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Committee on Homeland Security and Governmental Affairs
United States Senate

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

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

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

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

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

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

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

Suspension and Debarment Working Group Activities

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

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

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

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

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

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

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

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

Background on Suspension and Debarment

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

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

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

“Myth busting”: Addressing Misconceptions about S&D

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

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

- (1) that contemporaneous civil or criminal proceedings will be compromised if suspension or debarment is pursued,
- (2) that suspension and debarment actions must be tied to judicial findings (conviction, civil judgment, or indictment), and
- (3) that referrals may not be based on OIG audits or inspections.

Impact on Civil or Criminal Proceedings

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

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

Judicial Findings

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

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

Referrals from Audits and Inspections

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

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

Suggested Practices to Increase the Use of Suspension and Debarment

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

Assigning Dedicated Personnel within OIGs

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

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

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

Identifying and Recommending Improvements to Agency Suspension and Debarment Programs

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

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

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

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

Enhancing OIG Referral Practices

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

- Requiring that cases be referred for suspension or debarment within 7 days of an indictment or conviction;
- Issuing an OIG Bulletin that requires investigative regions to refer for possible suspension all subjects that are charged via criminal complaint, indictment or information, and for possible debarment all subjects that are convicted and sentenced;
- Evaluating statistics on S&D during performance appraisals;
- Issuing annual investigative priorities, goals and objectives that emphasize the coordination of remedies, including suspension and debarment; and
- Issuing policies and procedures that include assessment of opportunities for suspension and debarment as part of the office's ongoing case review process.

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

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

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

Developing Strong OIG Suspension and Debarment Policies

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

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

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

Increasing Outreach among Relevant Communities

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

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

Providing Additional Training Presentations

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

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

Leveraging Semiannual Reports

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

Conclusion

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

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

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