



Looking Inside the Accountability Toolbox: An Update from the CIGIE Suspension and Debarment Working Group

Suspension and Debarment Working Group

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Introduction

In 2010, the Council of the Inspectors General on Integrity and Efficiency (CIGIE) formed a Suspension and Debarment (S&D) Working Group, as a component of the CIGIE Investigations Committee. The purpose of the S&D Working Group was to actively promote the use of S&D -- in an effort to protect taxpayer funds -- by ensuring that the government only does business with responsible parties. This report is part of the group's ongoing efforts; the discussion that follows: 1) provides a brief primer on S&D, 2) summarizes Working Group activities to date, 3) gives a current snapshot of S&D practices within the federal Inspector General community, 4) reinforces Office of Inspector General (OIG) practices that can help ensure full and effective S&D use, and 5) concludes with remarks on other remedies and activities that can be pursued to strengthen accountability.

Background on Suspension and Debarment

Suspensions and debarments are administrative remedies that federal agencies may take in order to protect government programs from potential or identified fraud, waste, abuse, poor performance, and noncompliance with contract provisions or applicable law.¹ Government-wide debarment ensures that for a defined period of time (often three years), the entire federal government will not conduct 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 the parties' honesty, ethics, or competence. Suspension is an interim action taken where there is an immediate need to act to protect the integrity of a federal procurement or nonprocurement process before there is enough evidence to support a debarment proceeding. The evidentiary standard for a suspension is "adequate evidence", and the standard for a debarment is "preponderance of the evidence" (or 51%).

Suspensions and debarments can be based upon judicial proceedings; for instance, a conviction for fraud can serve as the basis for a debarment and a fraud indictment is grounds for a suspension. The applicable regulations also authorize a suspension or debarment without such a judicial proceeding based upon facts that show a party lacks present responsibility to participate in government transactions and programs. Such actions are known as "fact-based" suspensions and debarments.

Suspensions and Debarments are both "exclusionary" remedies, in that the individual or organization is excluded from doing new business with the federal government. However, these

¹ On February 18, 1986, President Reagan issued Executive Order 12549, "Debarment and Suspension," to establish a government-wide suspension and debarment system covering the full range of federal procurement and nonprocurement activities, and to establish procedures for nonprocurement suspension and debarment actions. <http://www.archives.gov/federal-register/codification/executive-order/12549.html>. The Procurement S&D regulations are located at 48 CFR Part 9, and the non-procurement regulations are found at 2 CFR Part 180.

remedies may not affect existing business activities. Agencies may decide to continue existing awards or to terminate performance; neither suspensions nor debarments have any effect on current business done with the excluded party.²

There are two types of suspensions and debarments: those which an agency may elect to pursue (“discretionary”) and those which are mandatory under law (“statutory”). This report focuses on discretionary suspensions and debarments. They arise from the federal government’s authority as a purchaser and consumer of goods and services to limit the pool of those with whom it will do business to parties who have demonstrated responsibility and integrity.

Working Group Efforts to Promote Suspension and Debarment

Since its inception, the CIGIE Working Group has been extremely active. In 2010, the group surveyed the OIGs to obtain baseline data about S&D referral activity, information about best practices, and observations concerning challenges to S&D use. Additionally, in 2011, and in coordination with the federal Recovery Accountability and Transparency Board, the Working Group surveyed the 28 federal agencies that received Recovery Act funds to gather information about their S&D use.³

In September 2011, the Working Group issued a report, *Don’t Let the Toolbox Rust: Observations on Suspension and Debarment, Debunking Myths, and Suggested Practices for Offices of Inspectors General*, which presented the OIG survey results.⁴ That report identified suggested practices that could help OIGs increase OIG S&D referrals to their agencies.

The Working Group has also attempted to enhance an understanding of S&D remedies and to foster cooperation among relevant federal government communities (OIG attorneys, auditors, and investigators, Department of Justice (DOJ) attorneys), and federal Suspension and Debarment Officials (SDOs) located at different agencies) through outreach (such as a training video for DOJ attorneys) and workshops. The first workshop 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 400 representatives from over 60 agencies and OIGs. The most recent workshop, in November 2012, which focused on fact-based actions (i.e., those that are not grounded in judicial proceedings), was jointly sponsored with the

² Federal Acquisition Regulation 9.405-1(a) (explaining that “agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the acquiring agency’s head or a designee directs otherwise”); 2 CFR § 180.315(a) (agencies “may [but are not required to] continue to use the services of an excluded person as a principal . . . if [they] were using the services of that person in the transaction before the person was excluded”).

³ A survey summary is available at: <http://www.recovery.gov/About/board/Documents/SuspensionDebarmentSurveyResults2011.pdf>

⁴ The report is available at <http://www.ignet.gov/randp/sandwgrpt092011.pdf>.

Interagency Suspension and Debarment Committee (ISDC) and was attended by more than 200 SDOs, investigators and attorneys.

The Working Group's 2010 survey demonstrated that many OIGs felt that additional training to OIG personnel would enhance their understanding of S&D processes and assist their effectiveness in recommending suspension and debarment actions. To complement the 3-day S&D course offered by the Federal Law Enforcement Training Center (FLETC), various Working Group members worked with the CIGIE Training Institute to develop S&D a training program that is specifically aimed at non-investigators (i.e., attorneys, auditors, and inspectors).

Topics covered during the training include explaining the rules and authorities of S&D and describing the S&D process. The class provides breakout sessions for auditors/inspector/evaluators and for attorneys to provide additional curriculum focused on their respective roles. For example, auditors and inspectors hear about the importance of communicating regularly with agency S&D officials to build relationships that will facilitate S&D referrals for agency action. The class concludes with reviewing referrals developed in a case study/training example to highlight how all the pieces of the S&D process fit together.

The Training Institute offered the training in November 2012, January 2013, May 2013, and September 2013. Additional sessions are planned for 2014. About 110 individuals (89 auditors/inspectors/evaluators and 18 attorneys) representing more than 30 different OIGs have completed the training. Participant feedback has been very positive; for example, nearly 100 percent of participants indicated that they can apply what they learned to their jobs and that they recommend the course to others.

In 2012, then-Federal Housing Finance Agency Inspector General Steve A. Linick helped to create a suspension and debarment training video for Department of Justice (DOJ) attorneys. The training video provides useful background information on suspension and debarment, addresses potential DOJ concerns related to working with agency suspension and debarment officials (SDOs), and offers useful information on these remedies from an agency perspective. The training video centered on a panel discussion moderated by Inspector General Linick, and featured Neil H. McBride, United States Attorney for the Eastern District of Virginia, and Richard A. Pelletier, SDO for the Environmental Protection Agency. DOJ has made the training video available to its attorneys, reflecting the Department's commitment to the effective use of parallel proceedings as a means to help ensure total accountability for wrongdoing towards the federal government. The video will soon be made available to SDO and OIG communities.

Suspension and Debarment 2012 Survey

The Working Group conducted a second survey in 2012 to bring the 2010 S&D survey information up to date. The 2012 survey yielded a snapshot of information about S&D from the OIG perspective, which revealed some continuing challenges. A lack of agency resources was cited as the primary barrier standing in the way of greater S&D use. Some OIGs also noted that

their agencies either chose not to use S&D or were hesitant to do so. Several indicated that S&D use could be bolstered through referrals originating outside of OIG (e.g., from contracting officers who may identify a present responsibility issue in their work).

The 2012 survey also reflected greater S&D knowledge and noticeable improvement in the utilization of these remedies within the IG community since 2010. Among the ingredients for expanded and more effective S&D use identified in the 2012 results are: 1) use of a dedicated staff member to make S&D referrals and to develop a good working relationship with the SDO; 2) ample S&D training, including “in-house” instruction; and 3) strong lines of communication between OIGs, SDOs, and DOJ attorneys.

The 2012 survey asked several questions to obtain information about fact-based suspensions and debarments (i.e., those that are based entirely on the strength of the facts absent a predicate judicial finding). As the following table illustrates, there was a noticeable increase in fact-based referrals in 2012. The percentages represent the portion of 2012 referrals made by those responding that were fact-based and judicial-based.

We note that two OIGs were clear outliers, having values nearly six times larger than the highest value among other respondents. One of these offices reported 294 suspension and 432 debarment referrals in FY 2012, the other reported 240 suspension and 265 debarment referrals. Because we only had one outlier in 2010, we did not include that office’s data in the survey results. In 2012, we had two outliers (including an OIG that did not respond last time). For that reason, and to give as complete of a picture as possible, outlier data is shown here.

Table 1 - Suspension referrals in 2012 and in 2010

	2012 (outliers removed)	2010
Fact Based	41%	23%
Judicial Action	59%	77%

	2012 (outliers included)	2010 (No corresponding values with outliers)
Fact Based	30%	--
Judicial Action	70%	--

Table 2 - Debarment referrals in 2012 and in 2010

	2012 (outliers removed)	2010
Fact Based	51%	22%
Judicial Action	49%	78%

	2012 (outliers included)	2010 (No corresponding values with outliers)
Fact Based	34%	--
Judicial Action	66%	--

These results suggest that some of the perceived barriers to fact-based actions (such as concerns about litigation or impact on parallel proceedings) may be diminishing.

The 2012 survey results also suggest progress among OIGs in making referrals from audit findings. For instance, seven OIGs reported five suspensions and 41 debarment referrals arising out of audit work. Another OIG also indicated that it made 16 “generic” referrals based on audit work (i.e., referrals for exclusion without a specific recommendation for suspension or debarment). While the 2012 survey reported a total of 62 audit-related S&D referrals, there is likely room for further referral growth in the audit arena.

Similarly, S&D action originating from inspections and evaluations appears to be an area for growth -- the 2012 survey reported only 5 inspections-related referrals. We note, however, that inspections tend to focus on internal agency operations, and this may account for the low referral rate. Further information and analysis would be needed to better understand the extent to which inspections focus on external parties.

Suggestions from the S&D *Toolbox* Report Appear to be Working Well

The Working Group’s September 2011 (*Toolbox*) report (discussed above) contained a number of suggestions for OIGs to help increase S&D activity – namely:

- Assigning dedicated personnel within OIGs
- Identifying and recommending improvements to agency S&D programs
- Using investigative, audit, and inspection reports to identify S&D candidates
- Enhancing OIG referral practices
- Developing strong OIG suspension and debarment policies
- Increasing outreach among relevant communities
- Training
- Leveraging OIG semiannual reports

An overwhelming number of those responding to the 2012 survey (76%) said that they had adopted some of these practices, and we reiterate their value here.

The Road Ahead

The IG community is committed to enhancing S&D use to protect government programs from fraud, waste and abuse. The Working Group will continue to promote increased S&D actions by:

1. Continuing to provide workshops on suspension and debarment (discussed below).
2. Continuing to provide support for suspension and debarment training programs such as the program offered by FLETC and the CIGIE Training Institute. Ensuring that auditors and inspectors understand how to spot S&D opportunities in their work is especially important.
3. Continuing to work with outside organizations such as the ISDC and the Department of Justice to promote greater communication among the relevant Federal organizations, and a greater willingness by prosecutors to see suspensions and debarments as complementing criminal prosecutions.
4. Continuing to promote practices within the OIG community to enhance the use of suspensions and debarments. For example, in addition to training (which includes a practical focus), practical mechanisms, such as policies, checklists, and appropriate TeamMate enhancements could be built into the audit/inspections processes to help ensure active consideration and use of suspension/debarment in the audit and inspections arenas.

The Working Group has scheduled a fourth workshop in Spring 2014, which will be held in conjunction with the Interagency Suspension and Debarment Committee. It will provide additional instruction in S&D while also touching on other remedial actions that are in the government's toolbox, which complement S&D.

Additional Tools to Combat Waste, Fraud, and Abuse

In addition to S&D, other administrative tools to combat waste, fraud and abuse are also available in the toolbox. As discussed in more detail below, award-specific or program-specific suspensions or terminations and use of administrative authority under the Program Fraud Civil Remedies Act (PFCRA) may be options. Also, data analytics in OIG work has the potential to greatly expand the ability to identify problems that could lead to S&D or other remedial action.

Award-Specific Suspensions and Terminations

While government-wide suspension and debarment actions are prospective in nature, agencies can also consider suspending or terminating existing grants, contracts or program participation authority when evidence of fraud or other wrongdoing exists.⁵ These agency-specific remedies may be available, for example, when evidence arises during an audit or investigation that federal funds have been misused or misappropriated

⁵ For authority to take such action, see, e.g., FAR Part 49 (containing provisions for termination of procurement contracts for convenience of the government and for default); 2 CFR §§ 215.61, 62 (setting forth a uniform suspension and termination process for grants and agreements with institutions of Higher Education, Hospitals, and Other Non-Profit Organizations). Also, agency-specific policies and award terms and conditions may apply.

Suspension or termination of specific awards is also appropriate when an OIG has determined that the entity has failed to meet eligibility criteria for an award, has made material false representations at the proposal stage, or has filed inaccurate financial or technical reports to the government. Even in cases where government-wide S&D have been recommended, consideration of a corresponding action involving current award funds should occur.

Program Fraud Civil Remedies Act

Complementing suspension and debarment remedies in the accountability arena is the Program Fraud Civil Remedies Act. Although infrequently used, PFCRA allows government agencies to pursue both false statements and false claims administratively within 6 years of the claim being made. The statute permits agencies to pursue recovery on claims of \$150,000 or less if a false statement is made in connection with the claim. Agencies can obtain damages that are twice the amount of the claim, a \$5,000 civil money penalty for each false statement made, and agencies can pursue cases before Administrative Law Judges within an agency rather than going to federal court. PFCRA also allows agencies to pursue false statements that do not result in the payment of funds.

Thus, agencies may pursue “false statements” made in a federal grant proposal that was never awarded, provided the statement was accompanied by a certification or affirmation of truthfulness (often contained on grant proposal coversheets). As such, PFCRA is a valuable tool for taking action against individuals who attempt unsuccessfully to obtain federal grant funds under false pretenses.

A separate CIGIE Working Group is exploring ways to facilitate PFCRA use. OIGs can work to promote awareness of this administrative tool among their personnel and encourage their employees to consider PFCRA actions as a complement to other criminal, civil and administrative remedies.

Data Analytics

Although not a remedy itself, data analytic technique can be a particularly valuable tool for oversight. Data analytics can enhance oversight and permit OIGs to: 1) identify high-risk awardees and target work, 2) focus attention on questionable expenditures, 3) increase oversight from a sampling of transactions to 100 percent coverage, and 4) conduct continuous monitoring in real time to expose problems sooner and prevent misuse. Using automated techniques provides needed transparency over recipient spending that has sometimes been difficult to observe using traditional methods.⁶

In short, automated tools significantly expand oversight coverage and can be a valuable in identifying problems that could form the basis for S&D or other remedies.

⁶ Examples of data sources that can be used include the System for Award Management (formerly the Excluded Parties List System) and recipients’ financial system records.

Conclusion

Suspension and debarment remedies not only protect the integrity of individual federal programs, but also the integrity of procurements and financial assistance awards across the entire federal government. As such, S&D are two of the government's most powerful defenses against fraud, waste, and abuse.

Through its efforts, the Working Group has worked to raise the profile of S&D as integral tools to help protect taxpayer dollars. Working under the auspices of the CIGIE Investigations Committee, the group expects to continue its efforts in this area, while also working to heighten awareness about additional tools that might be employed to safeguard further scarce federal funds.