

# Suspension and Debarment

## Debunking Myths and Suggesting Practices for Offices of Inspectors General

*By Inspectors General Allison Lerner and Steve Linick*

Whether through its role as a consumer in the marketplace or through the provision of financial assistance, the federal government uses a substantial amount of taxpayer dollars to fund its various programs and activities.<sup>1</sup> Protecting these public funds from potential misuse is of utmost importance, even in the best of economic times. When non-responsible contractors and other awardees violate the public trust through poor performance, noncompliance or misconduct, or other actions affecting present responsibility, administrative suspension and debarment remedies exist to prevent those entities or individuals from receiving any new federal business for a specified time period.<sup>2</sup> However, as congressional hearings in the past few years have shown, many poor performing contractors continue to receive public funding, and deficiencies exist in agency suspension and debarment processes.<sup>3</sup>

Given continuing congressional interest and the importance of ensuring that scarce federal funds are spent responsibly,<sup>4</sup> the Investigations Committee of the Council of Inspectors General on Integrity and Efficiency formed a working group to raise the profile of suspension and debarment as tools already in the government's "toolbox." Building on a survey it conducted of suspension and debarment use and practices among Offices of Inspectors General, the working group recently issued a report debunking common myths about these remedies and offering suggested practices for OIGs to increase their use of

these vital tools.<sup>5</sup> This article summarizes the working group's report.

### DEBUNKING MYTHS

According to the working group's report, the survey respondents indicated that suspension and debarment "could be used more frequently and more effectively."<sup>6</sup> Misconceptions about the impact of suspension and debarment on contemporaneous proceedings, as well as the appropriate bases for suspension and debarment, have likely affected people's perceptions of the utility of these tools.

These myths, which are discussed below, are readily debunked through a better understanding of a few fundamental concepts. In addition, some practical steps can be taken by OIGs and others to move past these roadblocks toward greater suspension and debarment use.

### MYTH #1: CONTEMPORANEOUS CRIMINAL OR CIVIL PROCEEDINGS WILL BE COMPROMISED

The first myth discussed in the working group's report is a belief that pursuing suspension or debarment will necessarily jeopardize contemporaneous criminal or civil proceedings by disclosing sensitive investigative information or case theories to the subject. However, procedural safeguards and careful planning can help protect contemporaneous proceedings while suspension and debarment actions are being pursued.

Notices of proposed debarment or suspension, for instance, do not require disclosure of all of the government's evidence; they must simply inform the subject of the grounds for taking action.<sup>7</sup> Courts have further expounded that the suspension notice

1) In Fiscal Year 2010, the federal government spent \$535 Billion on contracts and \$555 Billion on grants, as well as substantial amounts on other forms of assistance. See <http://www.usaspending.gov/explore?carryfilters=on>.

2) While federal statutes sometimes contain language governing the exclusion of federal awardees in certain circumstances, such as for Clean Air Act violations, this article focuses on discretionary suspension and debarment actions, which, in the procurement context, are governed by the Federal Acquisition Regulation (FAR), see 48 C.F.R. Part 9.4; and, in the realm of non-procurement transactions (grants, loans, or benefits), by Office of Management and Budget Guidelines to Agencies on Government wide Debarment and Suspensions (NPR), see 2 C.F.R. Part 180.

3) See, e.g., Rewarding Bad Actors: Why Do Poor Performing Contractors Continue to Get Government Business? Hearing before the Committee on Oversight and Government Reform, U.S. House of Representatives One Hundred Eleventh Congress, Second Session, March 18, 2010 Serial No. 111-78. (statements of Calvin L. Scovel III, Inspector Gen., U.S. Dep't of Transp.; Richard L. Skinner, Inspector Gen., U.S. Dep't of Homeland Sec.).

4) See generally American Recovery and Reinvestment Act, P.L. 111-5, 123 Stat. 115(2009) (requiring unprecedented levels of oversight, transparency, and accountability).

5) Don't Let the Toolbox Rust: Observations on Suspension and Debarment, Debunking Myths, and Suggested Practices for Offices of Inspectors General (Sept. 20, 2011) [hereinafter Working Group Report]. The report can be found at: <http://www.ignet.gov/randp/sandwgrpt092011.pdf>.

6) *Id.* at 1.

7) See FAR 9-406-3(c)(2); 9.407-3(c)(1); 2 C.F.R. §§180.715(b) and (c), 180.805(b).

need only contain enough information regarding the time, place and nature of the alleged misconduct to facilitate a meaningful contest.<sup>8</sup> Requests for documentation supporting the suspension may be denied if disclosure could harm the pending proceedings.<sup>9</sup> Additionally, while the rules governing suspension and debarment allow fact-finding hearings when material facts are in dispute, there are some boundaries. In the case of suspensions, such hearings must be denied based on Department of Justice advice that contemporaneous proceedings would be prejudiced.<sup>10</sup> Further, it is worth mentioning that fact-finding is not at all permissible in either suspension or debarment actions based on a conviction, judgment, or indictment.<sup>11</sup>

Practically speaking, OIGs can prevent the disclosure of sensitive information through careful planning during the referral process. OIG referrals need only provide enough information sufficient to satisfy the applicable evidentiary standards – “preponderance of the evidence” (or 51 percent) in the case of debarments and the lower “adequate evidence” standard with respect to suspensions. Some OIGs, for example, have provided the agency suspension and debarment official with simply a copy of the search warrant affidavit that had previously been disclosed to the subject.<sup>12</sup> Managing disclosure concerns can be aided by active communication among the relevant communities (OIGs, DoJ, SDOs and others). Through frank and open dialogue, disputes can be avoided or minimized.

## MYTH #2: SUSPENSION AND DEBARMENT MUST BE BASED ON JUDICIAL FINDINGS

Most commonly, suspension and debarment actions are based solely on the results of court proceedings – namely, a conviction, civil judgment or indictment for an integrity-related offense.<sup>13</sup> However, another less-traveled path exists to exclude a non-responsible individual or entity from doing further business with the government. Fact-based actions, which rest solely

on the strength of facts discovered through investigations, audits, or inspections, without an associated conviction, judgment, or indictment, may also be viable – but often overlooked<sup>14</sup> – options in many circumstances.

The Federal Acquisition Regulation and National Public Radio both explicitly provide for fact-based actions by explaining that debarments can be supported by a preponderance of the evidence<sup>15</sup> sufficient to establish, among other things:

- A particularly serious violation of the terms of a government contract, subcontract, or transaction; or
- Any other cause of such a compelling and serious nature that it affects present responsibility.<sup>16</sup>

The latter cause is especially sweeping and empowers the SDO to debar an individual or entity for an array of conduct indicating, for example, a lack of integrity or competency to handle federal funds.

Similarly, suspensions may – but do not always have to – rest upon court findings. While an indictment alone can support a suspension,<sup>17</sup> such action can also be anchored in other “adequate evidence” (a low standard akin to probable cause) establishing a cause for debarment, such as any cause so serious that it implicates present responsibility. Suspensions further require a need for immediate action to protect the government’s interest.<sup>18</sup> In deciding whether to impose a suspension, the SDO will evaluate the supporting facts to assess their “adequacy” and should consider such factors as the amount of evidence available, its credibility, corroboration and reasonable inferences.<sup>19</sup>

Apart from a general misconception that suspension and debarment actions are only possible with the existence of a supporting conviction, judgment or indictment, other factors also affect the use of fact-based exclusions. As the working group report notes, agencies may have concerns over the potential difficulties associated with conducting a fact-finding hearing, such as the time and resources that may be involved.<sup>20</sup> In addition, misunderstandings over the level of evidence required to impose a fact-based ac-

8) See *ATL, Inc. v. United States*, 736 F.2d 677, 686 (Fed. Cir. 1984); *Transco Security, Inc. v. Freeman*, 639 F.2d 318 (6th Cir. 1981), cert. denied, 454 U.S. 820 (1981).

9) See NPR Preamble, 68 Fed. Reg. 66543 (2003) (“[t]he suspending official may have to review [sensitive] evidence [pertaining to an investigation] in camera and be unable to disclose the evidence to a suspended respondent”). Cf. 5 U.S.C. § 552(b)(7)(A) (Freedom of Information Act exemption protecting records, which, if disclosed, could reasonably be expected to interfere with a law enforcement proceeding). The concept of an in camera review, in which evidence is not disclosed to the respondent, is supported by the ATL and Transco cases, above.

10) See FAR 9.407-3(b)(2); 2 C.F.R. § 180.735(a).

11) See FAR 9.406-3(b)(1), 9.407-3(b)(1); 2 C.F.R. §§ 180.830(a)(1), 180.735(a)(1).

12) Working Group Report at 6.

13) Such offenses include commission of any offense indicating a lack of business integrity or business honesty that seriously and directly affects present responsibility. See FAR 9.406-2(a); 9.407-2(a) and (b); 2 C.F.R. §§ 180.705(b); 180.800(a).

14) Only 27% of OIGs responding to the working group’s survey reported that they had made fact-based suspension referrals in Fiscal Year 2010; only 24% of the respondents had made fact-based debarment referrals. Working Group Report at 7.

15) A “preponderance of the evidence” means proof leading to the conclusion that a fact in issue is more probable than not. See FAR 2.101; 2 C.F.R. § 180.990.

16) FAR 9.406-2(b)(1)(i), (c); 2 C.F.R. §§ 180.800(b),(d). A comprehensive list of the causes for debarment that may be established factually (i.e., without a predicate judicial finding) can be found at FAR 9.406-2(b), (c); and 2 C.F.R. § 180.800(b), (c), (d).

17) FAR 9.407-2(b), 2 C.F.R. § 180.700(a).

18) FAR 9.407-1(b), 2 C.F.R. § 180.700(c).

19) FAR 9.407-1(b)(1), 2 C.F.R. § 180.705(a).

20) Working Group Report at 7.

tion and concerns about contemporaneous proceedings may also play a role. More simply, however, many agencies and OIGs mistakenly believe that suspension and debarment actions must be tied to a judicial proceeding.<sup>21</sup> Undoubtedly, some of these obstacles can be identified and overcome through strong relationships and dialogue between all parties involved in the suspension and debarment process, including OIGs, SDOs, other agency officials and staff, and DoJ. The bottom line is that an increased awareness of the fact-based option, amplified by outreach and communication, may pave the way for increased suspension and debarment use in instances where no judicial finding has been made.

### MYTH #3: SUSPENSIONS AND DEBARMENTS MAY BE BASED ONLY UPON INVESTIGATIVE FINDINGS.

The final myth discussed in the working group's report is a belief that suspensions and debarments may be imposed only based on investigative findings. OIGs, for example, rarely make "non-investigative" suspension or debarment referrals. According to the working group's survey, in fiscal year 2010, only 1.5 percent of the respondents' suspension and debarment referrals arose from non-investigative activities.<sup>22</sup> As discussed above, however, the FAR and NPR each contain very broad "catch all" provisions that permit suspension or debarment for any "serious or compelling" cause affecting "present responsibility,"<sup>23</sup> including the types of matters that may be discussed in OIG audit reports of grantees and contractors.

For example, audits often uncover significant or recurring internal control deficiencies that place federal funds in danger of misuse or misallocation; these findings might establish a cause for suspension or debarment. Auditors who perform work under Office of Management and Budget Circular A-133, given the wide lens through which they conduct their reviews,<sup>24</sup> are uniquely situated to see trends and persistent problems across government with particular awardees. Evidence of this nature might bear on present responsibility and make a strong case for suspension or debarment.

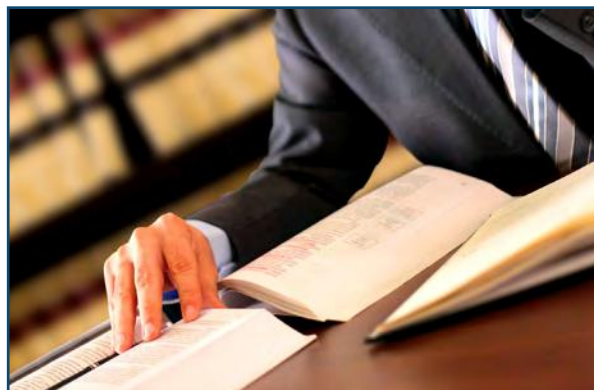
21) *Id.* at 7.

22) *Id.* at 8. The report notes that the low rate of non-investigative referrals could be due, in part, to the internal focus of many audits and inspections. Also, some OIGs may require audit and investigation units to refer fraudulent or improper activity discovered during the course of their work to the office of investigation.

23) FAR 9.406-2(c), 9-407-2(c); 2 C.F.R. §§180.800(d), 180.700(b).

24) Under OMB Circular A-133, which implements the Single Audit Act of 1984, each federal grant recipient that expends \$500,000 or more a year in federal assistance is required to have a single audit.

Merely recognizing that suspension and debarment may be obtained from non-investigative activities may not be enough to spur referrals based on audits or inspections. Many auditors and inspectors have little familiarity with these remedies and will need further education about their fundamentals before they are fully equipped to make referrals. Focused "in-house" training and/or wider participation in government-wide courses offered by the Federal Law Enforcement Training Center or by CIGIE would significantly raise the knowledge base. Other steps to stimulate non-investigative referrals may include developing checklists and referral templates tailored to audit and inspection activities. Finally, as with the other myths discussed, greater communication between OIGs, SDOs and other agency officials should take place to avoid confusion and surprises. This is especially important because many SDOs and other agency officials may be less familiar with referrals of this nature than with those stemming from investigations.



### SUGGESTED PRACTICES

Debunking the myths surrounding the use of suspension and debarment is just one-step to increasing the use of these remedies. Although recognizing that there is no "one size fits all" approach, the working group's report also identified several suspension and debarment-related practices that, if implemented, could help foster referrals. The report encourages offices to consider adopting these practices, which are summarized below, to the extent their circumstances warrant.<sup>25</sup>

- **Assigning Dedicated Personnel:** While no single staffing approach can be applied consistently across the entire OIG community, some OIGs have experienced success with the dedication of

25) See Working Group Report at 10-16, for a more full discussion of each suggested practice.



personnel specific to the suspension and debarment function. Such arrangements – where a specific OIG employee serves as the main point of contact with the SDO’s office – can build internal expertise and strengthen relationships with agency suspension and debarment staff.

- **Identifying and Recommending Improvements to Agency Programs:** Through their regular internal audit and evaluation functions, many OIGs have conducted audits or reviews of their agency’s suspension and debarment system, and therefore may be able to identify deficient processes and recommend positive changes.
- **Using OIG Reports to Identify Suspension and Debarment Candidates:** Several survey respondents assign staff to periodically review all OIG reports for information such as indictments, convictions, pleas and other information that may be indicative of a lack of present responsibility, all of which might support a suspension or debarment.
- **Enhancing OIG Referral Practices:** Referral practices can be enhanced in two ways. First, many OIG survey respondents explained that they use measures, such as statistics, designed to encourage employees to make suspension and debarment referrals when appropriate. Second, creating a system for preparing and tracking OIG suspension and debarment referrals, such as templates and checklists, can facilitate their preparation and use.
- **Developing Strong OIG Suspension and Debarment Policies:** 59 percent of survey respondents have written policies for addressing suspension and debarment referrals to the agency. These policies lend structure and organization to the process as a whole.
- **Increasing Outreach Among Relevant Communities:** Regular outreach and communication can go far to alleviate concerns or misconceptions that may affect suspension and debarment use. The working group suggests that all parties engaged in the process (OIGs, SDOs and DoJ) engage in regular dialogue to “work through areas of mutual concern and to correct misunderstandings.”<sup>26</sup>
- **Additional Training:** Formal training can increase awareness of suspension and debarment as viable tools and dispel the myths that sur-

round them. For their part, OIGs can encourage their staff to attend existing suspension and debarment training, such as the course offered by FLETC. They might also consider preparing and presenting training within their offices and agencies, providing “basic information to facilitate those remedies’ use under appropriate circumstances.”<sup>27</sup>

- **Leveraging Semiannual Reports:** Some survey respondents include specific statistics and discussions of suspension and debarment referrals in their Semiannual Reports. Such reporting can serve multiple purposes by: 1) providing a means to educate the Congress and other interested parties about suspension and debarment activities; 2) illuminating an office’s commitment to pursuing these remedies; and 3) illustrating the extent to which OIG referrals have been translated into actions.

## CONCLUSION

Fiscal responsibility and proper stewardship over public funds demand that the government transact business only with responsible parties. Suspensions and debarments are important tools in the fight against fraud, waste and abuse of public funds. Unfortunately, some basic misunderstandings can restrain their use. The working group report has addressed a few myths surrounding suspension and debarment by discussing safeguards for contemporaneous proceedings and highlighting the availability of fact-based actions, including those stemming from OIG audits and inspections. However, overcoming the effects of these myths will require further steps, including additional training, outreach and active communication among all parties involved in the process. ❧

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26) Working Group Report at 14.

27) Working Group Report at 15-16.



## Allison Lerner

Allison C. Lerner assumed the duties as inspector general of the National Science Foundation in April 2009, reporting to the National Science Board and the Congress. As head of the Office of Inspector General, she recommends policies for promoting economy, efficiency and effectiveness of NSF programs and operations. She leads efforts to prevent and detect fraud, waste and abuse; improve the integrity of NSF programs and operations; and investigate allegations of misconduct in science.

Ms. Lerner was appointed in November 2005 as counsel to the inspector general at the Department of Commerce, a position through which she acted as the IG's principal legal advisor and managed the office's staff attorneys and legal services.

Ms. Lerner began her federal career in 1991, joining the Office of Inspector General at Commerce as assistant counsel, and has been a member of the senior executive service since 2005. During her tenure, she served as special assistant to the IG, deputy assistant inspector general for auditing, and acting assistant inspector general for auditing. Prior to joining the federal government, she was an associate at a law firm in San Antonio, Texas.

In June of 2011, Ms. Lerner was designated by the president as a member of the Government Accountability and Transparency Board. She currently chairs the Counsel of the Inspectors General on Integrity and Efficiency working groups on suspension and debarment and research misconduct.

Ms. Lerner has been honored by the President's Council on Integrity and Efficiency with three awards for excellence: in 2001, for her work reviewing the Department of Commerce's management of 5,000 intra-agency and special agreements worth over \$1 billion; in 2002, for her assistance in a complex investigation of false claims submitted under a financial award from the National Institute of Standards and Technology; and in 2005, for her review of a controversial Booz-Allen Hamilton study that recommended significant structural changes to the National Oceanic and Atmospheric Administration's Office of Finance and Administrative Services.

Ms. Lerner received her law degree from the University of Texas School of Law and a B.A. in liberal arts from the University of Texas. She is admitted to the bar in both Texas and the District of Columbia.



## Steve Linick

On September 29, 2010, the United States Senate confirmed Steve Linick as the first inspector general of the Federal Housing Finance Agency. Mr. Linick was sworn into office on October 12, 2010. Prior to his appointment as inspector general, Mr. Linick served in several leadership positions in the United States Department of Justice. Between 2006 and September 2010, Mr. Linick served in dual roles as executive director of DoJ's National Procurement Fraud Task Force and deputy chief of the fraud section, criminal division, DoJ. As deputy chief, Mr. Linick managed and supervised the investigation and prosecution of white-collar criminal cases involving procurement fraud public corruption, investment fraud, telemarketing fraud, mortgage fraud, corporate fraud and money laundering, among others. In addition, Mr. Linick was the primary intake official at DoJ for contract fraud cases relating to the wars and reconstruction efforts in Iraq and Afghanistan. In October 2008, Mr. Linick received the Attorney General's Distinguished Service Award for his efforts in leading the department's procurement fraud initiative. Previously, Mr. Linick was an assistant U.S. attorney, first in the central district of California (1994-1999), and subsequently in the eastern district of Virginia (1999-2006).



