore, to provide information on the level of agency activity, we aggregated related entities, such as business affiliates and associated parties, and actions to identify the number of cases. See app. I for further information on how we aggregated the actions.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000092 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.056

Figure 1: Basis of EPLS Cases, Fiscal Years 2006 through 2010



Source: GAO analysis of EPLS data.

For fiscal years 2006 through 2010, about 4,600 cases—about 16 percent of all cases in EPLS—involved suspension and debarment actions taken at the discretion of agencies against firms and individuals based on any of the numerous causes specified in either the FAR or NCR, such as fraud, theft, or bribery or history of failure to perform on government contracts or transactions. Such cases generally result in exclusion from all federal contracts, grants, and benefits. About 47 percent of suspension and debarment cases were based on the NCR, which covers federal grants and assistance, with the Department of Housing and Urban Development accounting for over half of these grant and assistance–related cases. The other 53 percent of suspension and debarment cases were based on causes specified in the FAR and related to federal procurements.

During this same time period, about 84 percent—or about 24,000 of the approximately 29,000 total cases reported in EPLS—were other exclusions based on a determination that the parties had violated certain statutes or regulations. For example, prohibited conduct, such as health care fraud, export control violations, or drug trafficking, can result in an EPLS listing. In these types of cases, once an agency with the designated authority has determined that a party has engaged in a prohibited activity, such as fraudulently receiving payments under federal health care programs, or violating export control regulations, the law generally requires that the party be declared ineligible for specified government transactions or activities. Although most other exclusions are based on violations that are not related to federal procurements or grants, the party

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000093 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.057

is excluded from some or all procurement and nonprocurement transactions as set out in the statute.[20] As shown in table 1, HHS, Justice, and Treasury recorded the most other exclusion type cases. These cases were related to health care fraud, drug abuse, and drug-trafficking violations.

Table 1: EPLS Other Exclusions Cases for Fiscal Years 2006 through 2010

Department/agency	Violation	Cases
Department of Health and Human Services	Health care regulations	15,371
Department of Justice	Anti-Drug Abuse Act	4,301
	Defense regulations	100
Department of the Treasury	Foreign asset control provisions - drug trafficking	1,192
	Foreign asset control provisions - various	743
	Foreign asset control provisions - terrorism	189
Office of Personnel Management	Health care regulations	1,503
Department of Homeland Security	Immigration and Nationality Act	284
Environmental Protection Agency	Clean Air/Water Acts	255
Department of Labor	Labor - various	165
	Labor - Davis-Bacon Act	2
Department of State	Export control	122
	Iran sanctions/nonproliferation	60
Department of Agriculture	Crop Insurance Act	40
Government Accountability Office	Labor - Davis-Bacon Act	19
Department of Education	Higher Education Act	13
Department of Veterans Affairs	Veteran-owned business	2
U.S. Agency for International Development	Foreign Assistance Act	1
General Services Administration	Buy American Act	1
Total		**24,363**

Source: GAO analysis of EPLS data.

As shown in table 2, the number of suspension and debarment cases related to federal procurement varied widely among departments or

[20]For example, violations of the Iran Sanctions Act result in exclusion from all government contracts, while violations of the Clean Air Act and Clean Water Act only preclude contracts at the violating facility. Violations of the Anti-Drug Abuse Act may result in exclusion from some or all government contracts and benefits based on the discretion of the sentencing judge.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000094 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.058

agencies over the last 5 fiscal years. DOD accounted for about two-thirds of all suspension and debarment cases related to federal procurements with almost 1,600 cases. Of all the agencies, almost 70 percent had fewer than 20 suspension and debarment cases related to federal procurements. Six agencies—HHS, Commerce, and the Departments of Labor, Education, and Housing and Urban Development and the Office of Personnel Management—had no such cases over the last 5 fiscal years.[21]

Table 2: EPLS Suspension and Debarment Cases by Agency and Contract Obligations, Fiscal Years 2006 through 2010

Department/agency[a]	Contract obligations (in billions of dollars)	Suspension and debarment cases related to[b]		Total suspension and debarment cases
		Federal procurement	Grants and other assistance	
Department of Defense	$1,776.20	1,592	24	**1,616**
Department of Energy	129.70	82	0	**82**
Department of Health and Human Services	80.15	0	29	**29**
General Services Administration	73.44	269	0	**269**
National Aeronautics and Space Administration	72.56	41	1	**42**
Department of Homeland Security	70.79	116	8	**124**
Department of Veterans Affairs	69.00	4	11	**15**
Department of State	33.20	6	1	**7**
Department of Justice	31.97	8	3	**11**
Department of Agriculture	25.55	3	105	**108**
U.S. Agency for International Development	24.36	18	18	**36**
Department of the Treasury	23.67	8	1	**9**
Department of Transportation	23.41	11	193	**204**
Department of the Interior	23.04	94	10	**104**
Department of Commerce	14.10	0	0	**0**
Department of Labor	9.76	0	0	**0**
Environmental Protection Agency	7.81	1	332	**333**
Department of Education	7.59	0	163	**163**

[21]Some agencies may suspend or debar federal contractors utilizing the NCR, and such suspensions and debarments would be listed in EPLS as cases related to grants and other assistance.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000095 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.059

Department/agency[a]	Contract obligations (in billions of dollars)	Suspension and debarment cases related to[b]		Total suspension and debarment cases
		Federal procurement	Grants and other assistance	
Department of Housing and Urban Development	5.38	0	1,141	**1,141**
Social Security Administration	5.30	1	0	**1**
Office of Personnel Management	4.89	0	0	**0**
National Science Foundation	2.08	40	1	**41**
All other agencies	9.83	124	136	**260**
Total		**2,418**	**2,177**	**4,595**

Source: GAO analysis of Federal Procurement Data System–Next Generation and EPLS data.

[a]This table lists departments and agencies with over $2 billion in contract obligations for fiscal years 2006 through 2010. "All other agencies" includes those agencies with less than $2 billion in contract obligations.

[b]Agencies may suspend or debar federal contractors utilizing the NCR, and such suspensions and debarments would be listed in EPLS as cases related to grants and other assistance.

Agencies with Most Suspension and Debarment Cases Share Common Characteristics Missing at Agencies with Few Cases

Of the agencies we studied, those with the most procurement-related suspension and debarment cases share common characteristics. Agencies with few or no such suspensions or debarments for the same period do not have these characteristics regardless of the agency's volume of contracting activity. Officials at most of these agencies acknowledged that suspension and debarment is an underutilized tool at their agencies.

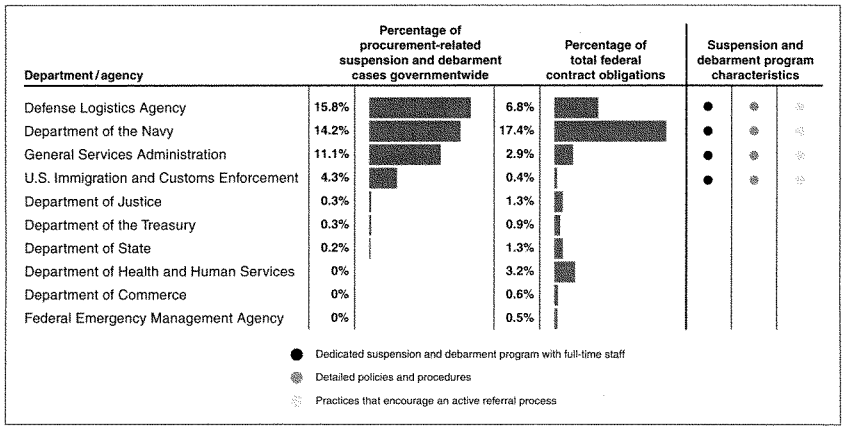
VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000096 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.080

Agencies with More Active Suspension and Debarment Programs Share Common Characteristics

While each agency suspension and debarment program we reviewed is unique, the four with the most suspension and debarment cases for fiscal years 2006 through 2010—DLA, Navy, GSA, and ICE—share certain characteristics. These include a dedicated suspension and debarment program with full-time staff, detailed policies and procedures, and practices that encourage an active referral process, as shown in figure 2.[22]

Figure 2: Analysis of Selected Agency Contract Obligations, Procurement-Related Suspension and Debarment Cases for Fiscal Years 2006 through 2010, and Program Characteristics



Source: GAO analysis of Federal Procurement Data System-Next Generation, EPLS data, and agencies' procedures and guidance.

[22]Figure 2 shows for each of the 10 agencies we studied the percentage of federal contract dollars obligated and the percentage of total government procurement-related suspension and debarment cases for fiscal years 2006 through 2010, and the extent to which certain characteristics were found among the selected agencies.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000097 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.061

Dedicated Program and Staff

One of the shared traits we identified among the four most active agencies is a dedicated suspension and debarment program with full-time staff (see table 3). Officials from the four agencies stated that having dedicated staff cannot be accomplished without the specific focus and commitment of an agency's senior officials.

Table 3: Description of the Staffing at Four Agencies

Department/agency	Description	Staffing
Defense Logistics Agency (DLA)	DLA's suspension and debarment activity is part of the agency's larger contracting integrity issue area. The activity is administered by full-time and part-time staff all with legal backgrounds from the Office of the General Counsel. Suspension and debarment staff responsibilities include processing referrals from the agency's primary field activity offices, assisting in coordination with the Department of Justice, and coordinating lead agency determinations with other relevant agencies.	**Full-time** 3 Attorneys **Part-time** 1 Paralegal
Department of the Navy (Navy)	The suspension and debarment program within the agency's Acquisition Integrity Office carries out the Navy's suspension and debarment activities as part of a larger fraud prevention program. This office has attorneys and staff support dedicated to developing and processing suspension and debarment cases referred by other offices.	**Full-time** 14 Attorneys 3 Staff support
General Services Administration (GSA)	GSA has a Center for Suspension and Debarment within the Office of Acquisition Policy.[a] Most staff have law degrees—and attend the Federal Law Enforcement Training Center's suspension and debarment training. Staff duties include referral processing, case development, and coordination with internal offices such as the Office of Inspector General, when appropriate.	**Full-time** 1 Division Director 4 Staff members
Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE)	The Suspension and Debarment Division administers ICE's suspension and debarment program. Full- and part-time staff in the division research referrals, coordinate with other offices within the Department of Homeland Security, track cases, and enter excluded parties into the Excluded Parties List System to handle ICE's substantial suspension and debarment caseload.	**Full-time** 1 Division Director 1 Procurement analyst 1 Staff assistant **Part-year** 2 Summer interns (fiscal year 2010)

Source: GAO analysis of agency documentation and discussions with agency suspension and debarment officials

[a]The office has since been renamed the Suspension and Debarment Division and is now part of GSA's Office of Governmentwide Policy.

Other reviews of agency suspension and debarment programs also have recognized the importance of having dedicated suspension and debarment staff. For example, responding to a February 2010 OIG

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000098 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.082

report,[23] DHS reviewed its suspension and debarment practices and concluded in October 2010 that it needed to establish and fully resource the suspension and debarment function throughout the department.[24] Additionally, in October 2009, the U.S. Agency for International Development's Inspector General recommended that the agency consider forming a dedicated division for suspension and debarment.[25] In response, the agency created and staffed the Compliance and Oversight of Partner Performance Division, which is dedicated to business integrity issues, including suspension and debarment. Furthermore, ISDC officials stated that without dedicated staff, none of the other essential functions of an agency suspension and debarment program can be carried out. During a recent hearing of the Commission on Wartime Contracting in Iraq and Afghanistan,[26] it was noted by the Administrator for Federal Procurement Policy that management and resources devoted to suspension and debarment are inconsistent across agencies and more could be done to protect the government and taxpayers from bad contractors.[27]

[23]Department of Homeland Security, Office of Inspector General, *DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors*, OIG-10-50 (Washington, D.C.: Feb. 2, 2010).

[24]Department of Homeland Security, *Assessment of Suspension & Debarment at DHS* (Washington, D.C.: May 28, 2010). In November 2010, DHS accepted the recommendations of this review and approved the implementation of a suspension and debarment official position within the Office of the Under Secretary for Management, tasked with developing a departmentwide suspension and debarment policy and program. The report concluded that ICE's suspension and debarment program—established in May 2008—was robust and sufficiently distinct in its enforcement of the Immigration and Nationality Act, and that it should remain a separate entity.

[25]U.S. Agency for International Development, Office of Inspector General, *Audit of USAID's Process for Suspension and Debarment* (Washington, D.C.: Oct. 1, 2009).

[26]Commission on Wartime Contracting in Iraq and Afghanistan, *Ensuring Contractor Accountability: Past Performance and Suspensions and Debarments* (Washington, D.C.: Feb. 28, 2011).

[27]The Commission on Wartime Contracting in Iraq and Afghanistan, an independent, bipartisan legislative commission, was established by Congress to study wartime contracting in Iraq and Afghanistan. Created in Section 841 of the National Defense Authorization Act for Fiscal Year 2008, this eight-member commission is mandated by Congress to study federal agency contracting for the reconstruction, logistical support of coalition forces, and the performance of security functions in Iraq and Afghanistan.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000099 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.083

Detailed Policies and Procedures

The agencies we reviewed with active suspension and debarment programs each had detailed policies and procedures that supplement FAR requirements. This generally included guidance on things such as referrals, investigations, and legal review. Table 4 shows how each of the top four agencies has developed agency-specific guidance that goes well beyond the suspension and debarment guidance in the FAR.

Table 4: Description of Detailed Policies and Procedures at Four Agencies

Department/agency	Description
Defense Logistics Agency (DLA)	DLA's *Business Integrity Program Handbook* has operational guidance for the suspension and debarment program, including definitions of roles and responsibilities at the field office and headquarters levels and notification of senior officials prior to high-risk exclusions. It also includes protocols for working with other defense and civil agencies, making lead agency determinations, and coordinating legal review.[a]
General Services Administration (GSA)	GSA's policies and procedures include the *Suspension and Debarment Standard Operating Procedures Manual*, which contains detailed information on the Center for Suspension and Debarment, including its mission and structure. The manual also has a step-by-step guide for compiling an action referral memorandum and assistance in the application of the evidence standards for suspension and debarment.
Department of the Navy (Navy)	Navy suspension and debarment policies and procedures include a Secretary of the Navy Instruction, which establishes the Acquisition Integrity Office as the lead on all fraud matters and outlines the suspension and debarment function. The instruction includes guidance on timely preparation of referrals based on indictments or convictions and coordinating with investigative units, such as the Naval Criminal Investigative Service.
Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE)	ICE's suspension and debarment program procedures include detailed guidance on conducting online database research, coordinating with other DHS components, preparing for legal review, and tracking cases in their database.

Source: GAO analysis of agency documentation and discussions with agency suspension and debarment officials

[a]Defense Logistics Agency, *Business Integrity Program Handbook*, DLSA P2 (February 2002).

Several of the reports we reviewed by inspectors general and others regarding agency suspension and debarment programs cited the importance of agency-specific, detailed policies and procedures to an active agency suspension and debarment program. For example, in August 2010, the Department of Agriculture's Inspector General reported that developing suspension and debarment policies and procedures is

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000100 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.064

important to ensuring that regulations are consistently applied throughout an agency.[28]

Practices That Encourage Referrals

Finally, each of the four agencies we studied with the most active suspension and debarment programs engage in practices that encourage an active referral process. The FAR directs agencies to refer appropriate matters to their suspension and debarment officials for consideration, and it allows agencies to develop ways to accomplish this task that suit their missions and structures. According to agency officials at these four agencies, when senior agency officials communicate the importance of suspension and debarment through their actions, speeches, and directives, they help to promote a culture of acquisition integrity where suspension and debarment is understood and utilized by staff (see table 5).

Table 5: Sample of Practices Encouraging Referrals at Four Agencies

Department/agency	Practices
Defense Logistics Agency	Staff outside of the Suspension and Debarment Office regularly trained on how and when to make referrals. Meeting regularly with other agencies within department to discuss intended actions.
Department of the Navy	Senior official issues agencywide directive stressing importance of fraud prevention, including suspension and debarment, as everyone's responsibility. Meeting with the Department of Justice regularly and demonstrating agency's ability to take suspension and debarment actions without jeopardizing potential legal proceedings.
General Services Administration	Use of a case management tool that allows for referral tracking and case reporting, and provides internal controls, all of which are intended to emphasize the importance of submitting and following up on referrals. Office of Inspector General looks for and refers cases based on investigations and legal proceedings.
Department of Homeland Security, U.S. Immigration and Customs Enforcement	Use of the Suspension and Debarment Case Management system that allows for tracking and follow-up on all referrals, which supports an active referral process.

Source: GAO analysis of agency documents and discussions with agency suspension and debarment officials

Government officials made similar observations about what actions agencies need to take to improve how they use suspension and debarment. For example, in February 2011, the Administrator for Federal Procurement Policy within OMB outlined progress among federal

[28]Department of Agriculture, Office of Inspector General, *Effectiveness and Enforcement of Suspension and Debarment Regulations in the U.S. Department of Agriculture*, 50601-14-AT (Washington, D.C.: Aug. 16, 2010).

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000101 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.065

agencies' suspension and debarment programs and highlighted those same characteristics we identified at the agencies we studied with the most suspension and debarment activity.[29] The Administrator acknowledged that there is much room for improvement among agency suspension and debarment programs and noted that more agencies are establishing formal suspension and debarment programs, dedicating greater staff resources to handling referrals and managing cases, strengthening policies, providing training, and taking action to root out illegal behavior and irresponsible actors. In addition, the DHS Inspector General, a member of the National Procurement Fraud Task Force, testified before Congress that the task force formed a Suspension and Debarment Committee, which concluded that several elements were necessary for an effective suspension and debarment program. Similar to our observations, he noted the need for a dedicated person or group responsible for identifying potential suspension and debarment cases and effective coordination with the agency's OIG. He also noted the need for protocols that identify the officials responsible for compiling suspension and debarment referral packages, as well as for legal support to pursue suspension or debarment actions against contractors.[30]

Agencies with Few or No Procurement-Related Suspension and Debarment Cases Lacked the Traits Common among Agencies with More Active Programs

The remaining six agencies we studied—HHS, FEMA, Commerce, Justice, State, and Treasury—do not have the characteristics common to the four agencies with the most suspension and debarment cases. Based on our review of agency documents and interviews with agency officials, none of these six agencies had dedicated suspension and debarment staff, detailed policies and guidance other than those to implement the FAR, or practices that encourage an active referral process. These agencies have few or no suspensions or debarments of federal contractors.

[29]Office of Management and Budget, Office of Federal Procurement Policy, *Statement of the Honorable Daniel I. Gordon, Administrator for Federal Procurement Policy, Office of Management and Budget, Before the Commission on Wartime Contracting* (Washington, D.C.: Feb. 28, 2011).

[30]Department of Homeland Security, Office of Inspector General, *Statement of Richard L. Skinner, Inspector General, U.S. Department of Homeland Security, Before the Committee on Oversight and Government Reform, U.S. House of Representatives* (Washington, D.C.: Mar. 18, 2010).

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000102 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.086

In addition, an agency's level of suspension and debarment activity was not necessarily related to its contracting volume. For example, FEMA and ICE, two components of DHS with separate suspension and debarment programs, had similar percentages of federal contract obligations for fiscal years 2006 through 2010—0.5 percent and 0.4 percent, respectively. ICE, however, represented 4.3 percent of the procurement-related suspension and debarment cases across the government, while FEMA had no suspensions or debarments. ICE practices included the three program attributes that we identified at the agencies with the most suspension and debarment cases. (See fig. 2.) FEMA had none of them.

Officials at the agencies we reviewed that have few or no procurement-related suspensions or debarments, acknowledged that their agencies need to place greater emphasis on suspension and debarment as a tool to ensure that the government only does business with responsible contractors. Some of these agencies have already begun efforts to develop more robust suspension and debarment programs. These ongoing efforts include the following:

- An HHS OIG official told us that since more than 80 percent of HHS's appropriations are for Medicare and Medicaid programs, their emphasis and budget have been largely directed toward monitoring those programs, including the Exclusions Program, which was designed to combat health care fraud.[31] The HHS suspension and debarment official added that HHS now sees suspension and debarment as an underutilized management tool, and the agency has made a commitment to having a more active process, which so far includes training and researching best practices. The official noted that the tools for suspension and debarment are present and that the agency needs to emphasize using them.

- FEMA officials have noted the need to improve their procurement-related suspension and debarment program, and are working closely with ICE to adopt some of the characteristics of agencies with more active programs. At the same time, DHS has named a suspension and

[31]Monitoring the Medicaid and Medicare programs includes HHS OIG's administration of the Exclusions Program, a program designed to combat health care fraud by preventing certain individuals and businesses from participating in federally funded health care programs and other government procurement and nonprocurement transactions, based on convictions for program-related fraud and patient abuse, licensing board actions, and default on Health Education Assistance Loans.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000103 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.067

debarment official within the Office of the Under Secretary for Management, who has been tasked with developing a departmentwide suspension and debarment policy and program.

- Treasury also has efforts under way to improve its procurement-related suspension and debarment program. Treasury officials noted that the Office of Inspector General is taking steps to promote the use of suspensions and debarments. According to an OIG official, they are improving training and education throughout the office by having OIG attorneys attend suspension and debarment training sponsored by CIGIE. In addition, investigators are beginning to receive training on using suspension and debarment with ongoing legal cases or those cases declined for prosecution by the U.S. Attorney that meet the criteria for potential debarment.

- Commerce officials stated that the Suspension and Debarment Official is working actively to build a robust suspension and debarment program. The OIG expects to have a fully functioning suspension and debarment program by the end of fiscal year 2011. The Office of Counsel to the Inspector General has proposed to serve as liaison between the OIG, other investigatory bodies within Commerce, and the Suspension and Debarment Official. The official is collaborating with the OIG and the Office of General Counsel to develop an acceptable process and leverage available resources.

Governmentwide Efforts to Oversee Suspensions and Debarments Face Challenges

Governmentwide efforts to oversee and coordinate suspensions and debarments have faced a number of challenges. OMB assigned responsibility for governmentwide coordination to ISDC; however, ISDC relies on agencies' voluntary participation in its processes and member agencies' limited resources to fulfill its mission. Other efforts are under way to coordinate suspension and debarment activity across government, including the CIGIE Suspension and Debarment Working Group's efforts to raise awareness by promoting the use of suspension and debarment and GSA's ongoing efforts to simplify and improve EPLS.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000104 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.088

Interagency Committee Relies on Voluntary Agency Participation and Limited Agency Resources to Oversee Suspension and Debarment Programs

OMB, starting in 1986, assigned responsibility for governmentwide suspension and debarment oversight and coordination to ISDC. More recently, the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009[32] strengthened the committee's role by specifying functions ISDC was to perform, including

- resolve lead agency responsibility and coordinate actions among interested agencies with respect to suspension or debarment proceedings,
- report to Congress annually on agency suspension and debarment activities and accomplishments as well as agency participation in the committee's work,
- recommend to OMB committee-approved changes to the government suspension and debarment system and its rules, and
- encourage and assist agencies in cooperating to achieve operational efficiencies in the governmentwide suspension and debarment system.

When more than one agency has an interest in the debarment or suspension of a contractor, the FAR requires ISDC to resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension or debarment by any agency.[33] According to ISDC officials, ISDC relies on voluntary agency participation in its informal coordination process, which works well when used. However, not all agencies coordinate through ISDC. Officials from ISDC cited as an example the Small Business Administration's recent suspension of a major federal contractor. Because the agency did not go through the ISDC coordination process, other agencies were surprised by the suspension and did not have an opportunity to offer their perspectives on this action. ISDC has to rely on the individual agencies involved in a potential suspension or debarment to resolve any coordination issues.

Likewise, in part because it could not compel agencies to respond to its inquiries, ISDC took almost 2 years to submit its required annual report to

[32]Pub. L. No. 110-417, § 873 (2008).

[33]FAR § 9.402 (d).

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000105 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.089

Congress on agencies' suspension and debarment activities. According to ISDC representatives, only about half of the member agencies responded to the initial request for information needed for the report. These officials also noted that their limited resources to devote to committee responsibilities further delayed the report. Consequently, ISDC issued its first report on June 15, 2011, covering both of the reports required for 2009 and 2010.[34] The report identifies several agencies that made progress in establishing formal suspension and debarment programs. It does not make any recommendations to improve the suspension and debarment system. However, the report describes a survey ISDC conducted of its members to create a baseline against which to measure agency progress—looking at internal agency controls, training efforts, and use of tools in addition to suspensions and debarments, such as show cause notices, administrative agreements, and voluntary exclusions. Although ISDC did not make recommendations in its report, its Acting Chair indicated that the committee is currently assisting agencies in improving suspension and debarment programs through the sharing of experience, operating policies, practices and procedures, and "example action documents" developed and used by active programs. OMB officials acknowledged that while they are seeing progress in the attention devoted by agencies to suspensions and debarments, agencies would benefit from guidance on how to establish such programs and how to work effectively with ISDC.

ISDC's coordination role concerning the governmentwide suspension and debarment system also has faced other challenges. ISDC holds monthly meetings for members as a forum to provide information and discuss relevant issues, but according to ISDC representatives, agencies without active suspension and debarment programs generally are not represented at these meetings. In addition, ISDC officials noted that the committee does not have dedicated staff and depends on limited resources provided by member agencies, particularly the agencies of the officials appointed as the Chair and Vice-Chair. According to the Chair and Vice-Chair, they do committee work in addition to their primary agency responsibilities, using their own agencies' resources.

[34]Interagency Suspension and Debarment Committee, *Report on Federal Agency Suspension and Debarment Activities* (Washington, D.C.: June 15, 2011).

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000106 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.070

Other Efforts Are Under Way to Improve Suspension and Debarment Coordination

Other efforts are under way across government to improve coordination of suspension and debarment programs. CIGIE's Suspension and Debarment Working Group—formed in the summer of 2010—promotes the use of suspension and debarment as a tool to protect the government's interest. This group includes representatives from the Recovery Accountability and Transparency Board and the OIGs for nine federal agencies. The CIGIE working group is taking steps to raise awareness, including sponsoring training and advising the inspector general community about other training opportunities. In October 2010, the working group held an all-day suspension and debarment workshop that generated great interest, with over 300 people attending. Subsequently, the working group notified the suspension and debarment community of the 3-day National Suspension and Debarment Training Program hosted by the Federal Law Enforcement Training Center. Working group representatives stated that the demand for the workshop made clear that more training and outreach needs to be done, and the working group is trying to determine ways to meet the need. In addition, the working group informally surveyed the entire inspector general community about suspension and debarment efforts to identify good practices and is in the process of analyzing the responses.

GSA has begun an effort to improve EPLS by consolidating and simplifying the codes agencies use to identify the basis and consequences of exclusions, referred to as cause and treatment codes. GSA included EPLS as part of an ongoing Integrated Acquisition Environment initiative to consolidate various acquisition-related systems under a single system for award management. As part of this effort, GSA officials reviewed the configuration and function of EPLS and concluded that the cause and treatment code structure represented a major area of potential improvement primarily because there were too many codes—some of which were duplicative or specific to one agency—and the consequences of a listing is sometimes unclear. As a result, agency officials could be confused when accessing EPLS to readily determine the extent of exclusion. According to a GSA official, the goal of the EPLS effort is to consolidate the codes into categories that clearly define the effect of a listing.

Conclusions

Suspensions and debarments can serve as powerful tools to help ensure that the government protects its interests by awarding contracts and grants only to responsible sources. The attention dedicated to these tools varies across the agencies we reviewed. Some agencies could benefit from adopting the practices we identified as common among agencies

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000107 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.071

that have more active suspension and debarment programs. Because agency missions and organizational structures are unique, each agency must determine for itself the extent to which it can benefit from adopting these practices. However, one point is clear: agencies that fail to devote sufficient attention to suspension and debarment issues likely will continue to have limited levels of activity and risk fostering a perception that they are not serious about holding the entities they deal with accountable. Additionally, the suspension and debarment process could be improved governmentwide by building upon the existing framework to better coordinate and oversee suspensions and debarments. As acknowledged by officials at the Office of Federal Procurement Policy, which provides overall direction of governmentwide procurement policies, agencies would benefit from guidance on how to establish active suspension and debarment programs and how to work more effectively with ISDC.

Recommendations for Executive Action

We recommend that the Attorney General and the Secretaries of Commerce, Health and Human Services, State, and the Treasury take steps to improve their suspension and debarment programs by

- assigning dedicated staff resources,
- developing detailed implementing guidance, and
- promoting the use of a case referral process.

We also recommend that the Secretary of Homeland Security, as part of ongoing efforts to establish a departmentwide program for suspensions and debarments, take steps to ensure that FEMA incorporates the characteristics we identified as common among agencies with more active programs.

In addition, to improve suspension and debarment programs at all agencies and enhance governmentwide oversight, we recommend that the Administrator of the Office of Federal Procurement Policy issue governmentwide guidance that (1) describes the elements of an active suspension and debarment program, and (2) emphasizes the importance of cooperating with ISDC in terms of

- helping to resolve lead agency issues,
- providing required reporting information in a timely manner, and

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000108 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.072

- designating existing resources as needed to enable the committee to function effectively.

Agency Comments and Our Evaluation

We provided a draft of this report to Commerce, DHS, DOD, GSA, HHS, Justice, OMB, State, and Treasury. In written comments, DHS, State, and Treasury concurred with the report's recommendations, while Commerce, HHS, and Justice generally concurred. In e-mailed comments from the agency liaison, OMB concurred with the report's recommendations. In addition, DHS, DOD, GSA, and OMB provided technical comments, which were incorporated as appropriate.

In commenting on the draft report, DHS stated that it is committed to ensuring that its suspension and debarment program has the same characteristics as those that we identified as common among agencies with more active programs. State noted that it recognizes the importance of maintaining strong suspension and debarment processes, and plans to publish agency guidance on referring a contractor or grantee for possible suspension or debarment. Treasury stated that it plans to leverage the practices identified as in use by other agencies to deploy more detailed implementing guidance and a better defined case referral process. Commerce stated that it is already taking action to implement the recommendations, and HHS stated that it will work with its OIG to develop detailed implementing guidance, including a case referral process. Justice noted the need for agencies to devote sufficient attention to suspension and debarment and plans to have its senior agency officials actively promote the suspension and debarment case referral process.

Commerce, Justice, and Treasury raised concerns about assigning full-time or additional staff to their suspension and debarment programs. HHS stated it will utilize existing resources rather than assigning dedicated staff resources. As we note in our report, agency missions and organizational structures are unique, so each agency must determine for itself the extent to which it can benefit from adopting these practices, including determining the appropriate level of resources. Given the current budget environment, our recommendation is for agencies to assign dedicated staff resources, but we leave it to the agencies to determine if additional full-time or part-time staff are needed, or if existing resources can be used to carry out suspension and debarment activities. Nevertheless, our findings show that agencies that do not devote sufficient attention to this area likely will continue to have few suspensions and debarments, which may place the government at risk of doing business with irresponsible contractors. We continue to believe that

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000109 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.073

agencies need to assign dedicated staff to have effective suspension and debarment programs.

Justice also stated that its current regulations and guidelines, coupled with its implementation of the recommendation to actively promote the referral process, will provide sufficient guidance to referring activities on the suspension and debarment policies and procedures. The agencies we reviewed with active suspension and debarment programs, however, each have detailed policies and procedures that supplement FAR requirements. These policies and procedures go well beyond the guidance in the FAR, are agency specific, and generally include guidance on matters such as referrals, investigations, deadlines, points of contact, and legal review. Justice's current guidance does not adequately cover these matters. We encourage Justice to supplement its existing regulations with agency-specific guidance that would include information such as referral requirements, time frames, and points of contacts.

Written comments from Commerce, HHS, DHS, Justice, State, and Treasury are reprinted in appendixes III through VIII, respectively.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to interested congressional committees; the Director of the Office of Management and Budget; the Attorney General; the Secretaries of Commerce, Defense, Health and Human Services, Homeland Security, State, and the Treasury; and the Administrator of General Services. The report will also be available at no charge on the GAO website at http://www.gao.gov.

If you or your staff have any questions about this report, please contact me at (202) 512-4841 or woodsw@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix IX.

William T. Woods

William T. Woods, Director
Acquisition and Sourcing Management

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000110 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.074

Appendix I: Scope and Methodology

To determine the nature and extent of governmentwide suspensions and debarments, we analyzed data for fiscal years 2006 through 2010 from the web-based Excluded Parties List System (EPLS) managed by the General Services Administration. We analyzed the various codes agencies use to enter exclusions in EPLS that specify the cause of the action and effect of the listing to identify (1) suspension and debarment actions against firms or individuals based on the Federal Acquisition Regulation, (2) suspension and debarment actions based on the Nonprocurment Common Rule covering grants and other assistance, and (3) other exclusions.[1] Reporting a case in EPLS can result in numerous actions. For example, a case may include (1) multiple individuals associated with an excluded firm, (2) several business units or affiliates of the firm, and (3) listings under different names of a firm or individual—all of which are recorded as separate actions in EPLS. In addition, each listed firm or individual can have multiple related actions, such as a suspension, proposed debarment, and debarment, which are also listed as separate actions. To provide information on the level of agency activity, we aggregated related entities, such as business affiliates and associated parties, and actions to identify the number of cases. We counted cases with multiple actions in the fiscal year of the first exclusion action. We counted cases in which a party was excluded by more than one agency for the agency first taking the action.[2] We used cases to provide a common comparison among the agencies. A case may include separate action for an individual, a business, and each affiliate and may entail dedication of resources and the potential for separate representation by a party's counsel and separate resolution. (See table 6, which shows the number of actions entered in EPLS and the corresponding number of cases during the same period.)

[1]For purposes of this report, "other exclusions" are based on violations of certain statutes or regulations other than the Federal Acquisition Regulation or are required under executive orders. These are also known as declarations of ineligibility. These exclusions can relate to such matters as health care fraud, export control violations, or drug trafficking, which may render a party ineligible for specified government transactions or activities. These violations may be unrelated to federal contracts, grants, or assistance but may include sanctions that preclude the party from some or all procurement and nonprocurement transactions as set out in the statute or regulation.

[2]For example, both the Department of Health and Human Services and the Office of Personnel Management exclude some health care professionals.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000111 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.075

Table 6: Department or Agency Actions Reported in EPLS and Cases, Fiscal Years 2006 through 2010

Department/agency	Total EPLS actions	Total cases
Department of Agriculture	235	148
Department of Commerce	0	0
Department of Defense	6,110	1,616
Department of Education	180	176
Department of Energy	212	82
Department of Health and Human Services	15,424	15,400
Department of Homeland Security	487	408
Department of Housing and Urban Development	1,552	1,141
Department of Justice	4,417	4,412
Department of Labor	307	167
Department of State	236	189
Department of the Interior	153	104
Department of the Treasury	4,987	2,133
Department of Transportation	320	204
Department of Veterans Affairs	17	17
Environmental Protection Agency	887	588
General Services Administration	1,161	270
National Aeronautics and Space Administration	52	42
National Science Foundation	41	41
Office of Personnel Management	4,242	1,503
Social Security Administration	2	1
U.S. Agency for International Development	38	37
All other agencies	617	279
Total	**41,677**	**28,958**

Source: GAO analysis of EPLS data.

Notes: This table lists departments and agencies with over $2 billion in contract obligations for fiscal years 2006 through 2010. "All other agencies" include those agencies with less than $2 billion in contract obligations. Cases include both suspension and debarment and other exclusion cases.

We analyzed the activities of all agencies listed in EPLS. We assessed the reliability of EPLS data by performing electronic testing, reviewing system documentation, and interviewing knowledgeable officials about data quality and reliability, and determined that the data were sufficiently reliable for the purpose of this review.

To determine the relationship, if any, between selected agency practices and the level of suspension and debarment activity, we identified

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000112 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.076

agencies with more than $1 billion in contract obligations and their total number of procurement-related suspension and debarment cases in fiscal year 2009.[3] These agencies are listed in table 7. We selected a mix of these agencies, including the Defense Logistics Agency, the Department of the Navy, the General Services Administration, and the Department of Homeland Security's (DHS) U.S. Immigration and Customs Enforcement—all of which had relatively more cases involving federal procurement than other agencies—and the Departments of Commerce, Health and Human Services, Justice, State, and the Treasury, and DHS's Federal Emergency Management Agency—all of which had relatively few or no exclusions involving federal procurements.[4] We selected these agencies based on the number of suspension and debarment cases and whether the agency had recently been reviewed by its inspector general. The Inspectors General for the Departments of Defense and Justice were reviewing the agency suspension and debarment processes at the time of our review. We closely coordinated our reviews to minimize any duplication of effort.

[3]Fiscal year 2009 was the most recent full year of contract obligations data available at the beginning of our review.

[4]We included two components for the Department of Defense and DHS because each had its own suspension and debarment official as well as its own guidance and procedures.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000113 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.077

Table 7: Departments or Agencies with Contract Obligations Greater Than $1 Billion, Fiscal Year 2009

Agencies	Total contract obligations (dollars in billions)	Percentage of total government obligations	Total number of procurement-related suspension and debarment cases (fiscal year 2009)
Department of the Army	$133.4	24.7	132
Department of the Navy	95.4	17.6	58
Department of the Air Force	67.8	12.5	127
Defense Logistics Agency	38.0	7.0	89
All other defense activities	38.9	7.2	1
Department of Energy	31.7	5.9	12
Department of Health and Human Services	20.2	3.7	0
General Services Administration	15.5	2.9	58
National Aeronautics and Space Administration	15.2	2.8	12
Department of Veterans Affairs	14.8	2.7	0
U.S. Immigration and Customs Enforcement	2.1	0.4	28
Federal Emergency Management Agency	1.7	0.3	0
All other Department of Homeland Security activities	10.4	1.9	0
Department of Justice	7.5	1.4	4
Department of State	7.5	1.4	1
U.S. Agency for International Development	6.1	1.1	0
Department of Transportation	5.5	1.0	0
Department of Agriculture	5.4	1.0	1
Department of the Treasury	4.9	0.9	0
Department of the Interior	4.3	0.8	32
Department of Commerce	3.2	0.6	0
Department of Labor	2.0	0.4	0
Environmental Protection Agency	1.8	0.3	0
Department of Education	1.5	0.3	0
Social Security Administration	1.3	0.2	0
Office of Personnel Management	1.2	0.2	0
All other agencies	3.5	0.6	69
Total	**$540.8**	**100[a]**	**624**

Source: GAO analysis of Federal Procurement Data System–Next Generation data and EPLS data

[a]Percentages may not add to total because of rounding.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000114 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.078

At the 10 selected agencies, we identified certain attributes of the suspension and debarment process, including the organizational placement of the suspension and debarment official, staffing and training, formal or informal process, and the referral process, including triggering events. We conducted a comparative analysis to identify attributes that agencies with relatively more cases involving federal procurements have in common that are not present at agencies with few or no cases. To help identify attributes associated with a more active suspension and debarment program, we reviewed agency inspector general reports identifying needed improvements and met with representatives of the Council of the Inspectors General on Integrity and Efficiency's (CIGIE) Suspension and Debarment Working Group[5] and the Interagency Suspension and Debarment Committee.

To identify governmentwide efforts to oversee and coordinate the use of suspension and debarment, we met with officials from the Office of Management and Budget, which provides overall direction of governmentwide procurement policies;[6] the Interagency Suspension and Debarment Committee; CIGIE's Suspension and Debarment Working Group; and the General Services Administration, which manages and maintains the governmentwide EPLS. We also met with or obtained information from suspension and debarment and inspector general officials at the 10 selected agencies.

We conducted this performance audit from September 2010 to August 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe

[5]The Inspector General Reform Act of 2008, Pub. L. No. 110-409, established CIGIE as an independent entity within the executive branch to address integrity, economy, and effectiveness issues that transcend individual government agencies and to increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in establishing a well-trained, highly skilled workforce in the offices of the inspectors general. The Suspension and Debarment Working Group was formed in summer 2010 as part of the CIGIE Investigations Committee to raise the overall profile and expand the use of suspension and debarment.

[6]The Office of Federal Procurement Policy in the Office of Management and Budget provides overall direction of governmentwide procurement polices, including procurement suspension and debarment. 41 U.S.C. § 1101.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000115 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.079

that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000116 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.080

Appendix II: Causes for Suspension or Debarment

The Federal Acquisition Regulation (FAR) provides numerous potential causes for debarment, which are based on criminal convictions, civil judgments, or a preponderance of the evidence, as shown in table 8.[1] The existence of a cause for debarment does not require that a firm or an individual be debarred. In determining whether it is in the government's interest to debar the firm or an individual, the agency suspension and debarment official should consider the seriousness of the acts or omissions, any remedial measures, and mitigating factors. This official may impose a suspension pending the completion of an investigation or legal proceeding, when immediate action is necessary to protect the government's interest. A suspension may be based on adequate evidence[2] of most of the causes for debarment listed in table 8.[3]

[1]FAR § 9.406-2.

[2]In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether important allegations are corroborated, and what inferences can reasonably be drawn as a result. Indictment for any of the causes specified in FAR § 9.407-2 (a) constitutes adequate evidence for suspension.

[3]Letters f. and l. in table 8 are not included in the causes for suspension listed at FAR § 9.407-2.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000117 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.081

Table 8: Causes for Debarment Listed in FAR § 9.406-2

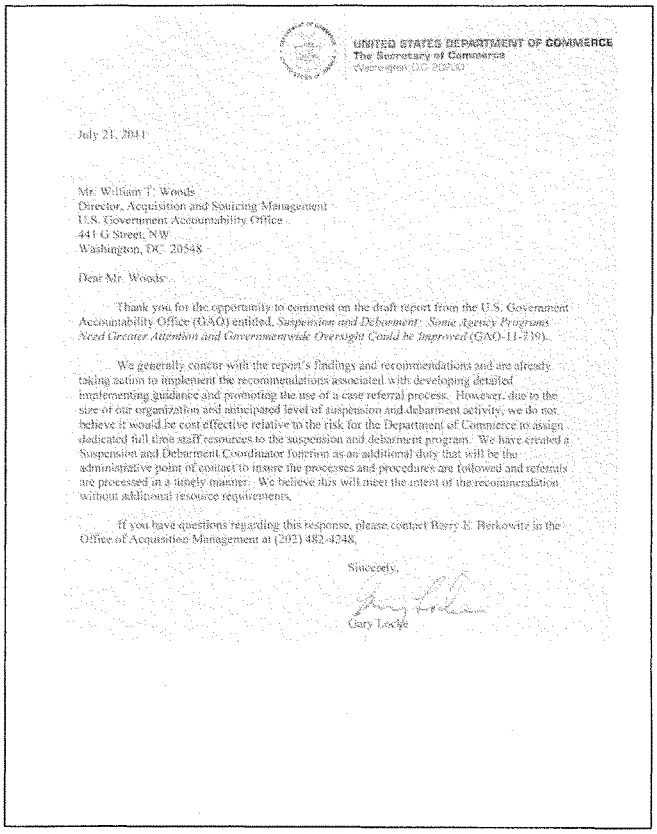
A contractor may be debarred for a criminal conviction or a civil judgment for:	
a.	Commission of fraud or criminal offense related to obtaining, attempting to obtain, or performing a public contract or subcontract.
b.	Violation of federal or state antitrust statutes relating to the submission of offers.
c.	Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property.
d.	Intentionally affixing a false "Made in America" label to a product not made in the United States.
e.	Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.
A contractor may be debarred based upon a preponderance of the evidence for:	
f.	Serious violation of terms for one or more government contracts or subcontracts, such as willful failure to perform, history of failure to perform, or history of unsatisfactory performance.
g.	Certain violations of the Drug-Free Workplace Act
h.	Intentionally affixing a false "Made in America" label to a product not made in the United States.
i.	Commission of an unfair trade practice, including certain violations of the Tariff Act of 1930 (19 U.S.C. 1337), certain violations of the Export Administration Act or similar export agreement, or knowingly making a false statement about a major element in the foreign content certification of a supply item.
j.	Delinquent payment on finally determined federal tax liability in excess of $3,000.
k.	Knowing failure by a principal to timely disclose to the government, in connection with award, performance, or closeout of contract or subcontract, credible evidence of violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations; violation of civil False Claims Act; or significant overpayment(s) on the contract.
A contractor may also be debarred based upon:	
l.	A determination by the Secretary of Homeland Security or U.S. Attorney General that the contractor is not in compliance with Immigration and Nationality Act employment provisions.
m.	Any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.

Source: GAO analysis of the FAR

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000118 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.082

Appendix III: Comments from the Department of Commerce



UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

July 21, 2011

Mr. William T. Woods
Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Woods:

Thank you for the opportunity to comment on the draft report from the U.S. Government Accountability Office (GAO) entitled, *Suspension and Debarment: Some Agency Programs Need Greater Attention and Governmentwide Oversight Could be Improved* (GAO-11-739).

We generally concur with the report's findings and recommendations and are already taking action to implement the recommendations associated with developing detailed implementing guidance and promoting the use of a case referral process. However, due to the size of our organization and anticipated level of suspension and debarment activity, we do not believe it would be cost effective relative to the risk for the Department of Commerce to assign dedicated full time staff resources to the suspension and debarment program. We have created a Suspension and Debarment Coordinator function as an additional duty that will be the administrative point of contact to insure the processes and procedures are followed and referrals are processed in a timely manner. We believe this will meet the intent of the recommendation without additional resource requirements.

If you have questions regarding this response, please contact Barry E. Berkowitz in the Office of Acquisition Management at (202) 482-4248.

Sincerely,

Gary Locke

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000119 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.083

Appendix IV: Comments from the Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES — OFFICE OF THE SECRETARY

Assistant Secretary for Legislation
Washington, D.C. 20201

William T. Woods
Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
441 G Street N.W.
Washington, DC 20548

JUL 21 2011

Dear Mr. Woods:

Attached are comments on the U.S. Government Accountability Office's (GAO) draft report entitled, "SUSPENSION AND DEBARMENT: Some Agency Programs Need Greater Attention and Governmentwide Oversight Could Be Improved" (GAO-11-739).

The Department appreciates the opportunity to review this report prior to publication.

Sincerely,

Jim R. Esquea
Assistant Secretary for Legislation

Attachment

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000120 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.084

GENERAL COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) ON THE GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT REPORT ENTITLED, "SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED" (GAO-11-739)

The Department appreciates the opportunity to review and comment on this draft report.

GAO Recommendation

We recommend that the Secretary of Health and Human Services take steps to improve its suspension and debarment programs by:

- assigning dedicated staff resources
- developing detailed implementing guidance, and
- promoting the use of a case referral process

HHS Response

The Department has reviewed the findings and recommendations made by GAO. The Department's Office of Grants and Acquisition Policy and Accountability, which is led by HHS' Suspending and Debarring Official, will work with HHS' Office of Inspector General to develop detailed implementing guidance, including a case referral process. The Department will utilize existing resources to support these and other assigned duties rather than assigning dedicated staff resources.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000121 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.085

Appendix V: Comments from the Department of Homeland Security

U.S. Department of Homeland Security
Washington, DC 20528

July 19, 2011

William T. Woods
Director, Acquisition and Sourcing Management
441 G Street, NW
U.S. Government Accountability Office
Washington, DC 20548

Re: Draft Report GAO-11-739 "SUSPENSION AND DEBARMENT: Some Agency Programs Need Greater Attention and Government-wide Oversight Could Be Improved"

Dear Mr. Woods:

Thank you for the opportunity to review and provide comments on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO's) work in planning and conducting its review and issuing this report.

The Department is pleased to note GAO's positive recognition that the U.S. Immigration and Customs Enforcement (ICE) Suspension and Debarment office has many of the attributes found in successful Suspension and Department Programs. In the brief period since the office was established, DHS has been impressed with ICE's Suspension and Debarment accomplishments and intends to build on those successes as DHS establishes a single department-wide Suspension and Debarment program.

The draft report contained one recommendation directed at DHS, with which DHS concurs. Specifically, GAO recommended that the Secretary of Homeland Security, as part of ongoing efforts to establish a Department-wide program for suspensions and debarments, take steps to:

Recommendation 1: Ensure that the Federal Emergency Management Agency (FEMA) incorporates the characteristics we identified as common among agencies with more active programs.

Response: Concur. As acknowledged in GAO's report, DHS is in the process of developing a Department-wide suspension and debarment policy and program. DHS is committed to ensuring this program has the same characteristics as the successful programs GAO reviewed. FEMA's current suspension and debarment process will be transitioned to DHS's new suspension and debarment program. The new program will have a dedicated trained workforce that coordinates with contracting officers, grant officers, the DHS Office of the Inspector General (OIG), and other DHS investigative units. It will also have formal policies and procedures published and available for all DHS employees. The newly developed office and processes will make coordination quicker and easier to ensure more effective

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000122 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.086

coordination of cases for potential suspension or debarment action, as appropriate. In this way, DHS's new program will implement all the characteristics GAO identified as present in robust suspension and debarment programs.

Again, thank you for the opportunity to review and comment on this draft report. Technical comments were previously provided under separate cover. We look forward to working with you on future Homeland Security issues.

Sincerely,

Jim H. Crumpacker
Director
Departmental GAO/OIG Liaison Office

2

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000123 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.087

Appendix VI: Comments from the Department of Justice

U.S. Department of Justice

Washington, D.C. 20530

July 20, 2010

William T. Woods
Director, Acquisition and Sourcing
United States Government Accountability Office
Washington, DC 20548

Dear Mr. Woods:

The Department of Justice (Department) has reviewed the Government Accountability Office's (GAO's) draft report *"Suspension and Debarment: Some Agency Programs Need Greater Attention and Governmentwide Oversight Could be Improved."* GAO-11-739 (Report). The Department concurs with much of the Report's findings and conclusions, and in particular with the Report's emphasis on the need for agencies to devote sufficient attention to suspension and debarment in order to ensure that agencies conduct business with responsible parties only. The Department's comments on the Report's recommendations follow.

Recommendations. The Report recommends that the Attorney General and the Secretaries of Commerce, Health and Human Services, State, and the Treasury take steps to improve their suspension and debarment programs by (1) promoting the use of the case referral process; (2) assigning a dedicated suspension and debarment program with full-time staff; and (3) developing additional detailed policies and procedures to supplement the guidance contained in the Federal Acquisition Regulation (FAR). The Report also recommends that the Director of the Office of Management and Budget (OMB) direct the Administrator of the Office of Federal Procurement Policy (OFPP) to issue governmentwide guidance (4) describing the elements of an active suspension and debarment program and (5) emphasizing the importance of cooperating with the Interagency Suspension and Debarment Committee (ISDC).

The Department's Response: As an initial matter, the Department notes that the Report's recommendations are based on a review of the "shared traits" of the four agencies with the greatest number of suspension and debarment cases for fiscal years 2006-2010, as identified in the General Service Administration's (GSA's) Excluded Parties List System (EPLS).[1] The Report does not address in detail the policies and practices of the other federal agencies, including the Department. Additionally, the Report does not consider certain factors that may

[1] While the total number of suspension and debarment cases identified in the Report for the Department during this time period appears accurate, the division between procurement and non-procurement cases appears to be inaccurate, likely the result of EPLS coding errors. The Department understands that GSA is considering changes to the EPLS.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000124 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.088

William T. Woods
Page 2

impact the number of suspension and debarment cases, including, for example, the total number of contractors and grantees conducting business with an agency, or the types of products or services being acquired by an agency. Importantly, the Report acknowledges that, because agency missions and organizational structures are unique, each agency must determine for itself the extent to which it can benefit from adopting the characteristics of these four agencies.

Promoting the Case Referral Process. The Department agrees with the Report's recommendation that senior agency officials actively promote and encourage the suspension and debarment case referral process, and it intends to implement this recommendation. The Department intends to issue memoranda to all component heads, emphasizing suspension and debarment as an important tool to protect the Government. The memoranda also will remind all potential referring components, including contracting, grant-making, investigating, and litigating activities, of the Department's procedures when a cause for suspension or debarment arises. The Department believes that implementation of this recommendation should significantly improve its suspension and debarment program.

Assigning Dedicated Full-time Staff. The Department does not believe that assigning dedicated full-time staff to its suspension and debarment program is necessary or practical at this time. First, the Department appreciates the importance of conducting business with responsible parties and the important role of suspension and debarment. Second, given the current fiscal environment, including a hiring freeze, it is impractical to hire new staff at this time. Third, given budget constraints, the Department anticipates that the amount of obligations for both contracts and grants likely will be reduced in the near term, thereby reducing the overall number of contractors and grantees conducting business with the Department, which in turn likely will curtail the overall level of suspension and debarment activity. Finally, the Department believes that implementing the Report's recommendation to actively promote the case referral process, in combination with existing policy and procedures, will demonstrate both within and outside the Department that the Department is serious about holding entities with which it does business accountable.

Additional Policies & Procedures. The Department relies upon a number of guidelines in its suspension and debarment program, including the FAR, the Justice Acquisition Regulation (JAR), the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Non-procurement), and the Justice Non-procurement Debarment and Suspension Regulations. The U.S. Attorneys' Manual (USAM) also contains guidance regarding the coordination of criminal, civil, and administrative actions, including emphasizing the need for timely and effective communication with suspension and debarment authorities. The JAR specifically outlines the Department's internal process when a possible cause for suspension or debarment is shown, including directing the contracting activity to seek review by the activity's legal counsel and Procurement Chief. Indeed, it is the Department's experience that when a possible cause for suspension or debarment surfaces, the contracting or grant-making activity typically contacts its legal counsel early in the process. If the contracting or grant-making activity decides that

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000125 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.089

William T. Woods
Page 3

additional fact-finding is required, the matter is then referred to the Department's Office of the Inspector General (OIG), which investigates and, after consultation with the referring activity, refers the matter directly to the Department's suspension and debarment official. The Department believes that the current regulations and guidelines, coupled with the Department's implementation of the Report's recommendation to actively promote the referral process, will provide sufficient guidance to referring activities of the Department's suspension and debarment policies and procedures without unnecessary duplication.

OFPP Guidance and Cooperation with the ISDC. The Department concurs with the Report's recommendations directed to the OMB, including encouraging agencies to cooperate with the ISDC (and two Department employees currently participate in the activities of the ISDC).

The Department appreciates the opportunity to comment on the GAO's draft report. Should you have any questions regarding this topic, including the Department's comments, please do not hesitate to contact Richard Theis, Department of Justice, Audit Liaison, on (202) 514-0469.

Sincerely,

Lee J. Lofthus
Assistant Attorney General
for Administration

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000126 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.090

Appendix VII: Comments from the Department of State

United States Department of State
Chief Financial Officer
Washington, D.C. 20520

Ms. Jacquelyn Williams-Bridgers
Managing Director
International Affairs and Trade
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548-0001

JUL 2 2 2011

Dear Ms. Williams-Bridgers:

We appreciate the opportunity to review your draft report, "SUSPENSION AND DEBARMENT: Some Agency Programs Need Greater Attention and Governmentwide Oversight Could be Improved," GAO Job Code 120934.

The enclosed Department of State comments are provided for incorporation with this letter as an appendix to the final report.

If you have any questions concerning this response, please contact Daniel Walt, Procurement Analyst, Bureau of Administration, Office of the Procurement Executive at (703) 516-1696.

Sincerely,

James L. Millette

cc: GAO – William T. Woods
A – William A. Moser
State/OIG – Evelyn Klemstine

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000127 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.091

Department of State Comments on GAO Draft Report

SUSPENSION AND DEBARMENT:
Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved
(GAO-11-739, GAO Code 120934)

Thank you for the opportunity to comment on your draft report entitled, *Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could be Improved.* The Department of State recognizes the importance of maintaining strong suspension and debarment processes to maintain the integrity of our supply chain and help keep non- and poor performers from continuing to receive government contracts and grants.

GAO recommends the Secretary of State take the following steps to improve our suspension and debarment programs. We agree with all of these recommendations and provide the following additional responses:

1. **Assign dedicated staff resources**. We will review current staffing levels and pursue any needed staffing level changes in light of current departmental priorities.
2. **Develop detailed implementing guidance**. We will draft guidance that will provide more detailed information to Contracting Officers and others regarding the debarment and suspension process.
3. **Promote the use of a case referral process**. We will publish guidance to our acquisition community (both domestic and overseas) regarding when and how to refer a contractor or grantee for possible suspension or debarment.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000128 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.092

Appendix VIII: Comments from the Department of the Treasury

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

JUL 2 8 2011

William T. Woods
Director, Acquisition and Sourcing Management
Government Accountability Office
441 G Street NW
Washington, DC 20548

Re: GAO Draft Report GAO-11-739

Dear Mr. Woods:

I have reviewed the draft report entitled *Suspension and Debarment: Some Agency Programs Need Greater Attention and Governmentwide Oversight Could be Improved* (GAO-11-739) and I am pleased to offer comments on behalf of the Treasury Department.

We agree with GAO's recommendations, and plan to leverage to the extent possible the practices identified in the report in use by other agencies to deploy more detailed implementing guidance and a better defined case referral process. We will also leverage Departmental and other available federal resources to promote the responsible use of suspension and debarment tools.

With regard to GAO's recommendation on dedicated resources, Treasury has a total of eight staff to cover all the legislated requirements for use of procurement authority, including suspension and debarment. Due to budget forecasts, however, there appears to be little probability of obtaining additional resources. We will, however, examine existing resources to ensure they are being used to maximum efficiency for suspension and debarment activities.

The Treasury Department appreciates the opportunity to review and respond to the draft report. Please contact me on 202- 622-1039, or Thomas.Sharpe@do.treas.gov) if you have any questions in this matter.

Sincerely,

Thomas A. Sharpe, Jr.
Senior Procurement Executive
Department of the Treasury

cc: Mike Lewis, Sr. Advisor to the ASM & CFO

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000129 Fmt 06601 Sfmt 06601 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.083

Appendix IX: GAO Contact and Staff Acknowledgments

GAO Contact

William T. Woods, (202) 512-4841 or woodsw@gao.gov

Staff Acknowledgments

In addition to the contact named above, John Neumann, Assistant Director; Noah Bleicher; Morgan DelaneyRamaker; Angela Pleasants; Russ Reiter; Raffaele (Ralph) Roffo; Roxanna Sun; and Bradley Terry made key contributions to this report.

VerDate Nov 24 2008 12:28 Apr 30, 2012 Jkt 72557 PO 00000 Frm 000130 Fmt 06601 Sfmt 06011 P:\DOCS\72557.TXT SAFFAIRS PsN: PAT

72557.094