

**PROTECTING TAXPAYER DOLLARS: ARE FEDERAL
AGENCIES MAKING FULL USE OF SUSPENSION
AND DEBARMENT SANCTIONS?**

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY, INFORMATION
POLICY, INTERGOVERNMENTAL RELATIONS AND
PROCUREMENT REFORM

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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PROTECTING TAXPAYER DOLLARS: ARE FEDERAL AGENCIES MAKING FULL USE OF SUSPENSION AND DEBARMENT SANCTIONS?

THURSDAY, OCTOBER 6, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY,
INTERGOVERNMENTAL RELATIONS AND PROCUREMENT
REFORM,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2247, Rayburn House Office Building, Hon. James Lankford (chairman of the subcommittee) presiding.

Present: Representatives Lankford, Connolly, Murphy, Speier, Kelly, Chaffetz, Walberg, Labrador.

Staff present: Ali Ahmad, communications advisor; Richard A. Beutel, senior counsel; Will L. Boyington, staff assistant; Molly Boyd, parliamentarian; Ashley H. Callen, counsel; Linda Good, chief clerk; Jaron Bourke, minority director of administration; Paul Kincaid, minority press secretary; Adam Koshkin, minority staff assistant; Mark Stephenson, minority senior policy advisor/legislative director; Cecelia Thomas, minority counsel.

Mr. LANKFORD. We are going to wait just a couple of moments. Our ranking member is on his way over. So we won't be starting immediately, but we will be starting promptly.

[Pause.]

Mr. LANKFORD. I want to give you a quick update, as well. We have votes that have been called, of course, about 10:15 today. So we are going to get started and go through this panel, opening statements and such, and see how far we can get before they call the votes, then we will make that judgment call as we go. Just wanted to give everyone a quick scheduling update.

With that, the committee will come to order. The Oversight and Government Reform Committee exists to secure two fundamental principles. First, Americans have a right to know that the money that Washington takes from them is well spent. And second, Americans deserve an efficient, effective government that works for them.

Our duty on the Oversight and Government Reform Committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers because taxpayers do have the right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts

to the American people, bring genuine reform to Federal bureaucracy. This is the mission of the Oversight and Government Reform Committee.

I would like to thank all the witnesses on both panels for participating in today's hearing. I hope this is an informative hearing where witnesses can share best practices and form relationships going forward that will encourage our mutual due diligence.

The Federal Government spends more than \$500 billion on contracts each year. Most contractors are patriots who fulfill their contractual obligations to the Federal Government in spite of the mountains of Federal forms and frustrations. They provide indispensable products, they deliver quality services to Federal agencies. But unfortunately, this committee has examined instances in the past in which certain contractors tried to defraud the Government, where they demonstrate a pattern of inability to deliver on their contractual commitments.

One of the tools that agencies have to address this unethical, fraudulent or chronically poor-performing contractors is the remedy of suspension and debarment. Today we will hear testimony that while some agencies are effective in using this administrative remedy to weed out bad actors who waste taxpayer dollars, other agencies are simply not fulfilling their responsibility to suspend or debar.

This hearing will explore the following question: Why is it that some agencies are able to uncover problems with their contractors and take dozens of suspension and debarment actions each year, while other agencies with similar or larger contract spending initiative virtually no action? While I hope it is because some agencies have high quality contractors and they have not experienced any contracting issues, it is unlikely that there are no poor-performing or dishonest contractors working for the agencies that have not suspended or debarred any contractors. Common sense would seem to suggest these agencies are not looking for and thus not uncovering fraud on the part of their contractors.

In some cases, though, these agencies may simply accept poor performance or staff may not complete the followup paperwork or help others avoid the same bad contractors in the future.

GAO's work bears out our suspicion that agencies that focus on using the tool of suspension and debarment and make it a priority are successful at rooting out future waste and fraud by excluding the contractor from future business with the government or forcing the contractor to take needed corrective measures. Clearly, it takes a concerted effort to identify candidates for suspension and debarment, develop the necessary factual record and at the same time, provide the required due process safeguards for contractors.

The alternative, however, is not an option. Agencies that put in the necessary work to implement a robust suspension and debarment program can expect to see returns on their investment in terms of programmatic fraud or waste avoided. In addition, because the governmentwide exclusion that can result from suspension or debarment actions, having an effective suspension and debarment program also serves to strengthen the integrity of the overall contracting system. It sends a clear message that dishonest contrac-

tors or shoddy work will not be accepted, which protects taxpayer dollars from flowing to sub-par contractors.

This committee is a watchdog for the taxpayers' money. But we also think it is reasonable to expect each agency to be diligent, ferreting out bad actors they know in the contracting world so that we can stop contracting fraud. The American people deserve our attention.

I would also like to thank Chairman Towns, who held hearings on this same subject in 2009 and in 2010. He has put sunlight on this process, and we will continue to do that until it is fixed.

I look forward to hearing the testimony today about how we can keep unethical contractors out of the Federal system.

And now I would like to recognize the distinguished ranking member, Mr. Connolly, for his opening statement.

[The prepared statement of Hon. James Lankford follows:]

I would like to thank the witnesses for participating in today's hearing. I hope this will be an informative hearing where witnesses can share best practices and form relationships going forward that will encourage our mutual due diligence.

The federal government spends more than \$500 billion on contracts each year. Most contractors are patriots who fulfill their contractual obligations to the federal government in spite of the mountains of federal forms and frustrations. They provide indispensable products, and deliver quality services to federal agencies. But, unfortunately, this Committee has examined instances in the past in which certain contractors try to defraud the government or they demonstrate a pattern of inability to deliver on their contractual commitments.

One of the tools that agencies have to address unethical, fraudulent, or chronically poor-performing contractors is the remedy of suspension or debarment. Today, we will hear testimony that -- while some agencies are effective in using this administrative remedy to weed out bad actors, who waste taxpayer dollars -- other agencies are simply not fulfilling their responsibility to suspend or debar.

This hearing will explore the following question: Why is it that some agencies are able to uncover problems with their contractors and take dozens of suspension and debarment actions each year, while other agencies with similar or larger contract spending initiate virtually no action? While I hope it is because some agencies have all high quality contractors and they have not experienced any contracting issues, it is unlikely that there are no poor performing or dishonest contractors working for the agencies that have not suspended or debarred any contractors. Common sense would seem to suggest that these agencies are not looking for -- and thus not uncovering -- fraud on the part of their contractors. In some cases, these agencies may simply accept poor performance or staff may not complete the follow up paperwork to help others avoid the same bad contractor in the future.

GAO's work bears out our suspicion that agencies that focus on using the tool of suspension and debarment and make it a priority are successful at rooting out future waste and fraud by excluding the contractor from future business with the government or forcing the contractor to take needed corrective measures. Clearly it takes a concerted effort to: (1) identify candidates for suspension and debarment, (2) develop the necessary factual record, and (3) at the same time, provide the required due process safeguards for contractors. The alternative, however, is not an option.

Agencies that put in the necessary work to implement a robust suspension and debarment program can expect to see returns on their investment--in terms of programmatic fraud or waste avoided. In addition, because of the government-wide exclusion that can result from suspension and debarment actions, having an effective suspension and debarment program also serves to strengthen the integrity of the overall contracting system. It sends a clear message that dishonest

contractors or shoddy work will not be accepted, which protects taxpayer dollars from flowing to subpar contractors.

This committee is a watchdog for the taxpayer's money, but we also think it is reasonable to expect each agency to be diligent ferreting out bad actors they know in the contracting world so we can stop contracting fraud. The American people deserve our attention. I look forward to hearing the testimony today about how we can keep unethical contractors out of the federal system.

Mr. CONNOLLY. Thank you, Mr. Chairman. And thank you for calling this important hearing.

The GAO report in the context of the final report of the Commission on Wartime Contracting, which we heard the other day, should be a deafening alarm bell about wasteful spending that could be curbed through the use of functional suspension and debarment programs. The National Security Subcommittee held a hearing last month examining potentially corrupt Department of Defense contracting in Afghanistan. Earlier this week, the Commission on Wartime Contracting told our committee that an estimated \$31 billion to \$60 billion has been lost to fraud or waste through contracting in Iraq and Afghanistan alone.

What is most extraordinary about this figure is not how large it is, but that the Commission told us that it isn't even comprehensive. The Federal Government lacks not only the tools to manage overseas DOD contracts, but even the mechanisms to account fully for the money we lose.

If there is one lesson we could learn from this experience, it should be that rushing into foreign wars unprepared can be incomprehensively expensive. The GAO report we are considering today is just as troubling as the Commission on Wartime Contracting report. GAO reassures us that the Department of Defense OIG recently reported that the Services and DLA had an effective suspension and debarment process, apparently based on the fact that DOD issues more suspensions and debarments than any other Federal agency.

No wonder. Between 2006 and 2010, DOD spent \$1,776 billion on contracting. That is to say, \$1.7 trillion, for those of us who would otherwise lose count of the zeroes. It is approximately 15,000 percent more money than any other agency spent on contracts, so it should follow that DOD would also issue more suspensions and debarments.

While it is very disturbing that some agencies have issued zero suspensions and debarments, unless we are to assume that their contracts are pristine, given the volume of DOD contracts and relative paucity of suspensions and debarments relative to the amounts, we must be vigilant in reducing waste in that department.

Rather than looking only at the total number of suspensions and debarments for agencies, maybe we should consider the numbers of suspensions and debarments per contracting dollar. For each \$1 billion DOD has spent on contracts, it issued an average of 0.9 suspensions and debarments. By contrast, the Environmental Protection Agency, which has a witness in today's hearing, has issued 42.6 suspensions or debarments per billion dollars contracting dollar spent. By this measure, EPA would seem to be far more attentive to protecting taxpayer dollars, frankly, than DOD.

Of course, the number of suspensions and debarments per contracting dollar is only informative if we know that there is some fraud or waste that the suspensions or debarments should address. The purpose of suspension or debarment is to protect the taxpayers, not to enact punitive measures against contractors, most of whom are patriotic Americans trying to serve the public as you indicated, Mr. Chairman.

In the case of DOD, we know from the recent commission report, sadly, that such fraud and waste is so rampant in Iraq and Afghanistan as to be virtually unquantifiable. The United States has spent in excess of \$200 billion in contingency contracting to support the wars in Iraq and Afghanistan over the last decade. According to the final report of the Commission on Wartime Contracting, up to \$60 billion of those taxpayer dollars were lost to waste, fraud and abuse. It is imperative that we improve suspension and debarment procedures for DOD so that we don't repeat the waste of money identified by the Commission on Wartime Contracting.

I greatly appreciate the willingness of the representative from GAO, DOD, HHS, DHS and EPA to appear before us today to discuss this important topic. It is clear there is wide variation in the methodology used to determine suspension and debarment. And replicating best practices to reduce waste must be our urgent task so that those agencies have more uniformity and predictability in this process.

I thank you again, Mr. Chairman.

Mr. LANKFORD. Thank you, Mr. Connolly.

Members may have 7 days to submit opening statements and extraneous material for the record.

We will now welcome our first panel. Mr. William T. Woods is the Director of Government Accountability Office in the Acquisition and Sourcing Management Team. Pursuant to committee rules, all witnesses will be sworn in before they testify. Mr. Woods, would you please rise and raise your right hand?

[Witness sworn.]

Mr. LANKFORD. Thank you. Let the record reflect the witness has answered in the affirmative. You may be seated.

In order to allow time for discussion, and obviously we have already discussed this as well, the votes that are being called at some point, I would like you to limit your testimony, you are the only member of this particular panel, so 5 or 10 minutes, we will give you a little bit of flexibility on the time there. But we would like to be able to pummel you with random questions as well, once you get through your testimony.

So in order to be able to receive your testimony, obviously your written statement will be made part of the record as well. You are recognized.

**STATEMENT OF WILLIAM T. WOODS, DIRECTOR, ACQUISITION
AND SOURCING MANAGEMENT, GOVERNMENT ACCOUNT-
ABILITY OFFICE**

Mr. WOODS. Thank you, Mr. Chairman, Ranking Member Connolly. Thank you so much for inviting the Government Accountability Office to be here this morning to address what you both have recognized is an extremely important topic in the area of government contracting.

We need a robust suspension and debarment process in order to ensure that the Federal Government does business only with responsible contractors, and that we avoid doing business with dishonest contractors, those that commit illegal acts and those that are irresponsible and unethical.

I am very pleased to be able to release our report this morning, which we did for this committee as well as the Senate Homeland Security and Governmental Affairs Committee, addressing the suspension and debarment issue on a governmentwide basis. That report is GAO-11-739, and with the permission of the committee, I would like to have that inserted into the record.

Mr. LANKFORD. Without objection.

[The information referred to follows:]

August 2011

SUSPENSION AND DEBARMENT

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



Mr. WOODS. Thank you, Mr. Chairman.

My statement today will cover the work that we did to prepare that report, the specific objectives that this committee asked us to address, our findings as a result of that work and our recommendations.

But first, I would like to provide just a very, very brief overview of the process. First of all, in terms of definitions, a suspension, both suspensions and debarments are exclusions from the Federal contracting process. Suspensions are a temporary remedy, generally lasting about 12 months. There is a provision for extending that up to 18 months if the Attorney General so requests.

Debarments, on the other hand, are for a fixed period of time, generally 3 years, although those can be extended as well.

Suspensions and debarments are covered in some detail in the Federal Acquisition Regulation. There is also a parallel process for grants, assistance, loans, loan guarantees and that sort of thing which are covered under the Non-Procurement Common Rule [NCR]. But both procedures are somewhat similar and they are reciprocal. In other words, if an entity is debarred under the Federal Acquisition Procedures Rules, that entity is considered to be debarred as well under the Non-Procurement Common Rule and vice versa.

Our first objective was to determine what entities are listed on the Excluded Parties List System. The Excluded Parties List is a list maintained by the General Services Administration, an electronic online system that contains all of the entities that have been subject to suspension, proposed for debarment or debarred. That, as I said, is maintained by the GSA. The individual agencies that take the actions are responsible for entering data, names, etc., into that EPLS system.

And our first objective is really to understand what is in that system. Frankly, I was somewhat surprised at the numbers. Because as indicated in my testimony, Figure 1 on page 4, the vast majority of entities that are listed are listed as a result of statutory exclusions. For example, the Department of Health and Human Services might debar or exclude a contractor or an entity for health care fraud. Export control violations are another matter where statutes specifically provide that if a violation is found through a judicial process or in some cases an administrative process, the Congress has decided that those entities shall be listed on that Excluded Parties List System.

Now, they may have had nothing to do with Federal contracts. But the consequence of listing on that system is that they are precluded from obtaining a Federal contract.

When we looked at that, we found that about 84 percent of the cases in the Excluded Parties List System were as a result of these statutory debarments. The remaining 16 percent were either actions taken under the Federal Acquisition Regulation, or actions taken under the Non-Procurement Common Rule.

Our second objective was to look behind those numbers and to determine which agencies are active and which agencies are relatively inactive in the area of suspension and debarments. At the request of this committee, we focused just on the procurement-related actions. So on that 16 percent or so that are listed on the Ex-

cluded Parties List System as a result of either Non-Procurement Common Rule actions or actions under the Federal Acquisition Regulation.

I refer you to Appendix 1 on page 10 of the statement that lists all of the major agencies, those that have done about \$2 billion or more in contracting over the period that we looked at. We looked back 5 years, from 2006 through 2010. As you have already correctly pointed out, the Department of Defense is far and away the largest user of the suspension and debarment system.

We wanted to get a snapshot and an idea of what are the variables at play and what are the reasons why some agencies appear to be quite active in this area and other agencies less active. So we chose a judgmental sample. We wanted to get a mix of Defense and civilian agencies. Within Defense, we chose the Navy and Defense Logistics Agency. We wanted to look at some large agencies. We looked at Health and Human Services, we looked at the Department of Homeland Security.

Within the Department of Homeland Security, we looked at two entities, one that appeared to be relatively active in the area, that was the Immigration and Customs Enforcement Bureau, and one that appeared to be relatively inactive, that was the Federal Emergency Management Agency. We wanted to get a feel for what are the factors that really account for the variation in these numbers. And we found that three factors account for that variation.

First, the agencies with the active programs have a dedicated program with dedicated staff. It happened that the staff on all of the four agencies that we looked at with active programs had dedicated full-time staff.

The second factor was that each of the four agencies with the active programs, and for reference, you may want to refer to Figure 2 on page 5 of my statement, which has a graphic display of what I am outlining at this point.

But the second factor that we found is that the active agencies had detailed policies and procedures, not just mirroring what is in the Federal Acquisition Regulation, but providing additional detail to their acquisition and non-acquisition personnel on how to deal with contractors that are poor performers, that have been convicted of certain transgressions or are simply unethical. But detailed policies and procedures were an important component of an active process.

And the third component was an active referral process. What that means is that agencies went out of their way to train people on how to take advantage of the suspension and debarment process. They had active inspectors general who routinely made referrals to the suspension and debarment official. They had contracting officers who would also make a practice of making referrals to the suspension and debarment official.

So those are the three factors that we found at the four agencies with the most active programs. Conversely, we found at six agencies that had less active programs, we found an absence of those three factors.

Our third objective, and again at the request of this committee, was to take a look at the interagency coordination process. For that, we looked first at the committee that is called the Interagency

Suspension and Debarment Committee. This is a committee that was created by executive order in the mid-1980's. Recently, it received statutory recognition and statutory direction in the 2009 Defense Authorization Act, where Congress outlined specific responsibilities for this interagency committee. So we wanted to take a look at how that committee was functioning, and what are the challenges that it was facing.

Briefly stated, the main function of that committee is to serve as the lead agency determination forum. When an entity may be running afoul of the law, may be suspected of some conduct that might lead to a suspension or debarment, the first issue on the table is which agency ought to take responsibility to pursue that. And that question gets resolved at this Interagency Suspension and Debarment Committee. They often act very quickly, through an email process or telephone, to quickly decide on which agency needs to step forward and take responsibility for pursuing either a suspension or debarment against the entity.

But we found that this interagency committee faced challenges. First major challenge was resources. They have no dedicated personnel. They have no budget. And we found that that raised some issues for that committee in terms of having to borrow staff from the members that actually, the chair and vice chair, in particular, that actually sit on that committee.

The second challenge that they faced was participation. There are members on the committee from all of the major agencies and many of the second tier agencies, if you will, that do less activity in the procurement arena in terms of dollar spending.

But participation in the monthly meetings of that committee is not what it really should be. There are many agencies that simply do not participate to the level that one would expect for this important area. And they were challenged, for example, in preparing a report that the Congress directed in that legislation that I referred to earlier, Congress directed them to prepare a report on their activities and the activities of their member organizations. And it took quite a while for them to get the cooperation of all of the agencies in order to prepare and submit that congressionally required report.

We had a number of recommendations in our report. And just very briefly, first of all, we wanted for the six agencies that had the relatively inactive programs, we wanted them to adopt the practices that we outlined that we found at the agencies that had an active process. All of the agencies concurred in that recommendation.

Our second set of recommendations was directed to the Office of Federal Procurement Policy within the Office of Management and Budget. And that was for the Office of Federal Procurement Policy to issue a memorandum to all Federal agencies, outlining what it takes to have an active, robust suspension and debarment program.

Second, we wanted the Office of Federal Procurement Policy to require and provide guidance to all agencies to cooperate with the Interagency Suspension and Debarment Committee.

Mr. Chairman, that concludes my prepared statement. I would be happy to respond to questions the committee may have.

[The prepared statement of Mr. Woods follows:]

United States Government Accountability Office

GAO

Testimony
Before the Subcommittee on Technology,
Information Policy, Intergovernmental
Relations and Procurement Reform,
Committee on Oversight and Government
Reform, House of Representatives

For Release on Delivery
Expected at 9:30 a.m. EDT
Thursday, October 6, 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



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.

Today, we are publicly releasing 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

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).

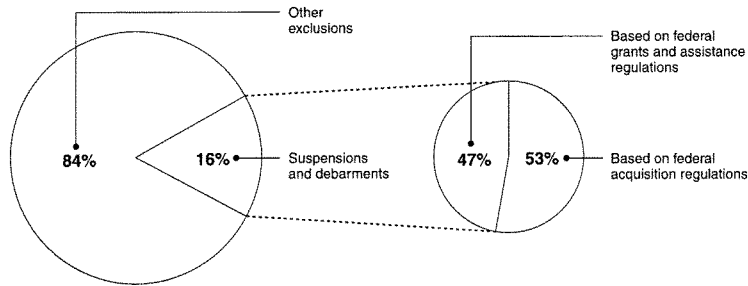
In addition, we met with officials from the Office of Federal Procurement Policy which provides overall direction of governmentwide procurement policies, including suspensions and debarments under the FAR; officials at the Interagency Suspension and Debarment Committee (ISDC); the Council of the Inspectors 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 Governmentwide 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.

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



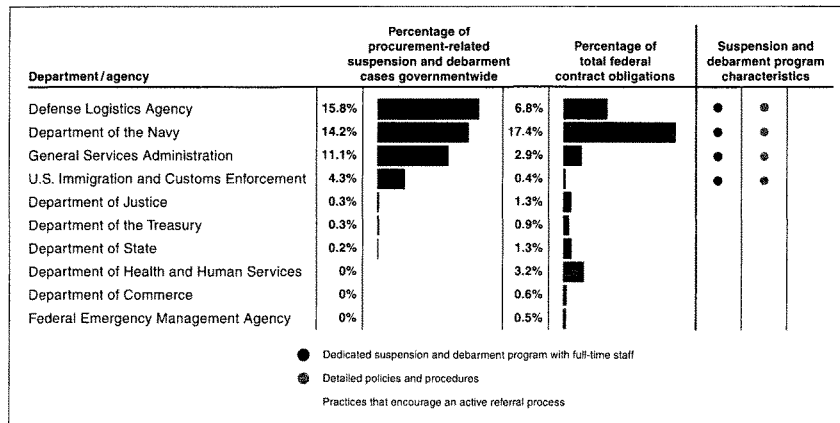
Source: GAO analysis of EPLS data.

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.

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

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 2009² 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

²Pub. L. No. 110-417, § 873 (2008).

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.

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

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

**Contacts and
Acknowledgments**

For questions about this statement, please contact William Woods at (202) 512-4841 or woodsw@gao.gov. In addition, contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Individuals who made key contributions to this testimony are Assistant Director John Neumann and Russ Reiter.

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.

^aThis 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.

^bAgencies 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.

Mr. LANKFORD. Thank you, Mr. Woods. With that, I would recognize myself.

Thank you for your report. It is very thorough. We do appreciate that, and the details that you put into it from there.

You answered several of my questions that I had initially, and that was dealing with the factors, both the three consistent factors that you saw, and then those that were not being effective in suspension and debarment, those three factors being absent as well. So that is very helpful to know.

When you talk about dedicated staff, how many staff are you talking about typically in these agencies? Is this 1,000 people? Is this four people?

Mr. WOODS. It did vary. Sometimes it was only one or two people. Sometimes it was more than 10, less than 20.

Mr. LANKFORD. Okay, so it is a small group from the agency that has been set aside and specifically tasked full time to that.

Mr. WOODS. It ranged in terms of full time, sir. Some of the agencies did have full time dedicated staff. But other agencies had part time staff, or staff who had other responsibilities, but one of their major responsibilities was to make the suspension and debarment process work.

Mr. LANKFORD. Did you see a shift in effectiveness? Was it basically the size of the program where one agency may be very large, for instance, the Department of the Navy that you talked about, obviously very large and a lot of contracts there, they would submit a larger staff, another agency with fewer people, did you see a correlation in that as far as the number of people that were involved?

Mr. WOODS. We did not see a correlation. We did see differences, and as you pointed out, the Navy had one of the larger staffs, and many of them were full time. But we did not observe a correlation between the size of the staff and the effectiveness of the program.

Mr. LANKFORD. Okay, the actual process of suspension and debarment that they have to go through, the paperwork to fill out, to complete, is there anything in that process that you determined, this is bulky, this is difficult, this is a disincentive to do suspension and debarment based on the actual bureaucratic red tape of doing it? Is there anything you discovered in that?

Mr. WOODS. The process is relatively straightforward. The process is also, in the regulation, it specifically requires that agencies adopt as informal a process as possible to avoid that kind of red tape. One of the hallmarks of the system is, the action needs to be taken quickly, because the whole purpose of suspensions and debarments is to protect the government's interest. And often we need to move very quickly in order to be able to do that.

So the Federal Acquisition Regulation requires that the procedures be streamlined and as informal as possible.

Mr. LANKFORD. Obviously we will be visiting with people as we go through this from HHS or FEMA and other things that you have mentioned as well in your report on that. Specific recommendations that you have made as you have made these recommendations, they have been received well by those agencies? Do you think it was just a matter of they were very busy in other areas and just didn't pay attention to the suspension and debar-

ment areas? What did you discover from that, and what has the follow-up been like?

Mr. WOODS. First of all, we were very pleased that all the agencies concurred with the recommendations. What we found during the course of the review is that even at the agencies that had the less active programs, that steps were being taken at each of the agencies to get serious about the suspension and debarment process. And there is a description in the report of several agencies with specific steps that those agencies are taking to do that.

Mr. LANKFORD. Let me shift gears on you a little bit. The statutory exclusions, I know that was not a part of your total research on that. How do you feel like that is being applied and who puts that on the list? So when it is not a bad actor in the sense that it is a statutory exclusion for whatever reason, how are they getting on that list and who is managing getting them off of that list?

Mr. WOODS. For example, let's take health care fraud. That would fall within the bailiwick of Health and Human Services. So that agency would be responsible for putting entities that have run afoul of health care provisions, be it payment provisions or outright health care fraud, they would be responsible for putting those entities on the list.

Mr. LANKFORD. So they are getting them on there. Who is responsible for getting them off? If they have been cleared, let's say it has been 5 years, is it an automatic removal on that? Or for those statutory areas, are they lifetime?

Mr. WOODS. Very often the statute will provide for a specific period of time, be it years, or whatever. When that period has expired, those entities should no longer be listed.

Mr. LANKFORD. But that is automatically being pulled? The agency is not having to pursue to go back and say, this needs to be pulled now, it has now been 3 years?

Mr. WOODS. I believe so. But you may want to ask the second panel about that.

Mr. LANKFORD. I want to be able to make sure, obviously, that people that have been debarred for a period of time, that is actually pulled off so they can be redeemed, I guess, at the end of it.

Let's talk real quickly about grants as well. You mentioned obviously grants and the contracting world being together, and this reciprocal list on it. Just in your overview and looking at it, is that a good thing, to be able to have grants and contractors together on this reciprocal list? And if so, are agencies effective on getting to this list? This is a bad actor in the grant world, so that people in the contracting world can also know that as well.

Mr. WOODS. We do not have any insight into the grant process. Because our review was just focused on contracts. But the reciprocal nature is one that the Congress decided in the mid-1990's ought to be part of the system. We didn't come across any reason to think that was an unwise decision, either then or now.

Mr. LANKFORD. Thank you, Mr. Woods.

With that, I yield to Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman, and welcome, Mr. Woods.

By the way, where are you from?

Mr. WOODS. I am from the Boston area originally. Is my accent giving me away?

Mr. CONNOLLY. A little bit. Fully rounded vowels.

Mr. WOODS. I wish Mr. Lynch were here. [Laughter.]

Mr. CONNOLLY. I also am from Boston. But Mr. Lynch talks more like you than I do, probably, yes.

Thank you for your testimony. How often does suspension and debarment occur based purely on non-performance criteria?

Mr. WOODS. There are various codes in the system. To be honest, I don't know the answer to that question, as to the frequency. But that is something that one could use the codes, because when an agency enters an entity into the system, they are also required to use one of the many codes so that someone could identify the reason that the entity is listed, and be in a position to answer your question.

Mr. CONNOLLY. Just seems to me, Mr. Chairman, that non-performance ought to be one of the reasons. That is a pretty big one.

You make the point, well said, that obviously different agencies are subjected to different statutory criteria, and therefore, they have to conform to that. That explains some variation among Federal agencies for terms and conditions for suspension and debarment.

But surely there ought to be a uniform process in every agency, so that we don't have the kind of variation you have described in terms of active programs and less active programs. What is the reason for the fact that some agencies have inactive programs?

Mr. WOODS. I think it is that they haven't paid sufficient attention to it. We found HHS, for example, is very active in the Medicare fraud area, and in fact has a substantial number of entities listed. But when you look on the procurement side, that agency spends a fair amount of procurement dollars. But we were surprised to see that over the 4-year period that we looked at, they had no suspensions and debarments based on the Federal Acquisition Regulation.

Mr. CONNOLLY. That is astounding.

You cited the fact that DOD had the most. But of course, as I said in my opening statement, that is to be expected. But if you actually looked at it on a per billion dollar contracting dollar, if you will, actually they are far below some other agencies, like EPA. Given the fact, I don't know, are you familiar with the report of the Commission on Wartime Contracting that we heard from the other day?

Mr. WOODS. I have looked at that report, yes, sir.

Mr. CONNOLLY. So the fact that there is an estimate of \$31 billion to \$60 billion of waste, fraud and abuse, how many contractors were debarred or suspended based on that finding, do you know?

Mr. WOODS. I don't know that, sir.

Mr. CONNOLLY. Presumably there ought to be some.

Mr. WOODS. One would think.

Mr. CONNOLLY. Yes. I mean, if it is at the higher end, you are matching Medicare fraud, waste and abuse.

Mr. WOODS. That is certainly a lot of money, and we were pleased that the Commission did focus on that and had specific recommendations as to how to improve the process.

Mr. CONNOLLY. Is conflict of interest one of the reasons for suspension and debarment?

Mr. WOODS. I don't believe that that is listed in the Federal Acquisition Regulation as one of the specific causes called out in the regulation.

Mr. CONNOLLY. But if a determination is made that there is a conflict of interest, that you engaged in a conflict of interest either in the RFP process or the proposal writing process or whatever it might be, you could be subject to being listed and prevented from contracting for some period of time, is that not correct?

Mr. WOODS. Yes, sir. There is catch-all language, if you will, in the Federal Acquisition Regulation that permits the suspension and debarment official to take action for other reasons that that official considers so serious as to warrant listing on the system.

Mr. CONNOLLY. One of the criticisms one hears sometimes from contractors about that is that it can be, first of all, the penalty is severe. And a conflict of interest can sometimes be very much subjective judgment. For example, you may be a large contractor and you have been asked to provide your expertise for a Federal advisory panel, scientific panel, defense panel, intelligence panel.

And even in advance, I know of cases where consent was gotten that if we do that, we don't want to be prevented from bidding on some contracts. Subsequently, somebody comes along in the IG's office and determines, wait a minute, you were on this panel and you have been on a contract, you won the contract, and we call that a conflict, and you are going to be listed.

My time is up, but how are we also making sure that when we decide to lower the boom that we have determined that this is fair and that the entity has had a fair opportunity to make its case?

Mr. WOODS. A couple of things. First of all, the decision to list someone or to exclude the party would be made by the agency suspension and debarment official, not by the Inspector General or anyone else that might expect one doing it.

Mr. CONNOLLY. But the IG's office may be determining there is a conflict of interest.

Mr. WOODS. And they would then therefore make a referral to the suspension and debarment official.

The other safeguard is that there are procedures for the entity to bring contrary facts, to make arguments to the suspension and debarment official as to why they should not be listed.

Mr. CONNOLLY. Thank you. My time is up, Mr. Chairman.

Mr. LANKFORD. Thank you. Mr. Walberg is recognized for 5 minutes.

Mr. WALBERG. Thank you, Mr. Chairman, and thank you, Mr. Woods, for being here and for the work that GAO does.

Your report found that agencies with a quarter of the contract obligations of HHS have significantly more activity in this area. Specifically, the Department of Interior, with annual contract obligations of approximately \$23 billion, had 94 percent procurement-related, or 94 procurement-related actions and 10 grant-related suspension and debarment actions. Department of Transportation, with contract obligations of approximately \$23 billion, had 11 procurement-related suspensions or debarments and 193 grant-related actions.

HHS in contrast, though, has \$80 billion in contract obligations, and during the same time period, had zero procurement-related actions and 29 grant actions. In your opinion, is HHS failing in regard to suspension and debarment?

Mr. WOODS. We were surprised at those numbers as well, sir. We did not look at the two agencies, Interior and Transportation. But when we did look at Health and Human Services, we were surprised at the number, the absence of any activity in the suspension and debarment arena, given the size of their procurement spending.

Mr. WALBERG. What it does, or did lack in this area, and would this have been something, is this something that you would say, judging by all of the other studies that you did, is acceptable?

Mr. WOODS. In response to your first question, they lacked the three attributes that we specifically found at the agencies with the active programs. They lacked the dedicated staff, the policies and procedures and the active referral process. When we talked to the officials at Health and Human Services, they in fact acknowledged that the suspension and debarment tool was under-utilized at their agency.

Mr. WALBERG. Going along that line, then, if you could explain what you mean by detailed policies or guidance. What does that look like?

Mr. WOODS. Certainly. At one level, the Federal Acquisition Regulation provides the policies and procedures. And it is quite detailed. What we would expect to see, and in fact what we found at the agencies with the active programs, was even further detail in their implementing guidance. In other words, roles and responsibilities, who actually implements and is charged with implementing the various provisions in the Federal Acquisition Regulation.

We found those answers in the four agencies. We did not find those answers at the other agencies.

Mr. WALBERG. Okay. I yield back.

Mr. LANKFORD. Thank you for yielding on that. Let me do one quick followup question, if the gentleman would yield.

Mr. WALBERG. I will yield.

Mr. Woods, just to clarify, if these agencies, very large as they may be, would just reassign two or three people to focus in on that, we have the potential of finding a lot of bad contractors that we can protect the rest of the Federal Government from through suspension and debarment. So we are not talking about a massive shift in agencies. We are talking about even reassigning two or three people, is that correct?

Mr. WOODS. We are not talking about a massive shift. And in fact, some of the agencies complain to us that they cannot, they are not in a position to devote full-time people. They are not in a position to hire people. And we understand that in today's budget environment.

But reassigning people or carving out some part-time responsibility for individuals, even a small number of individuals, would have the kind of impact that you just described, sir.

Mr. LANKFORD. Terrific. Thank you for yielding, Mr. Walberg.

Mr. Murphy is recognized for 5 minutes.

Mr. MURPHY. Thank you very much, Mr. Chairman.

Thank you for your testimony. I want to talk to you a little bit about the portion of your testimony related to the Interagency Suspension and Debarment Committee. The 2009 Defense Authorization gives them some increased powers and responsibilities. But you clearly seem to suggest that there is a lot more that they could do. They are a coordinating agency but have very little teeth.

What specifically would you recommend that we do in order to give that committee the kind of teeth that would, at the very least, allow them to collect more information or get the people that do not have active programs at the table? Or maybe at an even sort of next level, give them something more than just the power to convene and monitor? What do you suggest we do there?

Mr. WOODS. We think the action needs to come from the Office of Federal Procurement Policy. And we think it would be relatively simple and straightforward for the Office of Federal Procurement Policy to issue guidance to all Federal agencies to cooperate much more fully with the Interagency Committee in terms of participation in the process, in terms of responding to data requests, in terms of providing staff where possible to support the activities of that committee.

Mr. MURPHY. Does that committee have enough staff?

Mr. WOODS. That committee does not have any dedicated staff.

Mr. MURPHY. So where does that committee staff come from?

Mr. WOODS. The chair and the vice chair, at least during the period of our review, would use their own resources from their home agency to carry out the activities of the committee.

Mr. MURPHY. So let's say that directive comes down and there is a requirement that data and information is provided. The question is, so what? What does that really do, just to have more information or more resources at the Interagency Committee if they don't really have any power to compel particular agencies to step up and change their practices?

Mr. WOODS. I am not sure that is really needed. We have the Office of Management and Budget that has the kind of teeth that you were referring to. We have the Office of Federal Procurement Policy, within OMB, who is charged with the responsibility for making this system work. We think the pieces, the mechanisms are there. It is just a question of using those mechanisms.

Mr. MURPHY. Thank you. Thank you very much, Mr. Chairman.

Mr. LANKFORD. Thank you, Mr. Murphy.

With that, Mr. Woods, I appreciate very much your testimony.

I would like to take a short recess in order for the clerks to be able to prepare for our second panel. We will try to do the testimony of our second panel and get that into the record and then we may have to come back to be able to pummel you with questions and be able to go through that process.

With that, we will take a short recess.

Mr. CONNOLLY. Mr. Chairman, could I just, before Mr. Woods goes—

Mr. LANKFORD. You most certainly may.

Mr. CONNOLLY. Just a quick question. Legislatively, would it be helpful, do you think, if we had some legislation that tightened up some of the reporting requirements and standardization issues your report has covered?

Mr. WOODS. I am not sure additional legislation is needed at this point. The Congress was very clear a couple of years ago on the importance of the Interagency Committee, on the roles and responsibilities that the Congress expected that committee to play. And the administration issued a change to the Federal Acquisition Regulation to reinforce and implement the direction that the Congress gave.

I think, again, the pieces are there, it is just a question of managing that and stressing the importance of this area.

Mr. CONNOLLY. Thank you. Thank you, Mr. Chairman.

Mr. LANKFORD. I would think a day like today does stress the importance of that area.

Mr. CONNOLLY. Yes.

Mr. LANKFORD. Thank you, Mr. Woods.

We will take a short recess and reset.

[Recess.]

Mr. LANKFORD. I would like to go ahead and begin if we can.

We now welcome our second panel. Mr. Steven Shaw is the Deputy General Counsel for Contractor Responsibility at the Department of the Air Force, where he is also serving as the Air Force Suspension and Debarment Official. Mr. Richard Pelletier is the Suspension and Debarment Official for the Environmental Protection Agency. Dr. Nick Nayak is the Chief Procurement Officer at the Department of Homeland Security. Ms. Nancy Gunderson is the Deputy Assistant Secretary for the Office of Grants and Acquisition Policy and Accountability for the U.S. Department of Health and Human Services, where she also serves as the Department's Suspension and Debarment Official.

As I have mentioned before, we are watching for votes, we are tracking through those. We should have enough time to be able to get everyone's opening statement into that.

So pursuant to committee rules, all witnesses will be sworn in before they testify. Would you please rise and raise your right hands?

[Witnesses sworn.]

Mr. LANKFORD. Let the record reflect all the witnesses answered in the affirmative. Please be seated. Thank you.

In order to allow time for discussion, I am going to ask that you do limit your testimony to 5 minutes. Your entire written statement of course will be made part of the written record, and any other written documents that you would like to submit to this committee, we will include.

I now would like to recognize Mr. Shaw for 5 minutes.

STATEMENTS OF STEVEN A. SHAW, DEPUTY GENERAL COUNSEL FOR CONTRACTOR RESPONSIBILITY, DEPARTMENT OF THE AIR FORCE; RICHARD A. PELLETIER, SUSPENSION AND DEBARMENT OFFICIAL, U.S. ENVIRONMENTAL PROTECTION AGENCY; NICK NAYAK, PH.D., CHIEF PROCUREMENT OFFICER, U.S. DEPARTMENT OF HOMELAND SECURITY; AND NANCY J. GUNDERSON, DEPUTY ASSISTANT SECRETARY, OFFICE OF GRANTS AND ACQUISITION POLICY AND ACCOUNTABILITY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

STATEMENT OF STEVEN A. SHAW

Mr. SHAW. Thank you, Mr. Chairman, Ranking Member Connolly, members of the committee. Thank you for inviting me here today. This is a very important subject that is dear to my heart. I have been doing it for 15 years and find it to be extremely important.

I also want to thank GAO for an outstanding report in this area, even though they didn't address the Air Force, they addressed some important issues. Their recommendations are recommendations that we agree with. We have the three elements of active programs that they talk about. We have a dedicated staff. We have written processes and procedures. And we have practices that encourage referrals.

I am hesitating on the referrals a little bit, because one of the features of the Air Force is not to rely upon referrals. Referrals are important, procedures to increase referrals are important. But we do a lot more than deal with our in-box and respond to referrals from other agencies. I will get to that in a second.

The areas that are somewhat unique perhaps to the Air Force are at least why we think we are strong in this area, we think, are both structural and policy related. The structural areas are the full-time dedicated staff. We have through the entire 15 years of my tenure in this position and before that had a full-time staff, and more recently we have expanded that to a full-time field staff in the AFMC, the Air Force Materiel Command, and in headquarters for the non-MAJCOMS. So we have additional attorneys, so there are somewhat upwards of 10 or 15 attorneys that we have in the Air Force, even though there are only three in my office in headquarters Air Force.

Another unique part is that I am a full time debarring official. That is very unusual in the Federal Government. I personally think that is extremely important and I praise the Air Force for doing that. It was before my time, it has nothing to do with me, but I think that is an important feature. There are only three or four agencies in the whole Federal Government that have the full-time debarring official. I think that is an important feature for some of the reasons that I will talk about.

Also, separation from the acquisition chain I think is critical in this area. The Air Force, and the whole DOD, started doing this in the early 1990's as a result of an IG report, DOD IG report, recommending that it be structured that way. I agree with them, and I think the Defense Department is doing that correctly that way. We are independent of the acquisition chain. We certainly coordi-

nate with them and they are partners with us. But I don't wait or expect the acquisition people to approve of what I am doing. I am empowered to do what is right.

And that is the third important feature of the Air Force, and that is the empowerment. The senior leaders of the Air Force and of DOD have supported what I have done throughout my tenure, recognize this as an independent area. I coordinate everything, but I am empowered to do what is right. And the example that I used in the written testimony attest to that.

Then another feature is, perhaps it is unusual or unique to the Defense Department, and that is the fraud remedies program, I also manage within the Air Force. So I am overseeing two missions. One is coordinating and making sure the Air Force gets all the remedies, criminal, civil, contract and administrative, done. We are the inside lawyers, really, for the Justice Department in making those kinds of decisions.

Because of that, we have real visibility into cases, and we can reach out and do suspensions and debarments, even when nobody refers them to us. That is where the outreach and the proactiveness that I was talking about comes in, where we don't wait for referrals. We monitor cases from the investigators, their case status reports. If there is some case that looks like it is necessary to do a suspension or debarment to protect the interests of the Government, we will reach out to that investigator, ask for the report and will do a debarment, even though nobody is asking us to do that debarment. And even if people are objecting to it, we are going to do it, if that is the right thing to do.

On the policy side of this, the fact-based cases is an important part of what we do. I think there are a lot of agencies that only do debarments or suspensions where there is an indictment or a conviction. And I think that is ill-advised. That is just delegating all of your power to the Justice Department. If they don't have the resources to do a case, they won't do it. But we in the Air Force are still worried about that, so we will reach out and do a debarment anyway, based upon facts.

Also, it is not necessary to do contract actions. The power of a debarment under the FAR is not limited to fraud in a government contract. If an Air Force contractor, for example, is committing fraud on a commercial case or a personal income tax evasion, or anything more than jaywalking, probably, we are going to be concerned about it. Because if they are defrauding a commercial customer, they are going to defraud us.

Finally, the carrot and the stick we use, I talk about this a lot, because of the stick of debarment, we are able to influence proactively the defense industry, I think. We go out and talk to the defense industry and we give them incentives to improve their programs and processes, to avoid the fraud at the front end. So we are trying to limit fraud and do risk management, rather than solely doing the stick of debarment.

With that, I thank you and I will take any questions.

[The prepared statement of Mr. Shaw follows:]

Mr. Chairman, Ranking Member Connolly, and Members of this Honorable Subcommittee, it is a great pleasure to be called before you to testify concerning the recent Government Accountability Office (“GAO”) report entitled “Suspension and Debarment: Some Agency Programs Need Greater Attention, and Government wide Oversight Could be Improved,” and how the Air Force manages its Program.

The GAO report named three characteristics of “more active” suspension and debarment programs: a dedicated suspension and debarment program with full-time staff, detailed policies and procedures, and practices that encourage an active referral process. While I certainly agree that all of these features are important, I respectfully submit that, for purposes of the Air Force, they do not go far enough in making suspension and debarment programs as effective as they can be. Stated differently, the number of actions taken – which appears to be the focus of some people - is not the best metric to assess the effectiveness of a suspension and debarment program. I will add though that our numbers have always been high. This year we issued 367 suspension and debarment actions, and that is fairly consistent with each of the prior 14 years I have been the Air Force’s Suspending and Debarring Official.

But in my opinion - beyond what GAO recommends - 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 avoid taking action or to take action. 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. 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.

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 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. These Agreements are available on my office's public web page, which can be found by searching "Air Force debarment."

I respectfully request the Subcommittee's indulgence as I provide one more example of a recent case that was neither a suspension nor a debarment, but resulted in significant ethical transformation of a large global defense contractor. This example, I believe, shows how independent, full-time, and fully empowered Suspending and Debarring Officials can protect the Government in unique, but vital ways that may not have been possible in other agencies.

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 my office's public website.

I share this BAE case with you for two reasons. First, I want to make clear how important freedom 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 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 Subcommittee that we are not limited to taking action for misconduct only for conduct relating to U.S. Government contracts. None of us in this room would welcome 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.

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.

Mr. LANKFORD. Thank you, Mr. Shaw.
Mr. Pelletier.

STATEMENT OF RICHARD A. PELLETIER

Mr. PELLETIER. Thank you, Chairman Lankford and Ranking Member Connolly and members of the subcommittee, for this opportunity to speak about the EPA suspension and debarment program. I am the suspension and debarment official [SDO], for the agency.

Since 1981, EPA has had a robust program. Historically it has been the leader in this area. For example, my predecessor was a chairman of the ISDC, which you have heard some testimony about, for 20 years. Also, in 2003, with members of the Air Force, DLA and GSA, we formulated, the EPA actually led the formation of the National Suspension and Debarment Training Program, which is offered through the FLETC, the Federal Law Enforcement Training Center down in Glencoe, Georgia.

Currently, I am still the coordinator for that program. Also, EPA provides three of the six instructors for the three or four courses that we offer each year.

Now, the EPA program has really two elements to it. It has a statutory debarment and it also has the discretionary. The statutory are the Clean Air and the Clean Water Act. And the discretions can be taken under either the non-procurement rule, which you have heard some testimony about, as well as the FAR Part 9.4. At EPA, we almost exclusively use the non-procurement common rule.

At our office, we have, in the EPA, we have two separate offices that deal with suspension and debarment programs. There is my office, as the Suspension and Debarment Official. I have a hearing officer and a program analyst. We also have a Suspension and Debarment Division, which has a director, it has seven attorneys, has a paralegal, two investigators, an auditor and some administrative support personnel. All of us are full-time, and this is all we do, is the suspension and debarment.

The way the cases work at EPA, the Suspension and Debarment Division attorneys develop the case in close coordination with the OIG, for example, or the Office of Enforcement that we have, or any other State or Federal investigative body, or any public or private source that may provide us with information. Like Mr. Shaw said, we do fact-based cases as well.

We coordinate, or the division attorneys coordinate through the ISDC for lead agency. And then it is referred to my office for an action. Then on proper notice, we provide the respondents the opportunity to be heard, to present information and arguments in opposition to the proposed debarment. When I make a final decision, it is on behalf of not only the EPA but all Federal agencies.

Now, under the EPA non-procurement rule, as we have implemented it at EPA, there is an additional safeguard, in that the respondent can appeal my decision to the Director of the Office of Grants and Debarment prior to taking any court action under the Administrative Procedures Act. Just as a frame of reference, and the numbers are not magical, but just as a frame of reference, in the last fiscal year our initial numbers indicated we took 98 pro-

posed debarments and 111 suspensions, 115 discretionary debarments and approximately 42 statutory debarments. Also, we entered into three administrative agreements.

Now, the rate of EPA dollars spent, procurement to non-procurement, is approximately four to one. And that is why we use the non-procurement rule rather than the FAR. Both rules are reciprocal. So you can, of course, any action under one is binding on the other. Also, you can use the non-procurement rule for acquisition, as well as non-acquisition matters. So it is available if you want to do it for a contract direct acquisition process.

The written guidance that EPA has, we have implemented for example, the non-procurement rule as implemented by the agencies. We did that through our 2 C.F.R. 1532. But also over the years, we have supplemented with written guidance, SOPs, best practices that have been learned since 1981, and put those into a written form so it can be continued and consistently updated as we go through the process.

Another factor that is important is, my superiors actively encourage our involvement, not only with the ISDC, but also with other agencies, other organizations that are involved in this, such as the ABA Subcommittee on Suspension and Debarment. We are very proud of our rich history of protecting the taxpayers' dollars. We continue with this effort, and even in these hard times, we have been able to continue to have the personnel necessary. I am pleased to be able to talk about it today and I look forward to your questions.

Thank you.

[The prepared statement of Mr. Pelletier follows:]

TESTIMONY OF RICHARD A. PELLETIER
SUSPENSION AND DEBARMENT OFFICIAL

U.S. ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS
AND PROCUREMENT REFORM
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

October 6, 2011

Chairman Lankford, Ranking Member Connolly, and members of the subcommittee, thank you for the opportunity to appear before you today to testify on the United States Environmental Protection Agency's suspension and debarment program. I am the Suspension and Debarment Official for the agency.

Since 1981, the EPA has maintained a robust suspension and debarment program, and is currently one of three federal agencies that have a full-time Suspension and Debarment Official. Historically, the EPA has been a leader in this area. For over twenty years, my predecessor served as the chair of the Interagency Suspension and Debarment Committee. In 2003, together with representatives from the Air Force, the Defense Logistics Agency, and the General Services Administration, the EPA was the moving force behind the creation of the National Suspension and Debarment Training Program, which is a three-day program offered through the Federal Law Enforcement Training Center in Glynco, Georgia. The program provides detailed suspension and debarment training for government investigators, contracting officers, award officials, auditors, inspector general personnel, and lawyers. I continue to be the coordinator for this program and we provide three of the six instructors for the three or four courses offered each fiscal year.

The EPA suspension and debarment program consists of two components – statutory debarments under the Clean Air and the Clean Water Acts, as well as discretionary actions taken under either the Non-procurement Common Rule at 2 C.F.R. Part 180, or the Federal Acquisition Regulation Part 9.4. The EPA almost exclusively uses the Non-procurement Common Rule for all discretionary actions, whether procurement or non-procurement related.

At the EPA, we administer the suspension and debarment program through two separate offices – my office as the Suspension and Debarment Official and the Suspension and Debarment Division. The division consists of a director, seven attorneys, a paralegal, two investigators, an auditor, and two administrative support personnel. My office also has a hearing officer and a program analyst. All of us are work full time on suspension and debarment issues.

The division attorneys and staff develop cases referred by the Office of the Inspector General, the Office of Enforcement and Compliance Assurance, investigators from other federal and state agencies, and other sources, both public and private. The division attorneys work with the Interagency Suspension and Debarment Committee to determine the lead agency, and then coordinate with other stakeholders, including the Department of Justice and other federal and state agencies, that may have an interest in the matter. Once the assigned division counsel has developed the case, it is forwarded to my office for action. After providing the respondents with the proper notice, and affording them the opportunity to present matters and arguments in opposition, I make a final decision on behalf of the EPA and all other agencies within the Executive Branch. Under the EPA supplement to the Nonprocurement Common Rule for Suspension and Debarment, the respondent has the additional right to seek a review by the Office of Grants and Debarments Director before appealing to the US District Court under the Administrative Procedures Act. For FY 2011, the EPA initiated 98 proposed debarments, imposed 111 suspensions, 115 discretionary debarments and 42 statutory actions under the Clean Air and Clean Water ACTS. We also entered into three administrative agreements.

The ratio of EPA grants and other assistance program dollars, as compared to agency procurement expenditures, is approximately four to one. Therefore, the agency traditionally has used the Non-procurement Common Rule, as implemented and supplemented at 2 C.F.R. Part 1532, as the basis for its suspension and debarment actions. This is true regardless of whether the cause for the action originated from a non-procurement matter (grant, fellowship, etc.), or a procurement transaction (direct purchases of goods or services by the agency). An action under either the Non-procurement Common Rule or the Federal Acquisition Regulation Part 9.4 is reciprocal and is effective governmentwide. Over the years, EPA has developed and updated detailed written guidance and practice procedures to allow for continuity and consistency within the program.

Part of my duties as the Suspension and Debarment Official is to provide strategic guidance for the program. The division attorneys regularly meet with EPA investigative personnel to afford early identification and coordination of cases that may require a suspension or debarment action. My superiors actively encourage members of my office and the division to participate in

the Interagency Suspension and Debarment Committee and non-government groups such as the American Bar Association subcommittee on suspension and debarment.

The EPA is proud of its rich history of vigorously protecting the agency's and federal government's business interests by exercising its suspension and debarment authority to make non-responsible entities and other individuals ineligible to receive the taxpayers' money. Suspension and debarment are important tools in accomplishing the agency's mission of protecting public health and the environment. The agency is committed to continuing its appropriate exercise of suspension and debarment authority.

Thank you for the opportunity to testify today. I am happy to answer any questions you may have.

Mr. LANKFORD. Thank you.

As you have just heard, the votes have been called. I would like to receive both of your opening statements, then we will scoot out for a recess from there.

Mr. Nayak.

STATEMENT OF NICK NAYAK

Mr. NAYAK. Thank you very much, chairman, ranking member.

I will abbreviate my statement and hope that it helps you guys.

I am the Chief Procurement Officer for DHS, overall contracting at DHS. Sort of in a nutshell, we get this and we are going to get it right. We are going to be a best practice agency.

Prior to my arrival, and I have been here for a little bit less than a year, there was an IG review of DHS suspension and debarment. We took that to heart. The Under Secretary for Management, who is my boss, put together a task force. We studied all the best practice organizations, the Immigration and Customs Enforcement is one of those best practices within DHS that we studied.

We came out with a model. And since I have been on board, so a little bit less than a year, the Secretary approved the new program for suspension and debarment. It follows all the best practice that GAO outlined. We are committed to getting this right. We are going to have dedicated staff. We are going to have detailed policies and procedures. We are going to have an active referral process. And we are going to have a system for tracking referrals, suspensions and debarments. This is going to happen in short order, so we look forward to following up with the committee over time.

I thank you.

[The prepared statement of Mr. Nayak follows:]

Chairman Lankford, Ranking Member Connelly, and Members of the Committee, thank you for this opportunity to provide an update on the Department of Homeland Security's (DHS) Suspension and Debarment Program. I am the Chief Procurement Officer for DHS. I oversee the DHS procurement portfolio, including nine contracting activities that award more than fourteen billion dollars in contracts each year. Certain responsibilities for the suspension and debarment activities at the Department are delegated to my staff. It is vital that the Federal Government only do business with responsible contractors. Earlier this year, the Under Secretary for Management, Rafael Borrás, appointed the Department's Suspension and Debarment Official (SDO) as a direct-report within his office. The SDO works closely with my office on suspension and debarment issues. DHS is committed to good stewardship of the taxpayers' dollars and using suspension and debarment as appropriate tools to protect the government and taxpayers from contractors that engage in fraudulent, criminal or other seriously improper conduct.

In most cases, DHS contractors provide quality support to DHS's mission at a reasonable price. If a contractor fails to meet the terms of the contract, we take the appropriate action based on the specific circumstances and we work with the contractor to correct deficiencies. However, when a contractor cannot or will not perform, the contract is considered for termination for default.

Suspension and Debarment

If a termination for default is appropriate, we also evaluate whether the contractor should be referred for suspension or debarment. Suspension and debarment are intended to protect the government from continuing to do business with non-responsible companies. The Federal

Acquisition Regulation (FAR) sets forth criteria that may result in suspension or debarment, including: fraud, bribery, falsification of records, as well as other indicators of dishonesty or lack of integrity. Further, a contractor's willful failure to perform, history of failure to perform, or unsatisfactory performance may warrant suspension or debarment. If a termination is associated with any of these criteria, the contracting officer, in consultation with the Office of General Counsel, determines if the contractor and any individuals working for the contractor should be referred for suspension and/or debarment. If referred, the Suspension and Debarment Official (SDO) reviews the facts and takes the appropriate action. When a firm or individual is suspended or debarred, the name and other information are placed in the Excluded Parties List System (EPLS) so that no government agency awards them a contract, grant, or provides them with other types of financial assistance.

In 2009, the DHS Office of Inspector General (OIG) reviewed the Department's suspension and debarment processes and found that we rarely took action against non-performing contractors. After review of the OIG report, the Deputy Secretary established a task force to correct this problem. As the task force was developing its recommendations to improve the suspension and debarment processes, the U.S. Government Accountability Office (GAO) undertook its government-wide review of suspension and debarment programs.

In November 2010, Secretary Napolitano created a centralized DHS Suspension and Debarment Program which led to the creation of the Departmental SDO. The DHS SDO is currently developing detailed DHS-wide policies and procedures built around best practices identified in the GAO report.

As the GAO report shows, there are specific qualities that are present in active, strong suspension and debarment programs. The report also found that DHS's U.S. Immigration and

Customs Enforcement had the qualities associated with a strong and active suspension and debarment program. Specifically:

- A dedicated staff
- Detailed suspension and debarment policies and procedures
- An active referral process and a relationship with the investigative organizations.

The report recommended that DHS use these qualities and establish a Department-wide program for suspension and debarment. DHS concurred with the recommendation as steps were already being taken to implement them.

As recommended by GAO, DHS is working to improve the Federal Emergency Management Agency's (FEMA) suspension and debarment process, a particularly important issue as FEMA awards approximately \$11 billion in grants and financial assistance each year. DHS is working to ensure that these awards are only provided to responsible individuals and organizations.

DHS is also committed to resolving the backlog of A-133 and OIG audits of its financial assistance awardees, and is taking steps to suspend and debar as appropriate. The DHS Suspension and Debarment Program includes a review of these audit findings and the SDO will take action when appropriate to protect the government from individuals and organizations that embezzle or defraud DHS or any of its Components.

The new Suspension and Debarment Program will significantly enhance the Department's suspension and debarment process. Components such as FEMA will allocate a dedicated team based on the number of referrals anticipated from their investigative organizations. Using new centralized procedures and processes, Components will have the tools to recommend action on most referrals very quickly. The SDO will monitor their progress and

the U.S Immigration and Customs Enforcement (ICE) suspension and debarment team will assist with processing actions and training new staff as needed.

As part of the new policy and procedures that are being developed, the DHS SDO will review all contract terminations for default or cause independently to ensure that all the contractors and facts involving the terminations are considered for possible suspension or debarment. Additionally, DHS is working collaboratively with the multiple investigative organizations as part of the new Suspension and Debarment Program, including the DHS OIG, ICE, the Department of Justice, and others. As indicated in the GAO report, this type of collaboration ensures that investigators know where to refer cases, and files are fully developed to facilitate a prompt and appropriate resolution that protects the government.

The DHS centralized Suspension and Debarment Program is still in transition, but has already achieved results. In FY 2011, DHS received more than 500 referrals for potential debarment, resulting in more than 400 suspensions, proposed debarments or debarments. DHS takes action on all referrals it receives to ensure that non responsible individuals and businesses are prevented from doing business with the government and cannot receive federal financial assistance for the term of the debarment.

For example, based on investigations done by ICE's Homeland Security Investigations (HSI), DHS has taken steps to debar individuals and companies involved in trafficking in persons. In one case, a woman tricked young girls into illegally entering the United States and exploited them for work in her company. She was caught, convicted of multiple felonies, and sent to prison. DHS debarred the woman, as well as all of her companies from receiving federal contracts, grants or financial assistance, even though she had never done business with the

Department. This action prevented any agency from providing financial assistance or awarding a grant or contract to this convicted felon.

Conclusion

DHS is committed to doing business with responsible contractors. We will continue to hold our contractors accountable for their actions and the Department's new centralized Suspension and Debarment program will allow DHS to take appropriate action to protect the government's and taxpayers' interests. We have already increased the number of referrals for suspension and debarment and will implement all of the GAO's recommendations in order to create an active and strong suspension and debarment program. We are and will continue to suspend and or debar dishonest and non-responsible individuals and companies whenever it is appropriate to protect the government's interest.

Thank you for the opportunity to testify before the Committee. I look forward to any questions you may have.

Mr. LANKFORD. Thank you, Dr. Nayak. And you are right, you definitely abbreviated it. I appreciate it.

Ms. Gunderson.

STATEMENT OF NANCY J. GUNDERSON

Ms. GUNDERSON. Thank you, Chairman Lankford, Ranking Member Connolly and members of the subcommittee, thank you for this opportunity to appear before you to discuss the Department of Health and Human Services' grants and acquisitions policies and practices, and in particular, our use of suspension and debarment and our oversight practices.

As the Deputy Assistant Secretary for Grants and Acquisition Policy and Accountability, I serve as the Department's suspension and debarment official and am responsible for providing department-wide leadership in the areas of grants and acquisition management. My office oversees and supports the Department's 13 grants management offices and 10 procurement activities as they award and administer grants and contracts in fulfilling HHS' mission to enhance the health and well-being of Americans.

Fighting fraud and ensuring program integrity are central to fulfilling the Department's mission. We appreciate the work of this subcommittee and the GAO in highlighting the policies and practices from which HHS may learn.

The Department is committed to the effective use of suspension and debarment as a tool to support successful grant and acquisition management. HHS also believes that comprehensive pre-award source selection and post-award administration practices help ensure satisfactory performance and reduce our need to resort to suspension and debarment as we focus our resources on these practices.

As reported by the GAO, HHS debarred 29 grant recipients between 2006 and 2010. In fiscal year 2011, we also debarred six grant recipients, and these debarment cases were based on financial misconduct as investigated by our Office of the Inspector General, and scientific misconduct, as investigated by our Office of Research Integrity, in cooperation with the affected universities and research institutions.

Through our contract administration processes from fiscal year 2009 through 2011, HHS terminated approximately 12 contracts for default. In these cases, the associated performance issues were not so serious in nature to impose either suspension or debarment. In light of the GAO's recommendations and in an effort to strengthen our suspension and debarment processes, we are in discussions on how best to dedicate staff and resources to this function and related oversight activities, and in particular, to create a contractor integrity team.

We are currently assessing the policies and practices of other agencies for contract-related suspension and debarment in order to tailor best practices to our organization and issue detailed policies and procedures.

We also intend to create an electronic desk reference to implement the new policy and provide our contracting officers with associated reference materials and uniform decisionmaking tools regarding referrals for suspension and debarment, financial responsi-

bility determinations and other performance remedies. Additionally, we also plan to establish an electronic case referral and tracking process for both grant and contract-related concerns, which will enable HHS to monitor and follow through on each case and identify consistent themes and vulnerabilities.

Finally, these policies and practices will be reinforced through communication and training to ensure HHS' grant and acquisition communities understand their responsibilities and are able to identify and refer cases of fraud, misconduct and the abuse of the public's trust in the Department's grants and acquisition programs.

HHS strongly agrees with the need to protect taxpayer dollars, and is committed to using its grants and acquisition management practices to serve as careful stewards of these funds.

Thank you for the opportunity to testify before the subcommittee and about HHS' use of suspension and debarment in dealing with its grantees and contractors. I am glad to answer any questions you may have.

[The prepared statement of Ms. Gunderson follows:]

Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee, thank you for this opportunity to appear before you to discuss the Department of Health and Human Services' (HHS) grants and acquisition policies and practices; and, in particular, its use of suspensions and debarments in its oversight practices. As the Deputy Assistant Secretary for HHS' Grants and Acquisition Policy and Accountability, I serve as the Department's Suspension and Debarment Official and am the lead executive responsible for the management, administration and oversight of the HHS grants and acquisition programs. I supervise the Department's Senior Grants Policy and Senior Procurement Executives. I also oversee and support thirteen grants management offices and ten procurement activities within HHS.

HHS Office of Grants and Acquisition Policy and Oversight

My office, which is known as the Office of Grants and Acquisition Policy and Accountability, or OGAPA, provides Department-wide leadership in the areas of grants and acquisition management through: (1) policy development; (2) performance measurement; (3) oversight; and (4) workforce training, development, and certification. HHS is the Federal government's largest grant-making organization and third largest Department in federal contracting. As a result, my staff and I are actively involved in Government-wide governance bodies involving grant or acquisition priorities, policies, and systems; such as the Grants Policy Council, Chief Acquisition Officer's Council, and the Interagency Suspension and Debarment Committee. OGAPA also represents the Department in coordinating with the Office of Management and Budget, the Government Accountability Office (GAO), Congress, and other Federal agencies in the area of grants and acquisition policies and management. It is within this context, and in my role as the Department's Suspension and Debarment Official, that I join you today. We appreciate the work of this Subcommittee and GAO in highlighting policies and practices from which HHS may learn; to include: (1) dedicated staff resources, (2) detailed implementation guidance, and (3) an active case referral process.

Scope of HHS' Grants and Acquisition Programs

In fiscal year 2010, HHS' grants management and contracting offices awarded over \$368 billion in grants and \$19 billion in contract dollars, respectively. HHS' mission is to enhance the health and well-being of Americans by providing for effective health and human services and by fostering sound, sustained advances in the sciences underlying medicine, public health, and social services. HHS accomplishes its mission through several hundred programs and initiatives that cover a wide spectrum of activities, serving the American public at every stage of life and ranging from researching life-saving new cancer therapies to supporting Head Start grantees in providing children a better start in life.

Summary of HHS' Suspension and Debarment Activities

Fighting fraud and ensuring program integrity are central to fulfilling the Department's mission. The Department is committed to the effective use of suspension and debarment as a tool to support successful grant and acquisition management. HHS debarred 29 grant recipients, between 2006 and 2010; and in fiscal year 2011 debarred six grant recipients and executed one voluntary exclusion agreement. HHS has not suspended or debarred any of its contractors during this timeframe.

Suspensions and debarments are elements in the Department's broader effort to foster program integrity in its grants and contracts. We rely upon HHS' program, grant, and contracting officials to refer concerns; our Office of Inspector General and Office of Research Integrity to investigate those cases; and Office of the General Counsel to provide advice on prospective suspension and debarment actions. HHS is in the process of strengthening its suspension and debarment referral process.

HHS focuses its resources on comprehensive grantee and contractor selection and grant and contract administration processes, which help ensure satisfactory performance and reduce the need to resort to suspension and debarment. By strengthening the relevant policies and referral processes, and through increased training and awareness, HHS believes that its existing staff will be even better positioned to recognize fraud, waste, abuse and refer those cases to the proper authorities.

Grant Policies and Related Cases

The HHS grants community fosters program integrity through four dimensions of grant administration practices: (1) preventing fraud, waste, and abuse; (2) ensuring timely detection of inappropriate activities through routine monitoring & reporting procedures; (3) fostering compliance by providing technical assistance to grantees; and (4) facilitating corrective actions to address questionable activities or poorly performing grantees. HHS utilizes statutes, regulations, and Departmental policies to ensure that its grant programs are administered so that Federal dollars are given to the appropriate recipient, are spent on the appropriate types of activities, and facilitate delivery of high quality products and services to ensure meaningful outcomes that benefit the public. HHS follows the rules in the Code of Federal Regulations governing nonprocurement debarment and suspension, and further implements those regulations through HHS' Grants Policy Statement. Nonprocurement transactions include grants and cooperative agreements as well as scholarships, fellowships, and loan.

HHS divides the lifecycle of grant administration into two basic segments – pre-award and post award activities. In the pre-award phase, HHS employs a deliberative and objective process to review grant applicants and their capability to be successful, fiscally responsible, and ethical in determining eligibility for award. My office has recently reviewed HHS' policies that govern these processes, and we are making changes to strengthen them. Additionally, we have used surveys to determine whether our agencies are conducting risk assessments prior to making new and continuing awards by checking the Excluded Parties List System and other databases – and received favorable results. Across both phases of the grant lifecycle, HHS utilizes planning, education and communication, risk assessments and analysis, monitoring, reporting, technical assistance, and enforcement actions to facilitate strong program integrity, fiscal stewardship, and timely detection of inappropriate activities.

HHS' recent grant debarment cases were based on embezzlement and the submission of fraudulent invoices, as investigated by our Office of Inspector General; and scientific misconduct such as fabricating data or falsifying research, as investigated by our Office of Research Integrity in cooperation with the affected universities and research institutions.

Contract Policies and Related Cases

HHS follows the rules in Federal Acquisition Regulation (FAR) governing suspensions and debarments for acquisitions. HHS has issued additional guidance in the HHS Acquisition Regulation (HHSAR) regarding suspensions and debarments.

HHS strives to award contracts only to responsible sources by complying with the FAR, which includes researching the federal-wide databases available – such as the Excluded Parties List System – and determining if potential awardees have: (1) adequate financial resources to perform the contract; (2) the ability to comply with the required or proposed delivery or performance schedule; (3) a satisfactory record of performance, integrity and business ethics; and (4) the necessary organization, experience, accounting and operational controls, and technical skills.

Additionally, we manage risks to successful contractor performance by: (1) assigning a Contracting Officer's Representative to contracts; (2) scrutinizing contractor invoices and verifying through our receipt and acceptance processes that contract performance requirements have been met; (3) leveraging the termination procedures in the FAR by issuing cure notices and/or show cause notices as appropriate when performance issues arise; and (4) terminating for default those contracts where these steps have failed to overcome performance issues.

From fiscal year 2009 to date, HHS has terminated approximately 12 contracts for default. HHS' Heads of Contracting Activity have verified that, in each of these cases, none of the associated performance issues rose to the level of either suspension or debarment and none were based on such concerns as fraud or the lack of business integrity.

Interagency Coordination Efforts

As a standing member of the Interagency Suspension and Debarment Committee (ISDC), HHS representatives attend and participate in the ISDC. HHS agrees with the GAO that the ISDC could be strengthened and is committed to supporting the Office of Federal Procurement Policy and the ISDC in their efforts to issue Government-wide guidance for an active suspension and debarment program and to emphasize the importance of cooperating with the ISDC.

Improvement Plans

In light of GAO's recommendations, and in an effort to strengthen our suspension and debarment process, HHS is working with its Office of Inspector General to develop more detailed policies and implementing guidance. This will include a case referral process that can be leveraged by HHS' grants and acquisition communities. We are also in discussions on how best to dedicate staff and resources toward suspension and debarment and related oversight activities.

To further promote integrity in our grant programs, we are: (1) reviewing and revising HHS' existing grants policies to clarify the policy, procedures, and actions for reducing the risk of fraud, waste, and abuse – such as suspension and debarments – and addressing problematic grantees; (2) developing and requiring special award conditions for grantees that have performed poorly; and (3) reinstating the *HHS Alert List* to share information across HHS' grants management offices on poorly performing grantees.

To enhance our acquisition practices, HHS is: (1) assessing the policies and practices of other agencies for contract-related suspensions and debarments to tailor best practices to our organization and issue detailed policy and procedures, and (2) creating an electronic desk reference to implement the new policy and provide contracting officers with associated reference materials and uniform decision-making tools regarding referrals for suspensions and debarments, financial responsibility determinations, and other performance remedies.

Additionally, HHS plans to establish an electronic case referral and tracking process for both grant and contract-related concerns, which will enable HHS to better monitor and follow through on each case and identify consistent themes or vulnerabilities. Finally, these policies and practices will be reinforced through communication and training to ensure the HHS grants and acquisition communities understand their responsibilities and are able to identify and refer cases of fraud, misconduct, and abuse of the public's trust in the Department's grant and acquisition programs.

Conclusion

HHS strongly agrees with the need to protect taxpayer dollars and is committed to using its grants and acquisition management practices to serve as a careful steward of these funds. Suspensions and debarments, which exclude firms or individuals from receiving federal funds, are useful tools in this regard. Because of the serious nature of these remedies, and the consequences that they hold for firms and individuals, HHS only employs suspensions and debarments when absolutely needed to protect the interests of the Government. That said, HHS is actively working to strengthen its grant and acquisition-related suspension and debarment policies and referral process, and we appreciate the work of this Subcommittee and GAO in highlighting policies and practices at other agencies from which HHS may learn.

Thank you for the opportunity to testify before the Subcommittee about HHS' use of suspension and debarment in dealing with its grantees and contractors. I am glad to answer any questions you may have.

Mr. LANKFORD. Thank you, Ms. Gunderson.

With that, I would like to take a short recess. Let me give you an update on what we have. We have several votes and then a motion to recommit. Unless you want to talk everybody out of doing a motion to recommit, down there? No.

So it will take about probably 40 minutes or so, I would say, on our votes and our time to be able to come back. We will get restarted here as soon as we can with our questions, and we will re-engage again. I apologize for the delay, but we stand in recess until we have finished up voting. Thank you.

[Recess.]

Mr. LANKFORD. We will come back into session.

Thank you again for giving us some grace, a chance to get away and to be able to do the votes and come back in.

We have heard your testimony, received that, obviously have your written testimony as well. We are going to get a chance to discuss some things and ask questions, feel free to just be able to interact with us. Let us start running through those things as we can at that point.

Mr. Shaw, let me start with you on something. You had made a comment that I thought was very interesting about fact-based cases, that you are not waiting for an indictment somewhere through DOJ, you are doing your own fact-base cases. Two questions for that. One, if you could elaborate more on the process that you do with that. And the second one is, what kind of due process protections do you have in place to protect your contractors to make sure that as you are doing your own fact-based research here, that you don't also have a contractor out there that is getting stung inappropriately? How do you balance the two of those?

Mr. SHAW. Thank you.

First, it is a matter of looking at the evidence and not just relying entirely upon the fact of an indictment or a conviction. In the FAR, it says an indictment or conviction is sufficient as a matter of law. So a lot of agencies then use that as a security blanket.

Mr. LANKFORD. They are just exclusive to that? You are going into the details?

Mr. SHAW. Right. So we look at the evidence, and if the evidence meets the preponderance of the evidence standard of a debarment or adequate evidence standard of a suspension, then we will do the action. And probably half of our cases are that way, maybe more than half. I think that is a significant difference in why we have so many more numbers, or higher numbers.

Mr. LANKFORD. Do you feel like the contractors are still protected in the process as well?

Mr. SHAW. Yes. There is actually a lot of procedures, they have the right to come in within 30 days and meet with us personally. Or if there is a genuine dispute of material fact, then they have a right to a mini-trial, a fact-finding proceeding where under oath, cross-examination of witnesses, that type of proceeding.

Mr. LANKFORD. So, Mr. Pelletier, that is what you were talking about, basically this mini-trial that you all do with EPA as well?

Mr. PELLETIER. Yes, sir. If there is a dispute of a genuine material fact, then we likewise will have what we call a mini-trial, we actually just call it a fact-finding hearing.

Mr. LANKFORD. Okay. Mr. Shaw, you had mentioned as well that you were outside the procurement chain, and you felt like that was better on that. Is anyone else in that same situation for your agency, where you are outside the chain? Mr. Pelletier.

Mr. PELLETIER. Yes, sir, we are not in the acquisition chain. We are within the grants office. But it is a grants and debarment, so it is geared toward both. And it is not strictly within the purview of those that award the money. That is what really the thing we are aiming at.

Mr. LANKFORD. Dr. Nayak. Ms. Gunderson.

Mr. NAYAK. Yes, in our new program, the suspension and debarment official unfortunately couldn't be here today, because a family member is gravely ill, we will be outside the procurement chain.

Mr. LANKFORD. Ms. Gunderson.

Ms. GUNDERSON. I provide oversight over our procurement function, but I am not directly responsible for the operations, the actual awarding of contracts.

Mr. LANKFORD. It is in the same office, same group at that point?

Ms. GUNDERSON. Right.

Mr. LANKFORD. But say it to me again, the first thing you said?

Ms. GUNDERSON. I provide functional oversight over acquisition function, but my office is not directly responsible for the award or the administration of grants and contracts. So we are independent from that function.

Mr. LANKFORD. Okay, great.

Mr. Pelletier, tell me a little bit about on the EPA section of it, there is a list of Clean Water Act, Clean Air Act, obviously those exclusions that are there. You had mentioned a four to one ratio of non-procurement and procurement. Explain that to me again.

Mr. PELLETIER. The amount of money that the EPA awards, and the procurement side, it is not as much, or it is nearly four times as much in the non-procurement and the grants and interagency agreements and things of that nature.

The way it works of course is that we simply will make a grant to a State that then awards contracts. We keep a watch on those situations. If there is still some reason to debar somebody that has been receiving our money, whether it is by grant, through a contract with a State, we still will take action against them.

Mr. LANKFORD. But if you have somebody that has violated Clean Water Act, Clean Air Act, they are going on the list at that point?

Mr. PELLETIER. That is correct.

Mr. LANKFORD. Regardless of contract, is that just automatic, it is discovered this person has violated the Clean Water Act, you don't even know if they do Federal contracts, they just automatically go onto the exclusions list as well?

Mr. PELLETIER. Yes, sir. That is the mandate of the statute. And the way it goes is that we are notified of a conviction under certain provisions with the Clean Water or Clean Air Act. Then we must put them on the list if they meet the three criteria, which is a fact, were convicted. And the limitation, because the statutes under the Clean Air and Clean Water Act are limited debarments. It is only if they are going to perform a contract at the violating facility and they own, lease or control that facility.

To get off the list, they must submit information to the EPA which we call a reinstatement request. And then it is somewhat like a reverse debarment. At that point then we hear the evidence and determine if they have, they must, I have to certify that they have in fact cured all the violations that put them on the list in the first place.

Mr. LANKFORD. Okay. So there is a process to be able to get out, but the company has to initiate it. You all just leave them on the list until the company or entity initiates a request to get off the list?

Mr. PELLETIER. That is correct, sir.

Mr. LANKFORD. Okay. Let me talk a little bit about HHS. It is obvious, it has come up multiple times, there have been some issues there in the process on it. I am glad you are here, glad to be able to go through the process. The challenge of it is, from your testimony, two different times you said the words, "we intend to accomplish" this, and one other time you mentioned, "we are in discussion" about this. My only concern about that is, I need to know when. Because obviously this has come up for a while. This is a serious issue. You all have been very active in pursuing fraud in other areas to be able to get this into place.

So what I would like to request of HHS is that you get back to this committee when those things are going to be resolved, when the final process is complete, so we can have who the individuals are that have been reassigned to oversee that, and what their basic process is. These three factors that GAO discussed earlier. And the actual person that is overseeing that, whether that is you or someone else, so we will know who is the responsible party for that. That would be very helpful, if you would be able to get back to us.

So basically, when this is going to get accomplished and who the person is that is going to be responsible for overseeing it. We have to find a way to move from we intend to get this done to this is actually done.

Do you want to respond to that?

Ms. GUNDERSON. No, thank you for that opportunity. We would be happy to get back to you on our time lines and our specific plans.

Mr. LANKFORD. Obviously, you know there is an issue, it came up. You, I am sure, interacted in the process. Did you receive a draft of the GAO report before it was all complete?

Ms. GUNDERSON. Yes, we had received a draft report.

Mr. LANKFORD. So you had time to be able to interact, so obviously you had time to prepare on this .

Our staff did a quick search, just a Google search, looking for fraud, for instance, in NIH. There are a couple hits that came up immediately, Department of Justice press releases, Temple Hills, Maryland, man sentenced for bribing in purchasing, offer to do business for his computer company. Then another one, Hyattsville project manager pleads guilty to fraudulently obtaining money under oath with an NIH contract. We then went to EPLS, and they were not listed.

So we still have some of the same issues, obviously. I am not asking you to be aware of every single contract, every single case. But just in the quick search of possible contracts that may be out there,

are they getting on EPLS yet, obviously they are still not. So we have to move from intends to get it, I would just ask you to be able to get that report to us as quick as you can, so we can know this is covered.

You are very aware, as everyone else is, as well as FEMA and every other agency looking at it, it helps the entire Federal Government avoid getting into a bad contracting situation when we know one entity has done a bad contract, they have been debarred. Every other contracting officer can then look at that as well.

So with that, I appreciate that, and I yield my time to Mr. Kelly for 5 minutes.

Mr. KELLY. Thank you, Mr. Chairman.

Dr. Nayak, my concern is DHS, and it has to do with Katrina. GAO found that DHS had 116 suspensions or debarments related to Federal procurement from 2006 to 2010. Yet there were no FEMA actions. As you know, DOJ has an entire task force dedicated to Hurricane Katrina fraud. They have convicted numerous individuals of false statements and fraud in connection with FEMA disaster relief assistance.

According to the fifth anniversary report of the Attorney General, one of the principal types of fraud on which the task force concentrated is government contract and procurement fraud. Can you explain why FEMA has not taken action against any party indicted, convicted or found to have engaged in Katrina-related fraud?

Mr. NAYAK. Thank you for the question. Yes, I have been at DHS for a little bit less than a year, so I don't know how effective I will be at sharing what I know about Katrina. But I can share some things that FEMA is doing and some positive momentum that they are gaining, as well as share with you what we are doing at the departmental level that will affect everybody in DHS, including FEMA.

So the information that is probably most relevant is just, there is some positive momentum in FEMA around suspension and debarment. They actually have five individuals dedicated to doing this now. In this fiscal year itself, there were 19 investigations, 15 referrals, 5 suspensions, 5 debarments of either grantees or contractors. So there is some positive momentum. Then again, coming back to what we are doing at a departmental level, which is essentially following all the best practices, as has been shared here.

And then to add on to what Chairman Lankford just mentioned, we should be done and have this up and running in the next 3 months or so.

Going back to the Katrina days, one of the nice things about putting this program in place at the departmental level is it will be able to end the suspension and debarment official will be able to go back and look at any actions that occurred during that time-frame.

So we have a program that will follow best practice and we will report out on that over time.

Mr. KELLY. Okay, thank you. Thanks, Mr. Chairman.

Mr. LANKFORD. I am going to follow up on that as well. Dr. Nayak, is it possible, when that is complete, your process, you say it will be in the next 3 months, getting everything, that you would

submit that back to this committee, just so we could have that as a record as well?

Mr. NAYAK. Very pleased to do it.

Mr. LANKFORD. That would be terrific.

Let me start a second round. If you want to be able to jump in on a second round of questions, you can. I am going to give a moment for Mr. Connolly to be able to come and ask questions in a moment as well.

Mr. Shaw, we talked a little bit about legislative fixes. And GAO mentioned earlier it really feels like the legislation that is needed is already in place, there is no additional legislation needed. I would like to ask your opinion on that statement. Is there additional legislation that you would see? Or any of you, and you can also think about this as well, that you would see, this would provide greater assistance to the agencies, and clarification?

Mr. SHAW. Yes, thank you, Mr. Chairman. I don't see any legislation directly narrowly dealing with the suspension and debarment. But I do have thoughts in two areas, unrelated areas, that could help. One is the Program Fraud Civil Remedies Act, which I know your committee is familiar with, which was passed in 1986 but has not been used because it is so cumbersome, frankly.

Mr. LANKFORD. Now that is a shock, that there is a Federal instance that is cumbersome.

Mr. SHAW. So we are working on it, we expect that the Defense Department will be having a proposal for a fix for that, that would also have the suspending and debarring officials being the people that would enter the penalties under that. So that relates to debarment, it gives greater visibility into other cases for debarment officials. It is sort of an automatic referral process.

The second area that would stir up referrals from the contracting community particularly would be the use of proceeds from litigation that relates to procurement fraud. If the proceeds or some portion of the proceeds could go to the program that is victimized by the fraud, and not just to the U.S. Treasury, then the agencies would be able to fix the widget that was broken by the fraudulent contractor without taking it out of O&M funds. And that would encourage the contracting community to be more interested and proactive in this area.

Mr. LANKFORD. So run that by me again, where you see the process. You are saying when they are found to be fraudulent, the recovery of that money from fraud is currently not going back into the agency?

Mr. SHAW. That is right. If there is, if Smith Co. is convicted or there is a civil judgment for false claims act against a hypothetical Smith Co., and for having damaged a program, that KC-10 Air Force program, that money, millions of dollars often, cases in that situation, if the procurement money is closed, which is always the case in these situations, because it takes a long time to investigate these things. So the bad guy is being ordered to refund the money, but the money does not go to the program that is being victimized. It doesn't go to Tinker, it doesn't go to Oklahoma City Air Logistics Center.

Mr. LANKFORD. I would think all of it needs to go to Tinker or Oklahoma City on that. [Laughter.]

Mr. SHAW. So that would be helpful.

Mr. LANKFORD. Okay, that is very helpful to know.

Mr. Connolly brought up an issue on the contingency contracting. In a wartime situation, obviously, contracts are going very rapidly. A lot of new contractors going in. If you are dealing with Afghanistan and Iraq, a lot of foreign contracts are also getting engaged on the ground. How are we handling the issues of debarments and suspensions in a contingency operation?

Mr. SHAW. There is a memorandum of understanding within the Defense Department, where the Army is the lead agency, the administrative agency for debarments and suspensions and for contracting, actually, contracting as a whole. So I hate to duck that question.

Mr. LANKFORD. It is an Army question.

Mr. SHAW. Yes. The Air Force has done a lot of, a number of debarments and suspensions from the theater. But the great majority of them are Army ones.

Mr. LANKFORD. Okay. We will try to follow up with that as well. Because that obviously is important to us in a lot that is happening.

Just a moment.

Mr. Pelletier, tell me a little bit about the appeal process that you have going. You discussed this in your testimony earlier, about your appeal. When someone has a protest, they have been debarred, you talked about the mini-trial type of situation, coming in on appeal. Has that been effective? Or is that so cumbersome, let me say it this way. We don't want anything to stand in the way of saying, if there is a good process for suspension and debarment, we don't want someone to say, I don't want to go through that because it is so cumbersome and it is so bulky, I would rather not even go through it, than to actually do it. So I am looking for, how does that work for you?

Mr. PELLETIER. Yes, sir, it is actually easy in this respect. The appeal process that we have built in at the EPA is that I make a final decision to debar somebody or a decision to maintain a suspension. They have the right to appeal to the director of the division. It is a very easy process. They simply present whatever evidence they think why it should not be in place. And then the director has the opportunity to remand the case to me or uphold it. If it is remanded to me, then I can review what was, why it was remanded and have a second opinion or dismiss it, depending on what the circumstances are.

And then subsequently, of course, they have the right under the Administrative Procedures Act to go to a district court. But it does give, actually, what is easy about it, it gives the respondent, rather than the choice of immediately incurring court costs and going and hiring attorneys and doing anything that is involved, they can make an appeal within the system. And they do get a second look.

Mr. LANKFORD. How long does that take? Before you get into the Administrative Procedures Act and actually go into an outside court, total process on that, give me an average.

Mr. PELLETIER. The internal one?

Mr. LANKFORD. Yes, internal.

Mr. PELLETIER. Internal, it is usually within 3 months it has been up and back and a final decision again.

Mr. LANKFORD. So the whole process, 3 months, done?

Mr. PELLETIER. Yes, sir.

Mr. LANKFORD. That is fairly rapid for us.

Mr. PELLETIER. Yes, sir.

Mr. LANKFORD. You also mentioned you have 42 cases, and I want to see if I got this number correct, that you felt were statutory exclusions. Was that from last year, you are saying?

Mr. PELLETIER. Sir, that is the preliminary number we have for fiscal year 2011. It is a preliminary number.

Mr. LANKFORD. Those are individuals that have been included because of Clean Water Act violations, Clean Air Act violations, a total of 42. Is that nationwide?

Mr. PELLETIER. Yes, sir.

Mr. LANKFORD. Okay. That number is actually lower than I anticipated, is the reason I came back to it as well. That is not necessarily contractors, they are just individuals that have been found in violation of Clean Water, Clean Air Acts and have been listed out as saying, if they ever apply for a contract, there is an exclusion in this area, this plant, this location?

Mr. PELLETIER. That is correct.

Mr. LANKFORD. Okay. Terrific.

With that, I yield to Mr. Connolly.

Mr. CONNOLLY. Thank you, Mr. Chairman. Sorry to be a little late getting back. I had a meeting.

Ms. GUNDERSON, you heard the testimony of the GAO representative, Mr. Woods, who noted that when it came to procurement, there has not been a single suspension or debarment by HHS in 5 years. What is the value of the total procurement in that time period?

Ms. GUNDERSON. The total value in that timeframe was about \$81 billion. In the last 2 years we have done around \$19 billion annually.

Mr. CONNOLLY. Okay. Can you help enlighten us on why there would not be a single suspension or debarment? All the contracts are just that good?

Ms. GUNDERSON. We do take contractor oversight very seriously, including the way in which we select and evaluate our contractors prior to award and the way we administer those contracts during performance. We have had contractor performance issues that we have used other tools and flexibilities on, such as terminations for default. And we do see suspension and debarment as a tool in our tool box, per se, to manage concerns. But none of the issues we have had have risen to that level.

Mr. CONNOLLY. Right. And presumably, you shared that view with the GAO when they were looking at this issue in your agency?

Ms. GUNDERSON. Yes, we did, in our meeting.

Mr. CONNOLLY. What was their response to that?

Ms. GUNDERSON. Their response was very, it was generally acknowledging our premise, and we were delighted to see the recommendations around the three characteristics of the more active agencies and are taking those into consideration for developing our

plans around improving policies and our referral practices and dedicating staff to the effort.

Mr. CONNOLLY. Would it be fair for a layman to conclude that the priority within HHS is Medicare?

Ms. GUNDERSON. It would be fair to conclude that. The Secretary has come strongly on on all areas of program integrity, though. Program integrity is one of her key strategic initiatives, as well as encompassing our strategic plan.

Mr. CONNOLLY. Mr. Shaw pointed out that there are only three Federal agencies, I believe, that have like the Air Force a full-time dedicated debarment officer. Can we expect that HHS, given the huge volume you are talking about, even though apparently in the \$81 billion of the last 5 years, nothing rose to this level, would it make sense from your point of view, from the agency's point of view, to emulate the Air Force and have a full-time officer with respect to this set of issues?

Ms. GUNDERSON. That is one of the models we are looking at, among all the others that are out across the Federal agencies. I do serve as the suspension and debarment official because I have oversight over the acquisition and grants policies and the operations of those functions. So currently, as it stands, it makes the most sense to fit it within my organization.

And as I said, we are looking at other models that other agencies have had.

Mr. CONNOLLY. When might this committee know when you have finished looking at and have decided upon a plan of action?

Ms. GUNDERSON. The chairman has asked us to get back to the committee on that, and we will be doing that.

Mr. CONNOLLY. Do you have a time line, however?

Ms. GUNDERSON. Generally speaking, we are looking within the next 3 months at implementing these policies and a new plan.

Mr. CONNOLLY. Thank you.

And Mr. Nayak, you also outlined basically, if I heard you correctly, in your very concise and succinct testimony, thank you, that you were going to essentially, enshrine pretty much, the recommendations of the GAO and get on with it. What is your time line for doing that?

Mr. NAYAK. I also mentioned to the chairman, 3 months. By the end of the calendar year.

Mr. CONNOLLY. Three months. It was such a good answer, I just wanted to get it into the record a second time. [Laughter.]

Thank you, Mr. Chairman.

Mr. LANKFORD. It will be a terrific Christmas present to us, we will be able to read it over New Year's. I appreciate that.

I recognize Mr. Kelly.

Mr. KELLY. Thank you, Mr. Chairman.

From all of you, just your opinion on the mandatory debarments. Mr. Shaw, if you would start, just kind of walk me through on what you all think.

Mr. SHAW. Thank you, Congressman. I think that mandatory debarments are a bad idea in the procurement area. I am not familiar enough with the Clean Water Act and all those. That may work with regard to facilities. But in the procurement area, it takes away an important tool that we have to fight fraud. And that tool

is the leverage that we can use with this carrot and stick that I mentioned before, about working with contractors that are trying to do it right and to changing their conduct and improving their processes, so that they have risk management programs in place where fraud won't happen in the first place.

If there is a mandatory debarment, companies are going to tend to think, well, why bother, and they are just going to obfuscate and fight the investigations, rather than work proactively to avoid the fraud in the first place.

And there is a lot of good, I think, we do in that area, both when there is misconduct with such things as administrative agreements, but also where there is no misconduct at all. We meet regularly with all the major defense contractors to talk about their ethics programs, even when they are not in trouble. So I oppose it.

Mr. KELLY. Mr. Pelletier.

Mr. PELLETIER. Sir, thank you. I agree in the sense that the mandatory statutory debarments take away the key element of discretion. Like the Air Force, I am a full-time suspension debarment official. Each agency has its own particular interest and information, or situation, that it has to deal with.

Allowing the suspension and debarment official to have that discretion as it deals with a contractor that may be, versus someone that is bad, someone that has defrauded the government, somebody that has made a mistake, somebody that doesn't realize how the Federal process works, but is quite willing to change and adjust, we may have potentially a very good contractor or very good grants person available to us. We don't want to throw them out the window without a chance at getting back in the game.

So with the discretion that the suspension and debarment official has, we can do things like enter administrative agreements, which are basically commercial probation, if you will. We have a very strict set of requirements that they have to meet. We monitor that. They report back and a violation of an administrative agreement, for example, is another grounds for debarment.

And at the end of the process, and it is usually 3 years, we far more often than not end up with a better contractor or a better grant, what we call a participant than we started off with. And I think the best interest of the government has been protected.

Mr. KELLY. Dr. Nayak.

Mr. NAYAK. And so I am not as much of an expert as these gentlemen, but I would agree with them 100 percent where it comes to contractors, and then statutorily, I am just not that much of an expert to sort of give you a read on that. But happy to look into it with the committee.

Mr. KELLY. That would be great, thank you.

Ms. Gunderson.

Ms. GUNDERSON. HHS does use the mandatory exclusions on the health care side. That is not handled specifically by my office. It is an authority under our Office of the Inspector General. But it is a valuable tool that the Department uses to combat health care fraud, patient neglect and those sorts of issues that arise to mandatory exclusion.

Mr. KELLY. Good. Thank you. I yield back, Mr. Chairman.

Mr. LANKFORD. I would like to yield a couple minutes to Mr. Connolly.

Mr. CONNOLLY. Just a follow-up, thank you, Mr. Chairman.

Mr. PELLETIER, it strikes me, based on our analysis in terms of per billion dollars of contract dollars, you have a much higher debarment and suspension rate than does DOD. You would agree?

Mr. PELLETIER. Notwithstanding Mr. Shaw's opinion to the contrary, yes. [Laughter.]

Mr. CONNOLLY. Yes. Well, so my question is this. To what do you attribute that? We have a situation where DOD, per billion dollars of contract, has a much lower rate than you do. HHS and procurement has zero rate, because according to Ms. Gunderson, they have used other mechanisms.

If you are a Member of Congress listening to this, you are thinking, there seems to be a wide variety of judgment being exercised, and that may be a good thing. But it is hard to get our arms around in terms of predictability and accountability for the taxpayers we represent. I just want to give you the opportunity to comment on your own observation of why this variability among agencies and why does EPA apparently use this tool more frequently than some other agencies?

Mr. PELLETIER. First of all, sir, I couldn't obviously comment on the why other agencies are or are not doing something or how their programs work. Each one is unique.

But as I said in my statement, EPA is really the pioneer in this area. We started in 1981, developing a program. And over the years, as anything else, we developed an expertise in the area. And perhaps, and one of the things in teaching, which we are very active in the national suspension and debarment training program, one of the feedbacks we get from people that are in the class is, we didn't realize it was that easy to do.

So it may be that we have developed an expertise because of longevity that affords us a greased rail where we know how to do it, because we have done it so many times.

Mr. CONNOLLY. And do you have dedicated, full-time, as Mr. Shaw is for the Air Force?

Mr. PELLETIER. Yes, sir, I am the full-time.

Mr. CONNOLLY. You are it?

Mr. PELLETIER. I am it. And our staff at the division, that is their job. We have seven attorneys on that, two investigators, an auditor, and support personnel and a division director. That is all we do, is suspension and debarment.

Mr. CONNOLLY. And just a final question. I assume, and Mr. Shaw, you are free to answer as well, I think you already testified to this, Mr. Shaw pretty much said, having that full-time dedicated person makes sort of all the difference in making sure you have an active program. Would you concur?

Mr. PELLETIER. It has worked well for our agency. We have a senior person. And we have a dedicated person and it has proven to be very, very effective.

Mr. CONNOLLY. Thank you very much.

Mr. LANKFORD. Let's close out the hearing, but I want to give an opportunity for any of the four witnesses to make any final com-

ments that you would like be able to get in on the record as well, or a response to anything.

Mr. Shaw.

Mr. SHAW. I guess just a couple of observations. I have never done an analysis, it is interesting, your mathematics is correct per dollar. But I am wondering, well, first of all, let me say I think that the number of debarments is a bad metric anyway for this whole program, for this whole process. But it is an easy one, because the numbers are what the numbers are. So it is important, and everybody at the end of the year always compares numbers.

What you are doing proactively to prevent fraud, and to encourage improvement in the culture of companies I think is much more important. But having said that, even looking at the numbers metrics, I think the better way of looking at it would be not the number of debarments and suspensions per contract dollar, but maybe the number per contract. And I don't know how you would get at that number. But a big difference in DOD from EPA and ICE and other agencies, as we deal with big dollar contracts.

So for example, when I suspended Boeing several years ago on a \$15 billion space launch program, that counted, I guess, three. So I had three suspensions. But it was a \$15 billion contract. And all of the Air Force and defense contracts are big dollar amounts. I think that maybe skews a little bit that 0.09 thing.

Mr. LANKFORD. Any other comments from any of the other witnesses?

We do appreciate your attendance, the work to be able to come and to be able to be here. Your written statements obviously, probably the least favorite part of your week was to come and do a congressional hearing. So we do appreciate the time for you to be able to be here.

With that, this committee is adjourned.

[Whereupon, at 12:20 p.m, the subcommittee was adjourned.]

