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STOP UNWORTHY SPENDING ACT

DECEMBER 12, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ISSA, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

[To accompany H.R. 3345]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 3345) to amend title 31, United States Code, to consolidate suspension and debarment offices, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 4, line 2, insert "suspension and debarment" after "contrary".

Page 5, lines 23 and 24, strike "case management system,".

49–006

Page 6, after line 16, insert the following:

"(B) The number and summary of agency head determinations, if any, that allowed a suspended or debarred contractor, grantee, or other recipient of Federal financial assistance to receive new Federal funds.

Page 6, line 17, strike "(B)" and insert "(C)".

Page 12, line 18, strike "and".

Page 12, line 24, strike the period and insert "; and".

Page 12, after line 24, insert the following:

"(D) the number and summary of agency head determinations, if any, that allowed a suspended or debarred contractor, grantee, or other recipient of Federal financial assistance to receive new Federal funds.

Page 16, strike lines 4 through 8 and insert the following:

"(4) TIMELY REFERRALS AND PROCESSING OF CASES.—

"(A) The regulation shall provide procedures to strengthen timely referrals of cases, including—

"(i) the role of the agency remedy coordination official to act upon cases brought to such official's attention in a timely manner (as required in section 7 of the SUSPEND Act); and

"(ii) requirements for the Board or the agency suspension and debarment office to review the sufficiency of the information in the referred cases and to notify the agency remedy coordination official and cognizant Inspector General (if the case is originated from the Office of Inspector General) within 30 days after the initial referral date for any additional information if needed.

"(B) The regulation shall require all cases to be disposed of within 6 months after the initial referral date, unless the Chair of the Board or the agency suspension and debarment officer provides a written explanation and estimated timeline to the agency remedy coordination official and cognizant Inspector General (if the case is originated from the Office of Inspector General). Such written explanation shall be updated every 3 months until the final resolution of the case.".

Page 17, line 14, after "2(b)(2)" insert "and the merits of any such waiver".

Page 19, line 11, after "by" insert "the Office of Inspector General of the agency or".

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

The Federal Government seeks to protect the taxpayer by ensuring public funds are not improperly dissipated.[1] To that end, federal agencies are required to award contracts and grants only to responsible sources that are "reliable, dependable and capable of performing the work."[2]

Suspension and debarment (S&D) are two of the most powerful tools agencies can—and should—use to protect the government's interests[3] and "ensur[e] contract and program integrity."[4] It is not designed to punish contractors or grantees for past misconduct.[5] The Committee on Oversight and Government Reform (the Committee) recognizes the need for a robust S&D program to maintain public trust and to provide a level playing field for all responsible entities seeking federal financial awards.

The Federal Government spends over $1 trillion in contracts and grants annually (in fiscal year 2012, $517 billion in contracts and $536 billion in grants).[6] Yet, despite the intense Congressional oversight efforts in recent years, the United States Government Accountability Office (GAO) and the Committee's hearings have found that there are serious weaknesses in the S&D programs of numerous agencies.[7]

These weaknesses have resulted in the award of federal funds to companies and individuals who are not responsible contractors or grantees—including those with criminal convictions, federal tax liabilities, or terrorist ties. It has also demonstrated that some agencies are either extremely deficient in finding fraud or that their programs are practically non-existent—either due to a lack of dedicated staff or a lack of commitment to S&D on the part of the agency.

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[1] *See* Kate M. Manuel, Cong. Research Serv., RL34753, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments, at 4 (2012).

[2] U.S. Gov't Accountability Office, GAO–11–739, Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could be Improved, at 1 (2011) [hereinafter "GAO–11–739"].

[3] *See id.* at 22. A debarment typically lasts for a period that is commensurate with the cause and generally does not exceed three years. *See* Kate M. Manuel, Cong. Research Serv., R40633, Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures, at 4 (2013). A suspension lasts as long as any agency investigation of the underlying conduct or ensuing legal proceeding is ongoing. *Id.* The effect of a suspension or debarment is government-wide and not specific to an agency or contract. *Id.* If no legal proceeding is initiated, the suspension cannot exceed 12 months unless an extension is requested. *See* FAR 9.407–4 (2008). Any extension that is granted can last no longer than 6 months. *See id.*

[4] Interagency Suspension and Debarment Comm. (ISDC) Rep. on Federal Agency Suspension and Debarment Activities (Sept. 18, 2012), available at *http://www.epa.gov/isdc/pdf/isdc*_section_873_fy_2011_report_to_congress_lieberman.pdf [hereinafter ISDC Annual Report].

[5] *See* Steven Gordon & Richard Duvall, *United States: It's Time to Rethink the Suspension and Debarment Process*, Bloomberg BNA, 99 FCR 720, at 1 (June 18, 2013), *available at http://www.hklaw.com/files/Publication/dd6ffa6c-039a-48a7-9332-0160fec0dae4/Presentation/PublicationAttachment/88ff0ebe0999e7-4094-b1e0-042dbc630a41/TimeToRethinkSuspensionandDebarmentDuvallGordon.pdf.*

[6] See U.S. Gov't Accountability Office, GAO–13–758, Federal Data Transparency: Opportunities Remain to Incorporate Lessons Learned as Availability of Spending Data Increases (2013) (highlights); U.S. Gov't Accountability Office, GAO–13–707T, Suspension and Debarment: Characteristics of Active Agency Programs and Governmentwide Oversight Efforts (2013) (statement of John Neumann, Director, Acquisition and Sourcing Management, U.S. Gov't Accountability Office).

[7] *Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?: Hearing before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) (statement of John Neumann, Director, Acquisition and Sourcing Management, U.S. Gov't Accountability Office), (statement of Scott Amey, General Counsel, Project on Government Oversight); *see also* GAO–11–739, supra note 2, at 3, 6.

For example, according to the Interagency Suspension and Debarment Committee (ISDC), the Department of Health and Human Services (HHS), while awarding $402 billion in contracts and grants in fiscal year 2011 (which accounted for more than one third of the entire federal government contracts and grants spending for the year), had a total of 10 discretionary suspension or debarment actions.[8] In fiscal year 2012, the agency had a total of just 2 discretionary suspension or debarment actions while awarding $363 billion in contracts and grants.[9] Similarly, the Department of Labor (Labor), the Office of Personnel Management, and the Social Security Administration took zero discretionary S&D actions, while awarding approximately $11.6 billion, $1.6 billion, and $1.3 billion respectively in contracts and grants in fiscal year 2012.[10]

In 2011, GAO found commonalities amongst those agencies with negligible or weak S&D activities, which do not appear to reflect the level of activity needed to protect their agencies and the government from harm. Common at those agencies is the lack of: (1) a dedicated staff; (2) detailed policies and procedures; and (3) practices that encourage an active referral process.[11]

The S&D process at some agencies has also been further criticized for a lack of access to the system and a lack of transparency.[12] Currently, there is little consistency between agencies' S&D programs, with different agencies employing significantly different approaches to the S&D process. For example, there are wide disparities in such key areas as:

- The use and frequency of use of show cause letters [13] vs. direct notices of suspension or proposed debarment.
- Different views on acceptable remedial measures such as administrative compliance agreements.
- The process by which S&D cases are prepared and referred to.
- The process by which administrative records are prepared.
- The process by which informal no action decisions are made and documented.
- The use of consensus panels.
- What "informal procedures" [14] are employed and communication afforded to the accused.

The Stop Unworthy Spending Act (SUSPEND Act) reforms S&D procedures and overhauls the organizational management of S&D activity across the government.

Procedurally, it improves consistency and transparency by:

i) Combining the two separate S&D regulations governing contracts and grants into a single, comprehensive regulation;[15]

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[8] ISDC Annual Report, *supra* note 5, at 22.

[9] See FY 2012—Preliminary Data from ISDC, E-mail from ISDC to Eric Cho, H. Comm. on Oversight and Gov't Reform (Oct. 24, 2013, 16:47 EST) (on file with recipient); USASpending.gov.

[10] *See id.*

[11] GAO–11–739, *supra* note 2, at 12.

[12] *See Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?: Hearing before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013).

[13] Show cause letters are "pre-notice communications, which advise an entity that it is being considered for suspension or proposed debarment." ISDC Annual Report, *supra* note 5, at 8. 10 out of the 24 Chief Financial Officers Act ("CFO Act") agencies used show cause letters in fiscal year 2011. *See id.*

[14] The FAR calls for informal practices whenever possible when dealing with a vendor. *See* FAR 9.406–3(b)(1) (2013) ("agencies shall establish procedures governing the debarment decisionmaking process that are as informal as is practicable").

[15] *See How Convicts and Con Artists Receive New Federal Contracts: Hearing before the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2009) (statement of Frederic M. Levy, Part-

ii) Requiring consistent use of show cause letters to ensure accused parties are heard prior to any adverse action being taken against them;[16]

iii) Mandating a single government-wide case management system to track cases and make publicly available all final resolutions of S&D cases; and

iv) Enhancing oversight of the excluded parties database (known as the System for Award Management or SAM)[17] to ensure accuracy, timeliness, and completeness.

It also requires standard procedures for an expedited review process to handle contract or grant fraud in a contingency or time-sensitive environment, in both military and non-military settings.

Organizationally, the SUSPEND Act consolidates more than 40 executive agency S&D offices into one centralized board—the Board of Suspension and Debarment (the Board). This is akin to a successful reform effectuated by the Committee almost a decade ago, which consolidated what was then eight separate civilian agency Boards of Contract Appeals (as part of fiscal year 2006 National Defense Authorization Act) into a single entity.[18]

By consolidating the S&D offices, the Board will foster more government-wide consistency for how discretionary S&D actions are managed and tracked and ensure agencies have dedicated staff and resources committed to creating a robust S&D referral program. The Board will also be able to optimize the staff and administrative resources necessary to accommodate S&D caseloads, thereby reducing costs and increasing efficiencies.[19]

However, larger (CFO Act) agencies and the military departments can continue to operate their own independent S&D offices if granted a waiver upon demonstration of an effective S&D program. Specifically, those agencies need to show: (1) a dedicated S&D staff; (2) detailed agency-specific policies and procedures relating to S&D; (3) practices that encourage an active S&D referral process; (4) a consolidated S&D program with only one individual with the title of Suspension and Debarment Officer (SDO); and (5) average annual dispositions of 50 or more S&D cases.[20]

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ner, McKenna Long & Aldridge). The single regulation has been suggested by the American Bar Association, Public Contract Law Section, Committee on Debarment and Suspension. Its draft *Report on the Study of Federal Debarment and Suspension Processes*, however, was not finalized. *See id.* The single regulation will provide contractors with greater access to the processes behind the suspension and debarment system.

[16] *See Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?: Hearing before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) (Testimony of Angela Styles, Partner, Crowell & Moring).

[17] SAM includes the list of all known excluded entities. Under the SUSPEND Act, the Board of Suspension and Debarment would be required to oversee SAM contains a complete and accurate list of all excluded entities.

[18] *See* The Honorable Jeri Kaylene Somers, *The Board of Contract Appeals: A Historical Perspective*, 60 AM. U. L. REV. 745, 755–56 (2011) (noting the consolidation of the civilian boards "has been extremely successful, optimizing the role boards play in resolving contract disputes").

[19] Currently, there are approximately 80 full time and 149 part time attorneys and staff engaged in S&D activities in civilian agencies. The Department of Defense has 24 full time and 8 part time attorneys and staff. Overall, there are estimated 104 full time and 157 part time staff in 24 CFO Act agencies. *See* ISDC, Supplemental to CRS Inquiry, Federal Suspension and Debarment Programs.

[20] *Id.* Fifty cases were chosen simply as an approximate number to ensure that the SDO had enough caseloads to occupy him or herself full-time. A disposition may be an adverse action, a decision not to proceed, or any other appropriate action. In the DoD components—DLA, Navy, Army and Air Force—suspension and debarment officers handled 3,443 S&D between fiscal years 2009 through 2011. *See* U.S. Gov't Accountability Office, GAO–12–932, Suspension and Debarment: DOD has Active Referral Processes, but Action Needed to Promote Transparency, at 3 (2012) (note this number only includes those proposed for debarment or suspension actions

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The bill strengthens the existing ISDC by formalizing and codifying it in statute (it currently operates pursuant to an Executive Order) and by designating as Chair, the Administrator of OMB's Office of Federal Procurement Policy (OFPP). The ISDC currently operates both as a "forum for agencies to discuss best practices and trends, and current issues and challenges," and is "a coordinating body to promote efficient handling of actions by ensuring there is a 'lead agency' when two or more agencies have an interest in initiating suspension or debarment proceedings."[21] Even with the consolidation of agency S&D programs, it will still be necessary for the ISDC to coordinate lead agency functions amongst the Board and the agencies granted a waiver under the SUSPEND Act.[22]

The bill also requires joint Agency Head/Inspector General guidance in each agency to institutionalize efficient agency-wide coordination of remedies for fraud and corruption related to procurement and grant activities, including legal, regulatory, administrative, and contractual remedies to maximize timely recovery of funds.

Finally, the bill will strengthen the identification and referral of contractors and grantees that repeatedly fail to perform. Too often, a contractor is awarded a new government contract despite a lengthy history of poor performance on government contracts.[23]

BACKGROUND AND NEED FOR LEGISLATION

Government's inconsistent performance in managing S&D

GAO has consistently reported on weaknesses in agencies' S&D programs and on the weaknesses of the system as a whole. In 2005, GAO reported that "federal agencies may not be consistently identifying suspended or debarred contractors when awarding new contracts."[24] Specifically, GAO found the Excluded Parties List System (EPLS) contained insufficient data because it did not allow agencies to input contractor's unique identification numbers.[25] The report made two recommendations: (1) make contractor identification numbers a required field on the EPLS, and (2) increase data sharing on administrative agreements.[26]

In 2009, GAO found that some contractors continued to receive federal funds despite the fact that they were ineligible to be awarded contracts.[27] This, in part, was due to the continuing weaknesses of the EPLS system—ineffective management of the system and missing unique identification numbers, even though GAO in 2005 recommended that the unique identifiers be a required field in the

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and does not track how many referrals each military department received). DLA alone handled 1,168 cases during fiscal years 2009 through 2011. *Id.* (noting DLA has three full time attorneys working on S&D cases).

[21] ISDC Annual Report, *supra* note 5, at 1.

[22] *See id.*

[23] *See* Kate M. Manuel, Cong. Research Serv., R41562, Evaluating the Past Performance of Federal Contractors, at 1 (2013) (noting there are recent reports documenting that some contractors received new contracts despite allegedly deficient performance); *see also* Neil Gordon, Healthcare.gov Reveals Flaws in Contractor Screening, POGO BLOG, (Jan. 3. 2014), *http://www.pogo.org/blog/2014/01/healthcaregov-debacle-revelas-flaws-in-contractor-screening.html.*

[24] GAO–11–739, *supra note* 2, at 6; see also U.S. Gov't Accountability Office, GAO–05–479, Additional Data Reporting could Improve the Suspension and Debarment Process, (2005).

[25] GAO–05–479, *supra* note 27, at 3.

[26] *Id.*

[27] GAO–11–739, *supra* note 2, at 6; *see also* U.S. Gov't Accountability Office, GAO–09–174, Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds (2009). While the FAR recognizes that there are some circumstances where it is appropriate to award a contract to a suspended or debarred contractor, such circumstances must be compelling. FAR 9.405(a).

system.[28] In addition, contracting officers often received "no results from EPLS searches because of typographic and user input errors."[29] SAM, the system now hosting the excluded parties list used by all contracting and grant officers, remains incomplete, inaccurate, and not user-friendly.

In 2011, GAO again issued a report on the status of agencies' S&D programs.[30] GAO found that only 16 percent of the cases included on EPLS were discretionary suspensions or debarments over the last five fiscal years, suggesting a systemic weakness in referral process.[31] The remaining 84 percent of the cases "were other exclusions based on violations of laws and regulations resulting from certain prohibited conduct."[32] Such exclusions are mandatory because they are required by statute.[33] Though GAO noted that some agencies have effective S&D programs, many agencies do not.[34]

In addition to GAO's findings, the Committee's hearings found that the current system produces inconsistent results and leaves each agency to devise individual procedures in handling suspension or debarment cases. For example, though some agencies use "show cause" letters in S&D proceedings, other agencies either do not use such letters or are not fully aware of this process.[35] Similarly, not all agencies use administrative agreements to help resolve suspensions and debarments and the content of those administrative agreements can vary significantly amongst the various agencies.[36]

Recently, at an Oversight and Government Reform (OGR) subcommittee hearing concerning the Special Inspector General for Afghanistan Reconstruction (SIGAR), the lack of effective S&D referral and case management in contingency settings was seen as a significant source of waste and performance risks.[37]

Finally, despite GAO issuing guidance to the agencies to assess and strengthen their S&D programs, a report by the ISDC (dated September 18, 2012) reflected persistent weaknesses amongst some of the agencies such as HHS, Commerce, Labor, and the Department of Veterans Affairs (VA).[38]

There is also currently not enough emphasis on suspending or debarring contractors and grantees that repeatedly fail to perform. Time and time again, agencies award contracts to those contractors or grantees that have a history of repeated bad performance.[39] The

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[28] See GAO–09–174, *supra* note 30, at 16; GAO–05–479, *supra* note 27, at 3.

[29] Inspector General Report, No. D–2011–83, Additional Actions Can Further Improve the DoD Suspension and Debarment Process, at 19 (July 14, 2011) [hereinafter Inspector General Report].

[30] GAO–11–739, *supra* note 2.

[31] *Id.* at 7.

[32] *Id.*

[33] *See* Manuel, *supra* note 1, at 1–2.

[34] *See* GAO–11–739, *supra* note 2, at 3.

[35] *See Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively? Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) (Testimony of Angela Styles, Partner, Crowell & Moring). Significantly, recent studies report a "general lack of awareness about suspension and debarment, including limited knowledge about the procedures/criteria associated with these actions." Manuel, *supra* note 1, at 17.

[36] *See* ISDC Annual Report, *supra* note 5, at 9.

[37] See also Commission on Wartime Contracting in Iraq and Afghanistan, *Transforming Wartime Contracting: Controlling Costs, Reducing Risks, Final Report to Congress*, 156, 157 (Aug. 2011), *available at http://cybercemetery.unt.edu/archive/cwc/20110929213820/http://www.wartimecontracting.gov/docs/CWC*_FinalReport-lowres.pdf.

[38] *See generally id.*

[39] *See Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) (Testi-

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SUSPEND Act addresses this problem by making it clear that the single regulation adopted must strengthen the identification and referral process of those contractors and grantees that repeatedly fail to perform.

Dual regulations for procurement and non-procurement programs

There are currently two separate regulations governing S&D for procurement and non-procurement programs.[40] FAR Subpart 9.4—promulgated by the Office of Federal Procurement Policy (OFPP) governs procurement regulations, while the non-procurement common rule governs anything other than a procurement. This includes such thing as "grants, cooperative agreements, scholarships, fellowships" and many others.[41] If a contractor is excluded under one of the regulations, there is reciprocity between both of the regulations and it counts as a suspension or debarment Government-wide.[42]

In 2008, the Suspension and Debarment Committee of the ABA Public Contract Law Section suggested that the two regulations be consolidated into one regulation with the non-procurement common rule approach being adopted, which does not exclude a contractor upon receipt of a "Notice of Proposed Debarment."[43]

Persistent problems with the system for award management

Previously, separate acquisition systems tracked different aspects of the procurement process, described as follows. The EPLS listed all those individuals or organizations that were excluded from doing business with the Federal Government.[44] A contracting officer was required to check the EPLS before awarding funds to a prospective vendor.[45] The Central Contract Registration (CCR) system was the primary supplier database for the Federal Government. Finally, the Online Representations and Certification Application (ORCA) collected "vendor representations and certifications of business information that is required by law for contract award."[46]

In 2012, as the first phase of the Integrated Acquisition Environment effort, these three systems were consolidated into the System of Award Management (SAM). Issues with SAM were present from the start.[47] When the system first went online in July, it had to almost immediately be taken off-line due to performance issues.[48] This delayed the issuance of timely awards and also caused some

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mony of Scott Amey, General Counsel, Project on Government Oversight) (noting the Army used multiple contractors in Iraq with a "laundry list of allegations against them"). Agencies may also waive a contractor's exclusion which allows the contract to be awarded to a contractor or grantee that is currently included on the EPLS. *See* Manuel, *supra* note 1, at 13.

[40] Those two regulations are FAR Subpart 9.4 which governs procurement and 2 CFR §180 (2013) (as governed by OMB guidance).

[41] 2 CFR §180.970 (2013).

[42] GAO–11–739, *supra* note 2, at 5 (noting "a suspension or debarment under either the FAR or the NCR is recognized under the other and a party precluded from participating in federal contracts is also excluded from receiving grants, loans, and other assistance and vice versa.").

[43] *How Convicts and Con Artists Receive New Federal Contracts: Hearing before the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2009) (statement of Frederic M. Levy, Partner, McKenna Long & Aldridge).

[44] *See* GAO–09–174, *supra* note 30, at 6.

[45] *Id.* at 1.

[46] Crater Procurement Assistance Center, Online Representations and Certifications Application (ORCA), *http://craterptac.org/federal*_procurement/orca.php (last visited Feb. 21, 2014).

[47] *See* Matthew Weigelt, GSA's SAM continues to frustrate its users, FCW, (Sept. 13, 2012), *http://fcw.com/articles/2012/09/15/buzz-system-for-award-management-gsa.aspx.*

[48] *See id.*

agencies to stop using the system altogether.[49] More recently, GSA officials identified security vulnerabilities in SAM, some of which allowed existing users in the system to view others' registration information.[50]

As was the case with the EPLS, a contracting officer is required to check the SAM exclusions list before contract award.[51]

Inconsistent application of administrative agreements

Use of administrative agreements is increasing in recent years.[52] In a 2012 report, GAO found DoD used such agreements in 30 cases over a three-year period.[53] Administrative agreements are currently unregulated; it is up to the discretion of the SDO as to whether or not to enter into an administrative agreement.[54]

Administrative agreements can be used in lieu of suspension or debarment where the SDO decides it is inappropriate to take suspension or debarment action at the time.[55] These agreements are designed to ensure compliance such that future S&D action will be unnecessary.[56] Administrative agreements usually include "a requirement for a code of ethics, a training and compliance program, and a mechanism for reporting misconduct."[57] Violations of administrative agreements can lead to S&D actions.[58]

Mandatory disclosure rule

In February 2007, the Civilian Agency Acquisition Council and the Defense Acquisitions Regulations Council (Councils) proposed amending the Federal Acquisition Regulation (FAR) to require Government contractors to have a code of ethics and business conduct and to promote Office of the Inspector General (OIG) fraud hotlines by displaying posters.[59] In May 2007, the Department of Justice (DOJ) requested the Councils to consider amending the FAR to require Government contractors to notify the Government if they identify violations of criminal law or contract overpayment. In response, the Office of Federal Procurement Policy directed the FAR Councils to implement DOJ's recommendations.[60] The Councils proposed a mandatory reporting requirement in response to another DOJ request in late 2007.[61] In the Supplemental Appropriations Act of 2008, Congress further required that the FAR rule included "timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, includ-

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[49] *See id.*

[50] *See* General Services Administration, System for Award Management Security Vulnerability FAQs, *http://www.gsa.gov/portal/content/167855.*

[51] FAR 9.405 (2013).

[52] *See* Gordon & Duvall, *supra* note 6.

[53] *See id.* The three-year period tracked was for fiscal years 2009 through 2011. *Id.*

[54] *See id.*

[55] *See Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?: Hearing before the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) (statement of Angela B. Styles, Partner, Crowell & Moring).

[56] *See id.*

[57] *See* Inspector General Report, *supra* note 32, at 3.

[58] *See id.*

[59] *See* Contractor Code of Ethics and Business Conduct, 72 Fed. Reg. 7588 (Feb. 16, 2007).

[60] *See* Karen L. Manos, *Complying with the New Mandatory Disclosure Rule, Gov't Contract Cost, Pricing and Accounting Report,*. 1, Gov't Contract Costs, Pricing & Accountability Report at 1,(2009), available at *http://www.gibsondunn.com/publications/Documents/Manos-ComplyingWithMandatoryDisclosureRule.pdf.*

[61] *See* Contractor Compliance Program and Integrity Reporting, 72 Fed. Reg. 64019 (Nov. 14, 2007).

ing those performed outside the United States and those for commercial items."[62]

The final rule took effect in December 2008.[63] The mandatory disclosure rule requires "Government contractors and subcontractors to disclose to the Government whenever they have 'credible evidence' of certain criminal violations, a violation of the False Claims Act, or a significant 'overpayment' in connection with the award, performance or closeout of a Government contract or subcontract."[64] The mandatory disclosure rule was created as a response to the lack of voluntary disclosures from contractors or subcontractors.[65]

The Committee is aware that some agencies with weak or deficient S&D programs also appear to have weak mandatory disclosure programs. These agencies either do not have a specific point person for outside entities to disclose reportable incidents or do not have an established process to handle disclosures. The number of disclosures vary widely among agencies, with no reasonable association with the volume of contracting activities, while a handful agencies report no or very few disclosures.[66] Most agencies use the OIG to handle disclosures, but some do not. For example, multiple components within HHS handle disclosures in that agency.[67]

The Committee believes that there should be a single component within the agency, such as the OIG, with clear procedures to handle disclosures under the mandatory disclosure rule. Serious violations should also be referred from the OIG to the agency's S&D official for further review.

Oversight by the House Oversight and Government Reform Committee

The SUSPEND Act is the outgrowth of Committee hearings concerning the effectiveness of the Government's current S&D programs in light of reports detailing the numerous flaws in the current system.[68] Starting in the 112th Congress, the Committee began a detailed inquiry concerning each agency's S&D program.

On October 6, 2011, the Committee held a hearing entitled: *"Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions?"* This hearing examined why some agencies are effective at using the S&D remedy to weed out contractors who defraud the government while others languish far behind. This hearing highlighted characteristics of agencies

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[62] *See* Supplemental Appropriations Act, Pub. L. No. 110–252, §6102, 122 Stat. 2386 (2008).

[63] *See* Contractor Business Ethics Compliance Program and Disclosure Requirements, 73. Fed. Reg. 67064, 67066 (Nov. 12, 2008).

[64] Manos, *supra* note 56, at 4.

[65] *See* Brian D. Miller, The Federal Acquisition Regulation Mandatory Disclosure Rule Program at the U.S. General Services Administration Office of the Inspector General, at 2 (2012), *available at http://www.gsaig.gov/?LinkServID=FC200536-C294-E918-1FD147DE0F340B80&showMeta=0* (noting that at the time the mandatory disclosure rule took effect, the program was receiving less than 10 disclosures per year).

[66] For example, the Department of Treasury received 0 disclosures from the date of enactment of the mandatory disclosure rule, while the Department of Energy and the Department of Veterans Affairs had just 1 and 3 disclosures, respectively. *See* E-mail from Sheldon Shoemaker, Special Assistant to the Inspector Gen., Small Bus. Admin. to Eric Cho, H. Comm. on Oversight and Gov't Reform (Mar. 13, 2014, 10:15 EST) (on file with recipient).

[67] *See id.* The components that handle mandatory disclosures within HHS include: the Office of Counsel to the Inspector General, the Office of Audit Services, and the Office of Investigations. *See id.*

[68] *See, e.g.,* GAO–11–739, *supra* note 2, at 6; Manuel, *supra* note 1, at 16–17 (noting studies found the vast majority of debarment actions mandatory).

with effective S&D programs while illustrating the substantial weaknesses of other agencies' S&D programs.

On June 12, 2013, the Committee held a hearing entitled: *"Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?"* This hearing once again examined the continued shortcomings of the S&D system such that inconsistent and fragmented approaches persisted and contracts continue to be awarded to contractors or grantees where failure has been the past result. It also took note of the recent growth in grants spending. This hearing highlighted that the S&D process is still in disarray and that greater and more comprehensive reform is needed.

Though there has been some improvement with S&D in recent years, the Committee's hearings have established the need for further S&D reform. In a time where there are constant news reports regarding another contractor who has defrauded the government or repeatedly failed to perform its contracts, it has never been more important to have a robust S&D process. In order to better protect the taxpayer and the business interests of the Federal Government and to provide a level playing field for vast majority of companies and individuals that are responsible contractors and grantees, the S&D process needs to become more transparent, consistent, and effective.

Divergent statutory and debarment practices

In addition to weaknesses in agencies' S&D programs, there has also been a growing amount of legislation from various Congressional members creating mandatory statutory suspensions and debarments.[69] The 112th Congress enacted or considered numerous narrowly-focused measures to bolster the S&D function. These proposals, while well-intentioned, are often impractical or have limited outcomes (*see e.g.,* P.L. 112–74; P.L. 112–81; P.L. 112–56; H.R. 2838; H.R. 3184; H.R. 3338; H.R. 3588; H.R. 3638; S. 914; S. 1196; S. 1258; S. 1363; S. 1472).[70] They are ineffective because they impose mandatory statutory debarments in specific circumstances, tying the hands of the S&D offices and transforming the system into a punitive approach that diverges from the basic purpose of S&D, i.e. to protect the business interests of the government.[71] Without comprehensive reform, these trends are likely to continue.

LEGISLATIVE AND POLICY HISTORY

Office of Management and Budget guidance on S&D

On November 15, 2011, Jacob Lew, then-Director of the Office of Management and Budget (OMB), released a Memorandum following a GAO report directing the 24 agencies subject to the Chief Financial Officers Act ("CFO Act") to take action to strengthen

[69] *See* American Bar Association, Public Contract Law Section, Committee on Debarment and Suspension, Report on the Study of Federal Debarment and Suspension Processes Working Draft (2008) [hereinafter ABA 2008 Working Draft]; *see also* Jessica Tillipman, *The Congressional War on Contractors,* 45 Geo. Wash. Int'l L. Rev. 235 (2013).

[70] Some of these proposals are discussed in more detail *infra.*

[71] *See* ABA 2008 Working Draft, *supra* note 47, at 1; Tillipman, *supra* note 47, at 236–37.

their S&D programs.[72] The Memorandum specified action to be taken in the following four areas:

(1) Appoint a senior accountable official, if one has not already been designated, who shall be responsible for: (a) assessing the agency's suspension and debarment program, including the adequacy of available training and resources (including, where appropriate, full-time staff), (b) ensuring the agency maintains effective internal controls and tracking capabilities, taking into consideration the agency's mission, organizational structure, and level of procurement and grant-making activities; and (c) ensuring that the agency participates regularly on the Interagency Suspension and Debarment Committee.[73]

(2) Review internal policies, procedures, and guidance to ensure that the agency is protecting the Government's interests and taxpayer funds by effectively using suspension and debarment, when appropriate, as well as other remedies available to the agency that are designed to ensure, before an award is made, that potential contractors and recipients have the requisite business integrity.[74]

(3) Ensure that the agency's award official(s) review relevant databases and other information sources prior to the award of any Federal grants, contracts, or benefits, to prevent awards from being made to entities that are suspended or debarred or are otherwise non-responsible.[75]

(4) Take prompt corrective action, including appropriate action regarding the specific award and establishment of systemic controls and procedures to prevent recurrence, when the agency determines that it improperly made an award to a suspended or debarred entity.[76]

The Memorandum also directed the ISDC to assist the agencies with these activities and to "develop training and share best practices, ensure effective interagency coordination of suspension and debarment actions, and [to] report on agencies' activities as required."[77]

Interagency Suspension and Debarment Committee

The ISDC is designed to be a forum where agencies can discuss best practices, trends, current issues and challenges and is supposed to provide expert analysis and advice.[78] The ISDC includes about 50 member agencies and "[c]ommittee members meet monthly to discuss topics of interest in Government-wide S&D" and to "monitor[] participation in the Government S&D system."[79] The ISDC also helps to ensure agencies demonstrate transparency and administrative fairness when taking suspension or debarment actions.[80]

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[72] Memorandum from Jacob J. Lew, Director, U.S. Office of Mgmt. & Budget, to the Heads of Executive Dep'ts and Agencies (Nov. 15, 2011), available at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-02.pdf.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] ISDC Annual Report, *supra* note 5, at 1.

[79] *See* Inspector General Report, *supra* note 32, at 5.

[80] *See id.*

The ISDC came into existence in 1986 when President Reagan issued Executive Order 12549, Debarment and Suspension.[81] This Executive Order restricted the jurisdiction of the ISDC to non-procurement matters.[82] Subsequently, the ISDC's role began to grow and it began to coordinate S&D issues throughout the various agencies.[83] Currently, the ISDC also serves as "a regulatory drafting body for revisions to the government-wide non-procurement suspension and debarment common rule."[84]

In 2008, Congress passed legislation which required the ISDC to coordinate a lead agency if more than one agency had an interest in taking a suspension or debarment action.[85] In addition, the legislation required the ISDC to report every year to Congress on the status of the S&D system.[86]

112th Congress's Legislative Changes to S&D

The 112th Congress enacted several measures narrowly addressing some areas of S&D in the National Defense Authorization Act for FY2013.[87] These included mandating a minimum level of staffing and maintaining adequate resources for the S&D functions of DoD, the Defense Logistics Agency, the Department of State, and the U.S. Agency for International Development;[88] amending the Small Business Act "to restate the grounds upon which small businesses that misrepresent their size or status (e.g., woman-owned) are suspended, and requiring annual reports by the Small Business Administration on the number of contractors proposed for exclusion, among other things,[89] and requiring that the Department of Veterans Affairs (VA) debar for not less than five years firms that willfully and intentionally misrepresented their status to the VA's Veterans First Contracting program.[90]

SECTION-BY-SECTION (AS AMENDED BY THE COMMITTEE)

Section 1. Short Title; table of contents

Provides the title and the table of contents.

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[81] Brian Young, *Ready for Primetime? The Interagency Suspension and Debarment Committee, the Non-Procurement Common Rule, and Lead Agency Coordination,* 4 Wm. & Mary Pol'y Rev. 110, 120–21 (2012).

[82] *See id.* at 122.

[83] *See id.* at 130.

[84] Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments,* 38 Pub. Cont. L.J. 547, 562 (2009).

[85] Young, *supra* note 57, at 111.

[86] *See* Duncan Hunter National Defense Authorization Act, Pub. L. No. 110–417, § 872, 122 Stat. 4356, 4555 (2008); ISDC Annual Report, *supra* note 5.

[87] *See* National Defense Authorization Act for FY2013, Pub. L. No. 112–239, 126 Stat. 1632–2312 (2013) [hereinafter "NDAA FY2013"].

[88] NDAA FY2013, Pub. L. No. 112–239, 126 Stat. 1632–2312 (2013).

[89] *Id.* at § 1682–82, 126 Stat. 2086.

[90] Honoring American's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112–154, § 706, 126 Stat. 1206 (2012). Others measures passed by the 112th Congress that address suspension and debarment include the following: (a) requiring consideration of debarment and suspension in DoD guidance regarding the remedial actions to be taken against contractors found to have supplied counterfeit electronic parts, *see* National Defense Authorization Act for FY 2012, Pub. L. No. 112–81, § 818, 125 Stat. 1493–1500 (Dec. 31, 2011); (b) prohibiting the use of funds made available under certain appropriations measures from being used to enter contracts or agreements with corporations that have any unpaid federal tax liability or that have been convicted of a felony under federal law within the preceding 24 months, unless the agency has considered excluding the company and determined the action is not necessary to protect the interests of the government, *see* Manuel, *supra* note 1, at 19; and (c) requiring, as part of a study and report, the number of persons who have been debarred or suspended because of delinquent tax debt over the past three years, *see id*.

Section 2. Consolidation of suspension and debarment offices

Consolidates more than 40 executive agency S&D offices and programs into one centralized board named the Board of Suspension and Debarment (the Board). Encourages cost savings by sharing administrative resources with the pre-existing Civilian Board of Contract Appeals, also housed in GSA.

Allows larger agencies (24 agencies under the Chief Financial Officers Act (31 U.S.C. § 901(b)), *listed below*) and the military departments (5 U.S.C. § 102) to continue to operate their own independent S&D offices if granted a waiver upon demonstration of an effective S&D program within the agency.

The Department of Agriculture, the Department of Commerce, the Department of Education, the Department of Energy, the Department of Health and Human Services, the Department of Homeland Security, the Department of Housing and Urban Development, the Department of the Interior, the Department of Justice, the Department of Labor, the Department of State, the Department of Transportation, the Department of the Treasury, the Department of Veterans Affairs, the Environmental Protection Agency, the National Aeronautics and Space Administration, the Agency for International Development, the General Services Administration, the National Science Foundation, the Nuclear Regulatory Commission, the Office of Personnel Management, the Small Business Administration, and the Social Security Administration.

Allows an outside entity, such as the United States Postal Service (USPS), to enter into an agreement to transfer S&D activities to the Board as needed.

Requires the Board to oversee the government-wide excluded parties database (i.e., the System for Award Management (SAM)) to ensure availability of timely, accurate, and complete data, and to promote consistent and fair treatment of all persons and entities subject to S&D proceedings, including small businesses with limited resources.

Mandates that the annual report to Congress (by the Board and the Interagency Suspension and Debarment Committee (ISDC)) include the number and summary of any instance where the agency head made a determination to override the S&D decision and allowed a suspended or debarred entity to receive new contracts or grants.

Section 3. Interagency Suspension and Debarment Committee

Strengthens the existing ISDC by formalizing and codifying it in statute (it currently operates pursuant to an Executive Order) and designating as Chair, the Administrator of OMB's Office of Federal Procurement Policy (OFPP) and as Vice Chairs, the Chair of the Board of Suspension and Debarment and a designee of the Secretary of Defense.

Refines the annual ISDC report process (under Sec. 873 of FY2009 NDAA) by requiring it to be timely and to include data on the number of referrals, timeliness of case disposition, the breakdown of discretionary and nondiscretionary actions, and the number and summary of any agency waivers where a suspended or debarred entity received new federal funds.

Section 4. Single case management system

Establishes a single government-wide web-based S&D case management system for use by the Board and agency S&D officials. Requires the case status and the name of the official handling the case be updated each month.

Prohibits any release of pre-decisional information, including the names of the entities or individuals referred to, unless determined to be necessary to protect the interest of the Government.

Section 5. Single regulation for procurement and nonprocurement programs

Combines the two separate S&D regulations governing contracts and grants into a single, comprehensive regulation that provides:

- the use of show cause letters to ensure accused parties are heard prior to any adverse action being taken against them;
- transparent handling of all cases, including public availability of all final resolutions;
- timely and consistent referrals, including the identification of contractors and grantees that repeatedly fail to perform;
- standard procedures for an expedited review process to handle contract or grant fraud in a contingency or time-sensitive environment, in both military and non-military settings;
- acceptance or rejection of referrals by the SDO within 30 days; and
- resolution of S&D cases within 6 months from the initial referral date.

Section 6. Government Accountability Office review

Requires GAO review of the Board, agency S&D offices, and the case management system effectiveness.

Section 7. Coordination of remedies for fraud and corruption related to procurement and grant activities

Requires joint agency head/Inspector General guidance in each agency to institutionalize efficient agency-wide coordination of remedies for fraud and corruption related to procurement and grant activities, including legal, regulatory, administrative, and contractual remedies to maximize timely recovery of funds.

Section 8. Transfer, redesignation, and amendment of other provision of law relating to debarment and suspension

Provides technical or clerical amendments in the U.S. codes.

Section 9. Definitions

Provides the definitions for the purpose of this bill.

Section 10. Authorization of appropriations

Authorizes an additional $2 million for each of FY2015 through FY2021 to carry out the functions of the Board and for implementation of the case management system. This augments the current GSA funding for its S&D operations (approx. six full-time and three part-time employees).

Section 11. Effective date

Provides the effective date.

EXPLANATION OF AMENDMENTS

An amendment offered by Reps. Chaffetz and Speier was adopted by the Committee. The amendment further strengthens the SUSPEND Act by requiring timely referral and handling of S&D cases.

Specifically, the amendment provides a 30-day time limit for the referred cases to be either accepted or rejected by the S&D official. If additional information is needed, the agency official or the IG who prepared the case file must be notified. It also requires all S&D cases to be resolved within 6 months from the initial referral date. The agency official or the IG who prepared the case file will be notified of any cases unresolved within that time frame and be updated every 3 months until the final resolution of the case.

The amendment further requires that the annual report to Congress include the number and summary of any instances where the agency head made determinations to override S&D decisions and allowed a suspended or debarred entity to receive new contracts or grants.

COMMITTEE CONSIDERATION

On October 29, 2013, the Committee met in open session and ordered reported favorably the bill, H.R. 3345, as amended, by voice vote, a quorum being present.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill consolidates more than 40 executive agency suspension and debarment offices and programs into one centralized board named the Board of Suspension and Debarment, and encourages cost savings by sharing administrative resources with the pre-existing Civilian Board of Contract Appeals. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 3345 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section

21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

H.R. 3345 requires the Director of the Office of Management and Budget to develop one generally applicable regulation on S&D for procurement and nonprocurement programs. The bill also requires the heads of each executive agency and the Inspector General of the agency to issue guidance that institutionalizes efficient agency-wide coordination of remedies for fraud and corruption related to procurement and grant activities.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

H.R. 3345 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 3345. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 3345 from the Director of Congressional Budget Office:

JANUARY 17, 2014.

Hon. DARRELL ISSA, *Chairman,*
Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3345, the SUSPEND Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 3345—SUSPEND Act

Summary: H.R. 3345 would consolidate most federal efforts to suspend and debar individuals or organizations from receiving federal grants and contracts into a single office at the General Services Administration. In general, grantees or vendors may be prohibited or suspended from receiving federal funds because they have engaged in dishonest, unethical, or illegal conduct or are unable to perform their responsibilities. The bill also would establish an Interagency Suspension and Debarment Committee to coordinate activities, and authorize creation of a web-based management system to track all federal suspension and debarment cases. Finally, H.R. 3345 would authorize the appropriation of $2 million annually over the 2015–2021 period for these activities.

Assuming appropriation of the authorized amounts and based on information from GSA, CBO estimates that implementing H.R. 3345 would cost $10 million over the 2015–2019 period (and an additional $4 million after 2019). Enacting the bill could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net change in spending by those agencies would be negligible. Enacting the bill would not affect revenues.

H.R. 3345 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated Cost to the Federal Government: For this estimate, CBO assumes that the bill will be enacted in fiscal year 2014 and that the authorized amounts will be appropriated for each year. Estimated outlays are based on information from GSA and historical spending patterns of similar programs.

The estimated budgetary impact of H.R. 3345 is shown on the following table. The cost of this legislation falls within budget function 800 (general government).

	By fiscal year, in millions of dollars—						
	2014	2015	2016	2017	2018	2019	2014–2019
CHANGES IN SPENDING SUBJECT TO APPROPRIATION							
Authorization Level	0	2	2	2	2	2	10
Estimated Outlays	0	2	2	2	2	2	10

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures

for legislation affecting direct spending or revenues. Enacting the bill could affect direct spending by agencies not funded through annual appropriations; therefore, pay-as-you-go procedures apply. CBO estimates, however, that any net change in spending by those agencies would not be significant. Enacting the bill would not affect revenues.

Intergovernmental and Private-sector Impact: H.R. 3345 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate Prepared by: Federal costs: Matthew Pickford: Impact on state, local, and tribal governments; Melissa Merrell; Impact on the private sector: Paige Piper/Bach.

Estimate Approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 31, UNITED STATES CODE

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SUBTITLE V—GENERAL ASSISTANCE ADMINISTRATION

Chap.		Sec.
*	*	*
64.	*Suspension and Debarment*	*6401*
*	*	*

CHAPTER 64—SUSPENSION AND DEBARMENT

Sec.
6401. Board of Suspension and Debarment.
6402. Interagency Suspension and Debarment Committee.
6403. Single regulation for suspension and debarment for procurement and nonprocurement programs.
6404. Uniform suspension, debarment, or exclusion from procurement or nonprocurement activity.

§ 6401. Board of Suspension and Debarment

(a) ESTABLISHMENT.—There is established in the General Services Administration a board for suspension and debarment to be known as the Board of Suspension and Debarment (in this section referred to as the "Board").

(b) PURPOSES.—The purposes of the Board are to serve as a centralized body to manage all executive agency suspension and debarment activities and improve the suspension and debarment system through—

(1) the transparent and efficient handling of cases;

(2) the effective oversight of the Governmentwide database containing the list of all excluded parties ineligible for Federal programs pursuant to Executive Orders No. 12549 and No. 12689, including oversight to ensure receipt of information from other agencies and to ensure timeliness, accuracy, and completeness of the database;

(3) the consistent and fair treatment of all persons and entities subject to suspension or debarment proceedings, including small businesses with limited resources; and

(4) active engagement with remedy coordination officials (as defined in section 2307(i)(10) of title 10 and section 4506 of title 41) within executive agencies for efficient referral of contractors, grantees, or other recipients of Federal financial assistance suspected of committing wrongful actions or repeatedly performing poorly.

(c) EFFECT OF DETERMINATIONS OF BOARD.—

(1) CONCLUSIVE ON GOVERNMENTWIDE BASIS.—The determination by the Board on whether or not to debar or suspend a contractor, grantee, or other recipient of Federal financial assistance is conclusive on a Governmentwide basis. No other agency may take a contrary suspension and debarment action on a Governmentwide basis with respect to the same contractor, grantee, or other recipient based on the facts and circumstances in the administrative record considered by the Board.

(2) CONSIDERATION OF NEW OR ADDITIONAL EVIDENCE.—In considering any new or additional evidence of nonresponsibility of a contractor, grantee, or other recipient of Federal financial assistance not previously considered by the Board, an agency, in determining whether to award another grant or contract or other Federal financial assistance to such contractor, grantee, or other recipient, may consider the cumulative effect of the facts and circumstances previously considered by the Board.

(d) MEMBERSHIP.—

(1) APPOINTMENT.—The Board shall consist of members appointed by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) from a register of applicants maintained by the Administrator of General Services, in accordance with rules issued by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) for establishing and maintaining a register of eligible applicants and selecting members. The Administrator of General Services shall appoint a member without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a member.

(2) CHAIR.—The Administrator of General Services shall designate one member of the Board to serve as Chair of the Board. The position of Chair of the Board shall be a Senior Executive Service position (as defined by section 3132(a)(2) of title 5).

(3) REMOVAL.—The Administrator of General Services, with the consent of the Administrator for Federal Procurement Policy, may remove the Chair or any other member of the Board.

(e) SHARING OF RESOURCES.—The Administrator of General Services shall provide to the Board such administrative resources as are necessary for the Board to carry out its functions. In carrying out

this subsection, the Administrator may provide for the sharing of administrative resources of the Civilian Board of Contract Appeals, such as the Board's information technology infrastructure, legal resources, and facilities.

(f) PARTICIPATION BY ADDITIONAL ENTITIES.—The Board may enter into an agreement with any other entity that receives Federal funds for the Board to perform suspension and debarment activities on behalf of the entity.

(g) ANNUAL REPORT TO CONGRESS.—

(1) IN GENERAL.—Not later than October 30 of each year, the Chair of the Board shall submit to the relevant congressional committees a report containing the following:

(A) A summary of the activities and accomplishments of the Board in the Governmentwide suspension and debarment system, including the total number of referrals, timeliness of case disposition, and breakdown of discretionary and nondiscretionary cases.

(B) The number and summary of agency head determinations, if any, that allowed a suspended or debarred contractor, grantee, or other recipient of Federal financial assistance to receive new Federal funds.

(C) Recommendations to improve the suspension and debarment system.

(2) FORM OF REPORT.—The Chair of the Board may combine the report with the report required by section 6402(c)(7) of this title.

(h) DEFINITIONS.—In this section:

(1) EXECUTIVE AGENCY.—The term "executive agency" has the meaning provided in section 133 of title 41.

(2) RELEVANT CONGRESSIONAL COMMITTEES.—The term "relevant congressional committees" means each of the following:

(A) The Committee on Oversight and Government Reform of the House of Representatives.

(B) The Committee on Homeland Security and Governmental Affairs of the Senate.

(3) INTERAGENCY SUSPENSION AND DEBARMENT COMMITTEE.—The term "Interagency Suspension and Debarment Committee" means the committee established under section 6402 of this title.

§ 6402. Interagency Suspension and Debarment Committee

(a) ESTABLISHMENT.—There is established the Interagency Suspension and Debarment Committee (in this section referred to as the "Interagency Committee" which shall replace the committee constituted under sections 4 and 5 of Executive Order No. 12549.

(b) CHAIR AND VICE CHAIRS.—

(1) CHAIR.—The Administrator for Federal Procurement Policy shall serve as Chair of the Interagency Committee.

(2) VICE CHAIRS.—There are at least 2 Vice Chairs of the Interagency Committee. The Chair of the Board of Suspension and Debarment shall serve as a Vice Chair. The Secretary of Defense shall designate one official from the Department of Defense to serve as a Vice Chair.

(c) DUTIES.—The Interagency Committee shall—

(1) resolve issues regarding which of several Federal agencies is the lead agency having responsibility to initiate suspension or debarment proceedings, including with respect to contracts in connection with contingency operations;

(2) coordinate actions among interested agencies with respect to such action;

(3) encourage and assist Federal agencies in entering into cooperative efforts to pool resources and achieve operational efficiencies in the Governmentwide suspension and debarment system;

(4) recommend to the Office of Management and Budget changes to the Government suspension and debarment system and its rules, if such recommendations are approved by a majority of the Interagency Committee;

(5) authorize the Office of Management and Budget to issue guidelines that implement those recommendations;

(6) authorize the Chair of the Interagency Committee to establish subcommittees as appropriate to best enable the Interagency Committee to carry out its functions; and

(7) not later than October 30 of each year, submit to Congress an annual report on—

(A) the progress and efforts to improve the suspension and debarment system;

(B) member agencies' active participation in the Interagency Committee's work;

(C) a summary of each agency's activities and accomplishments in the Governmentwide suspension and debarment system, including the total number of referrals, timeliness of case disposition, and breakdown of discretionary and nondiscretionary cases; and

(D) the number and summary of agency head determinations, if any, that allowed a suspended or debarred contractor, grantee, or other recipient of Federal financial assistance to receive new Federal funds.

(d) DEFINITION.—In this section, the term "contingency operation" has the meaning given that term in section 101(a)(13) of title 10.

§ 6403. Single regulation for suspension and debarment for procurement and nonprocurement programs

(a) SINGLE REGULATION.—The Director of the Office of Management and Budget shall maintain one generally applicable regulation on suspension and debarment for procurement and nonprocurement programs.

(b) REQUIREMENTS.—

(1) IN GENERAL.—The regulation maintained pursuant to subsection (a) shall provide, at a minimum, for the procedures and other requirements set forth in paragraphs (2) through (8).

(2) ADVANCE NOTICE OF ADVERSE ACTION.—The regulation shall provide procedures for the Board to provide advance notice of adverse action before any adverse action may be taken against a private entity or individual, unless the Chair of the Board of Suspension and Debarment or the suspension and debarment officer of an executive agency granted a waiver under section 2(b)(2) of the SUSPEND Act determines that an expe-

dient action is necessary to protect the interest of the Government.

(3) TRANSPARENT HANDLING OF CASES.—The regulation shall provide procedures for transparent handling of all cases, including public availability of—

(A) the outcome of all referred cases, including the rationale for the decision to take or not take an adverse action; and

(B) the administrative agreements entered into by the Government in order to resolve a suspension or debarment proceeding.

(4) TIMELY REFERRALS AND PROCESSING OF CASES.—

(A) The regulation shall provide procedures to strengthen timely referrals of cases, including—

(i) the role of the agency remedy coordination official to act upon cases brought to such official's attention in a timely manner (as required in section 7 of the SUSPEND Act); and

(ii) requirements for the Board or the agency suspension and debarment office to review the sufficiency of the information in the referred cases and to notify the agency remedy coordination official and cognizant Inspector General (if the case is originated from the Office of Inspector General) within 30 days after the initial referral date for any additional information if needed.

(B) The regulation shall require all cases to be disposed of within 6 months after the initial referral date, unless the Chair of the Board or the agency suspension and debarment officer provides a written explanation and estimated timeline to the agency remedy coordination official and cognizant Inspector General (if the case is originated from the Office of Inspector General). Such written explanation shall be updated every 3 months until the final resolution of the case.

(5) CONSISTENT STANDARDS AND PROCEDURES.—The regulation shall provide procedures to ensure consistent standards and procedures that treat all alleged violators fairly and expeditiously, including small businesses with limited legal resources.

(6) REPEATED FAILURE TO PERFORM.—The regulation shall provide procedures to strengthen the identification and referral (for suspension or debarment consideration) of contractors and grantees that repeatedly fail to perform.

(7) CONTINGENCY PROCEDURES.—The regulation shall provide procedures for an expedited review process to handle contract or grant fraud in a non-traditional or time-sensitive environment, either in a military or non-military setting.

§ 6404. Uniform suspension, debarment, or exclusion from procurement or nonprocurement activity

(a) REQUIREMENT FOR REGULATIONS.—Regulations shall be issued providing that provisions for the debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity

under regulations issued pursuant to Executive Order No. 12549, shall have government-wide effect. No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded (to the extent specified in the exclusion agreement) that party from participation in a procurement or nonprocurement activity.

(b) AUTHORITY TO GRANT EXCEPTION.—The regulations issued pursuant to subsection (a) shall provide that an agency may grant an exception permitting a debarred, suspended, or otherwise excluded party to participate in procurement activities of that agency to the extent exceptions are authorized under the Federal Acquisition Regulation, or to participate in nonprocurement activities of that agency to the extent exceptions are authorized under regulations issued pursuant to Executive Order No. 12549.

(c) DEFINITIONS.—In this section:

(1) The term "procurement activities" means all acquisition programs and activities of the Federal Government, as defined in the Federal Acquisition Regulation. Such term includes subcontracts at any tier, other than subcontracts for commercially available off-the-shelf items (as defined in section 104 of title 41), except that in the case of a contract for commercial items, such term includes only first-tier subcontracts.

(2) The term "nonprocurement activities" means all programs and activities involving Federal financial and nonfinancial assistance and benefits, as covered by Executive Order No. 12549 and the Office of Management and Budget guidelines implementing that order.

(3) The term "agency" means an Executive agency as defined in section 103 of title 5.

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DUNCAN HUNTER NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2009

(Public Law 110-417)

AN ACT To authorize appropriations for fiscal year 2009 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

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SEC. 2. ORGANIZATION OF ACT INTO DIVISIONS; TABLE OF CONTENTS.

(a) * * *

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

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DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

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TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

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Subtitle G—Governmentwide Acquisition Improvements

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[Sec. 873. Role of Interagency Committee on Debarment and Suspension.]

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DIVISION A—DEPARTMENT OF DEFENSE AUTHORIZATIONS

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TITLE VIII—ACQUISITION POLICY, ACQUISITION MANAGEMENT, AND RELATED MATTERS

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Subtitle G—Governmentwide Acquisition Improvements

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[Sec. 873. Role of Interagency Committee on Debarment and Suspension.]

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Subtitle G—Governmentwide Acquisition Improvements

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[SEC. 873. ROLE OF INTERAGENCY COMMITTEE ON DEBARMENT AND SUSPENSION.

[(a) REQUIREMENT.—The Interagency Committee on Debarment and Suspension shall—

[(1) resolve issues regarding which of several Federal agencies is the lead agency having responsibility to initiate suspension or debarment proceedings, including with respect to contracts in connection with contingency operations" before the semicolon;

[(2) coordinate actions among interested agencies with respect to such action;

[(3) encourage and assist Federal agencies in entering into cooperative efforts to pool resources and achieve operational efficiencies in the Governmentwide suspension and debarment system;

[(4) recommend to the Office of Management and Budget changes to the Government suspension and debarment system and its rules, if such recommendations are approved by a majority of the Interagency Committee;

[(5) authorize the Office of Management and Budget to issue guidelines that implement those recommendations;

[(6) authorize the chair of the Committee to establish subcommittees as appropriate to best enable the Interagency Committee to carry out its functions; and

[(7) submit to Congress an annual report on—

[(A) the progress and efforts to improve the suspension and debarment system;

[(B) member agencies' active participation in the committee's work;

[(C) a summary of each agency's activities and accomplishments in the Governmentwide debarment system; and

[(D) a summary of suspensions, debarments, and administrative agreements during the previous year.

[(b) DATE OF SUBMITTAL OF ANNUAL REPORTS.—The annual report required by subsection (a)(7) shall be submitted not later than January 31 of each year, beginning with January 31, 2014.

[(c) DEFINITIONS.—In this section:

[(1) The term "contingency operation" has the meaning given that term in section 101(a)(13) of title 10, United States Code.

[(2) The term "Interagency Committee on Debarment and Suspension" means the committee constituted under sections 4 and 5 of Executive Order No. 12549.]

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FEDERAL ACQUISITION STREAMLINING ACT OF 1994

(Public Law 103-355)

AN ACT To revise and streamline the acquisition laws of the Federal Government, and for other purposes.

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SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

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TITLE II—CONTRACT ADMINISTRATION

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Subtitle E—Miscellaneous

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PART II—ACQUISITIONS GENERALLY

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[Sec. 2455. Uniform suspension and debarment.]

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TITLE II—CONTRACT ADMINISTRATION

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Subtitle E—Miscellaneous

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PART II—ACQUISITIONS GENERALLY

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[SEC. 2455. UNIFORM SUSPENSION AND DEBARMENT.

[(a) REQUIREMENT FOR REGULATIONS.—Regulations shall be issued providing that provisions for the debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity under regulations issued pursuant to Executive Order No. 12549, shall have government-wide effect. No agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded (to the extent specified in the exclusion agreement) that party from participation in a procurement or nonprocurement activity.

[(b) AUTHORITY TO GRANT EXCEPTION.—The regulations issued pursuant to subsection (a) shall provide that an agency may grant an exception permitting a debarred, suspended, or otherwise excluded party to participate in procurement activities of that agency to the extent exceptions are authorized under the Federal Acquisition Regulation, or to participate in nonprocurement activities of that agency to the extent exceptions are authorized under regulations issued pursuant to Executive Order No. 12549.

[(c) DEFINITIONS.—In this section:

[(1) The term "procurement activities" means all acquisition programs and activities of the Federal Government, as defined in the Federal Acquisition Regulation. Such term includes subcontracts at any tier, other than subcontracts for commercially available off-the-shelf items (as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))), except that in the case of a contract for commercial items, such term includes only first-tier subcontracts.

[(2) The term "nonprocurement activities" means all programs and activities involving Federal financial and nonfinancial assistance and benefits, as covered by Executive Order No. 12549 and the Office of Management and Budget guidelines implementing that order.

[(3) The term "agency" means an Executive agency as defined in section 103 of title 5, United States Code.]

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TITLE 5, UNITED STATES CODE

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PART III—EMPLOYEES

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SUBPART G—INSURANCE AND ANNUITIES

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CHAPTER 89—HEALTH INSURANCE

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§ 8902a. Debarment and other sanctions

(a) * * *

(b) The Office of Personnel Management shall bar the following providers of health care services or supplies from participating in the program under this chapter:

(1) * * *

* * * * * * *

(5) Any provider that is currently debarred, suspended, or otherwise excluded from any procurement or nonprocurement activity (within the meaning of [section 2455 of the Federal Acquisition Streamlining Act of 1994] *section 6404 of title 31*).

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