



**U.S. Department of Agriculture**

**Office of Inspector General**



# **Effectiveness and Enforcement of Suspension and Debarment Regulations in the U.S. Department of Agriculture**

**Audit Report 50601-14-AT  
August 2010**



U.S. Department of Agriculture  
Office of Inspector General  
Washington, D.C. 20250



DATE: August 16, 2010

REPLY TO  
ATTN OF: 50601-14-At

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FROM: Gil H. Harden, Assistant Inspector General, for Audit /s/

SUBJECT: Effectiveness and Enforcement of Suspension and Debarment Regulations in the  
U.S. Department of Agriculture

This report presents the results of our audit of the Department's implementation of the Governmentwide suspension and debarment authorities designed to ensure Department of Agriculture (USDA) agencies conduct business only with responsible persons and entities and suspend and debar non-responsible violators of agency programs to alert and thereby protect other Federal agency programs. Written responses to the official draft report were received from Departmental Management, Office of Procurement and Property Management; and Office of the Chief Financial Officer (OCFO); Farm Service Agency; Forest Service; Rural Development; and Food and Nutrition Service. Excerpts from the responses and the Office of Inspector General's (OIG) positions are incorporated into the Findings and Recommendations sections of the report, where applicable.

We accept management decisions on Recommendations 1, 4, 5, 6, 8, 9, 16, 18, 19, 20, 21, 23, 24, 26, and 27. We can accept management decisions on Recommendations 2, 3, 7, 10, 11, 12, 13, 14, 15, 17, 22, and 25, once we have been provided the information as outlined in the report sections, OIG Position.

In accordance with Departmental Regulation 1720-1, please furnish a reply within 60 days describing the corrective actions taken or planned, and timeframes for implementing the recommendations for which management decisions have not been reached. Please note that the regulation requires management decision to be reached on all recommendations within 6 months from report issuance, and final action to be taken within 1 year of each management decision to prevent being listed in the Department's annual Performance and Accountability Report. For agencies other than OCFO, please follow your internal agency procedures in forwarding final action correspondence to OCFO.

We appreciate the courtesies and cooperation extended to us by members of your staff during our audit fieldwork and subsequent discussions.

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# ***Effectiveness and Enforcement of Suspension and Debarment Regulations in the U.S. Department of Agriculture***

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## **Executive Summary**

Debarment and suspension are tools used by the Government to ensure that it does business with only responsible persons and entities. A debarment is an action taken to exclude persons or entities from doing business with the Government generally for periods up to 3 years for certain causes, such as commission of a fraud or certain other crimes, or violations of certain statutes.<sup>1</sup> Suspension, which can precede a debarment, is a temporary action. It can be used pending the completion of an investigation or legal proceeding. Suspension and debarment actions may be pursued concurrently with civil or criminal proceedings. Subpart 9.4 of the Federal Acquisition Regulation (FAR) covers procurement suspension and debarment; these regulations are supplemented at the Department of Agriculture (USDA) through USDA Acquisition Regulation, 48 *Code of Federal Regulations* (CFR), subpart 409.4.<sup>2</sup>

In 1986, the President signed an Executive order<sup>3</sup> directing Federal departments and agencies to participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits (nonprocurement). The President authorized the Director of the Office of Management and Budget (OMB) to issue guidelines to Executive departments and agencies governing which programs and activities are covered by the order and setting forth other details for effective administration of the guidelines. USDA implemented the Executive order in 1989, apart from the Governmentwide rule, through issuance of its own regulation.

In May 1987, OMB implemented the Executive order with its issuance of guidelines for nonprocurement suspension and debarment. In May 1988, 27 agencies, not including USDA, published a Common Rule that set forth a uniform system of suspension and debarment in the nonprocurement area. USDA's nonprocurement suspension and debarment rule became effective March 1, 1989.<sup>4</sup> In August 1989, the President ordered<sup>5</sup> that suspension and debarment actions under FAR and the nonprocurement common rule be given reciprocal effect.

The regulations require that agency officials list suspended and debarred individuals and entities on a Governmentwide database maintained by the General Services Administration (GSA) to

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<sup>1</sup> OMB's suspension and debarment regulations, 2 CFR 180, provide broad authority for agencies to debar program violators for several causes including conviction or civil judgment for fraud related to public agreements; violation of antitrust statutes for price fixing or bid rigging; embezzlement, theft, forgery or making false statements; willful failure or a history of failure to perform in accordance with public agreements; knowingly doing business with an ineligible person; failure to pay outstanding debts; violation of a voluntary exclusion agreement; violation of the Drug-Free Workplace Act of 1988; or any other cause so serious that it affects the program recipient's present responsibility.

<sup>2</sup> See Title 48 FAR, chapter 1, FAR, section 9.4. Also see USDA Acquisition Regulation, Title 48, chapter 4, parts 432.006, 423.506, and 449.106.

<sup>3</sup> Executive Order 12549, dated February 18, 1986.

<sup>4</sup> Apart from the March 1, 1989, rule that provided administrative suspension and debarment authority, many USDA agencies also have statutory authority to sanction, fine, and disqualify those who abuse their programs. For example, the Risk Management Agency (RMA) may disqualify those who intentionally violate its crop insurance statutes. Disqualification under such authority is limited to the particular program and agency in which the abuse occurred. In contrast, suspensions and debarments have Governmentwide effect. Nevertheless, the regulations require that disqualification actions be listed on the GSA's Excluded Parties Listing System, which will give effective notice to other agencies of the disqualification. 7 CFR 3017.515, 3017.520.

<sup>5</sup> Executive Order 12689, dated August 16, 1989.

alert and thereby protect other Federal agencies when those agencies award future contracts, grants, and other program benefits. The database is called the Excluded Parties Listing System (EPLS).

The Office of Inspector General (OIG) conducted its first audit of USDA's implementation of suspension and debarment in 1990. (See Exhibit A for a discussion of the history and resolution of the 1990 audit.) We found that USDA had not implemented an adequate system to suspend and debar program abusers, and we recommended agency officials reevaluate their policies that excluded their programs from coverage by the suspension and debarment regulations and fully implement the authorities. We initiated the current audit to determine whether today's agency officials are aware of their responsibility to suspend and debar nonresponsible program violators and if they are actively doing so.

We found that USDA has still not fully implemented either procurement or nonprocurement suspension and debarment programs. USDA's efforts have fallen far short of several other Federal departments that actively suspend and debar individuals and contractors for program and contract fraud, waste, and abuse to protect Federal resources. From 1989 to 1995, USDA established exclusions for many of its programs<sup>6</sup> and effectively much of its budget (see exhibit A for a detailed historical explanation of how these exclusions were established) from application of the suspension and debarment rules related to program activities. Some of these exclusions were justified by the 1986 Executive order, such as those for food assistance; others were unsupported, such as those for the Department's scientific, inspection and grading, marketing, and natural resources programs. For example, USDA agency officials chose not to implement suspension and debarment for Department scientific, inspection and grading, marketing, and natural resources programs, stating that to do so would endanger the public health and safety. The Environmental Protection Agency, however, suspends and debars violators of its clean air and water statutes to protect the public health and safety. The Department also misapplied justifiable exclusions to exclude entire programs from any suspension or debarment action. A program participant who abuses a program not covered by the suspension and debarment regulations should still be considered for suspension or debarment based on the misconduct or abuse that occurred. The suspended or debarred program participant would not be rendered ineligible for continued participation in the noncovered program. However, the program abuser, if suspended or debarred, would not be able to participate in other programs covered by the suspension and debarment regulations so that the Government's interests can be protected.

Due to the agencies' program exclusions, suspension and debarment was not implemented in programs making up \$98 billion of the Department's \$124 billion budget (79 percent) in fiscal year (FY) 2007. In addition, USDA lacked a centralized suspension and debarment division and instead dispersed the authority throughout the Department, without providing guidance to the responsible officials. Departmental and agency officials assigned to oversee suspension and debarment were not always trained and did not fully understand the process. Some agency

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<sup>6</sup> The suspension and debarment regulations, 2 CFR 180, do not provide for entire Federal programs to be excluded from suspension and debarment implementation. The regulations specify how the authorities will be implemented at the transaction level. Program transactions are classified as either covered or noncovered by the authorities. For example, entitlements and mandatory awards are noncovered transactions. In contrast, USDA's implementation of suspension and debarment authorities effectively excluded entire Federal programs.

officials were unaware they possessed the authority to suspend and debar nonresponsible program violators. Given these problems, USDA suspended and debarred few program violators. Of the 1,073 individuals convicted of crimes involving USDA programs as reported by the OIG Office of Investigations to USDA agencies from FY 2004 to 2007, only 38 were debarred, even though a conviction meets the standard of proof<sup>7</sup> needed to debar an individual.<sup>8</sup>

In April 2009, the Office of the Chief Financial Officer (OCFO) stated that the Department was revising its current regulations with respect to suspension and debarment and moving ahead toward implementing the regulations. OCFO acknowledged that individuals abusing a program excluded from covered transaction status in the regulations can and should be referred to the suspension and debarment official for a determination on whether a suspension and/or debarment action should be taken to protect other covered Federal programs. However, OCFO later held discussions with the agencies and tentatively decided to retain the majority of its program exclusions from suspension and debarment. These exclusions are reflected in the Department's new interim final rule published May 25, 2010.

USDA has recently taken suspension and debarment actions in at least two high-profile cases. In February 2009, the Agricultural Marketing Service suspended a peanut company for delivering peanut products containing salmonella as part of the National School Lunch Program. In December 2006, the Foreign Agricultural Service took debarment actions against a wheat board because of evidence indicating it engaged in bribery and kickbacks. USDA's actions in this foreign case reflect increasing interest in using suspension and debarment in cases of international fraud and corruption. For example, between 1999 and 2008, the World Bank debarred, in many cases permanently, 343 companies and individuals from doing project-related development work due to corrupt practices.

During 2008, USDA agencies suspended or debarred another 38 individuals or entities. In 2009, the agencies suspended or debarred 39 individuals or entities. RMA remained active in implementing these authorities, as it took nine actions in 2008 and four actions in 2009. In 2009, Farm Service Agency (FSA) debarred nine individuals or entities. We recognize this increased activity from past performance. As the Department moves forward to fully implement both procurement and nonprocurement suspension and debarment, USDA needs to (1) remove or justify its program exclusions from nonprocurement suspension and debarment, (2) centralize the organization of the suspension and debarment program, and (3) more effectively implement suspension and debarment for its procurement programs.

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<sup>7</sup> The 68 Federal Register 66,543 (Nov. 26, 2003) states, "Suspension or debarment may not be imposed upon mere suspicion of misconduct." While suspending or debarring officials are not required to follow formal rules of evidence, they are required to meet certain standards of proof before suspending or debarring a person. These standards require adequate evidence for suspension and preponderance of the evidence for debarment. If the proposed debarment is based upon a conviction or civil judgment, a standard of proof is met. 2 CFR 180.850(b). For procurement actions, the FAR lists a conviction as the first cause for debarment. For FAR actions based on violations other than a conviction, the FAR states that actions will be based on a preponderance of the evidence. FAR 9.406-2 "Causes for debarment."

<sup>8</sup> RMA was responsible for 27 of these 38 debarments, as it was much more vigorous in implementing suspension and debarment than other USDA agencies.

## USDA Needs to Remove or Justify its Program Exclusions from Suspension and Debarment

When USDA excluded entire programs from the application of the suspension and debarment rules on nonprocurement in the 1980s and 1990s, it compromised its efforts to implement the suspension and debarment authorities. The President's Executive order and OMB's guidance allowed for the exclusion of certain transactions, such as food assistance, from suspension and debarment; but they did not authorize the exclusion of entire Federal programs. We maintain that the Department should reconsider these exclusions and remove them. If they are not removed, the Department should offer adequate statutory language justifying its action to exclude a specific program or sound program rationale supporting why the program should be excluded. USDA should also take steps to ensure that program violators of justifiably noncovered program transactions are considered for debarment from covered programs.

As an example, the Food and Nutrition Service (FNS) considered its programs (with an overall budget of \$55 billion) exempt from suspension and debarment. The major reason given was that food assistance was an entitlement, and that program participants—even retailers and wholesalers who abused the program—could not be suspended or debarred from entitlements.<sup>9</sup> However, OMB's guidance explains that individuals on food assistance are indeed recipients of an entitlement, but they can be debarred, for example, based on fraud related to the receipt of that food assistance. Moreover, the retailers and wholesalers who run the food assistance programs are not recipients of entitlements, and they should be considered for suspension or debarment if they abuse the program. From 2004 to 2008, FNS permanently disqualified 3,981 retailers and wholesalers from its own programs, but it did not take steps to suspend or debar them so that other USDA or Federal programs would be protected.<sup>10</sup>

Other significant exclusions exempted the programs of FSA (overall budget of \$31 billion) and the Department's scientific, inspection and grading, marketing, and natural resources agencies (\$13 billion). In FSA's case, all of the agency's programs were excluded from coverage based on FSA officials' belief that payments to agricultural producers are either mandatory awards or entitlements. Some of FSA's program transactions may be mandatory awards or entitlements as required by the program's statutory language, and are thus properly not covered by suspension and debarment in accordance with the Executive order and OMB guidance. However, other FSA noncovered program transactions are questionable, such as agricultural loan transactions. For example, some agricultural loans related to emergencies and natural disasters may be entitlements. However, farm ownership and operating loans are traditional business loans, not entitlements. In order to bring FSA's programs under the protection of suspension and debarment regulations, USDA should remove unjustifiable exclusions from its programs, and it should also consider suspending and debaring program violators based on offenses related to even justifiably noncovered programs to protect other covered Federal programs.

USDA excluded many of the programs belonging to its scientific, inspection and grading, marketing, and natural resources agencies—Animal and Plant Health Inspection Service, Food

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<sup>9</sup> For purposes of this report, an entitlement is defined as a benefit that an individual has a right to by law and, in the context of suspension and debarment, without respect to present responsibility.

<sup>10</sup> In a May 2, 1990, letter from OMB to the USDA General Counsel, OMB stated, "For example, the common rule intends to strengthen sanctions by excluding entities guilty of wrongdoing with one agency from all dealings with all other Executive Branch agencies."

Safety and Inspection Service, Agricultural Research Service, National Institute of Food and Agriculture,<sup>11</sup> Forest Service (FS), and Natural Resources Conservation Service. These exclusions were justified for various reasons, including that the programs issued mandatory awards, were vital for the public's health and safety, or were necessary for agricultural commerce.

We question the agencies' program exclusions. We concluded that the agencies' reasons for exempting certain transactions from suspension and debarment may not be advisable and the exemptions may not be applied appropriately. Also, the agencies have not provided adequate statutory language supporting the exclusions. Finally, the exclusions do not parallel the practices of other Federal agencies who implement suspension and debarment in similar programs specifically to protect the public interest. We maintain that such questionable program exclusions must be either removed or adequately justified.

### USDA Needs to Centralize its Overall Organization for its Nonprocurement Suspension and Debarment Program

USDA's efforts to implement nonprocurement suspension and debarment have also been hindered because the Department has not established a centralized division that specializes in suspension and debarment. At present, the Department has 21 suspension and debarment officials spread throughout its agencies, but those officials have not received formal training in suspension and debarment procedures, and often were not fully aware of their responsibilities or the possibility of legal challenges to their decisions. We found that agency administrators, who are the designated suspension and debarment officials, typically relied on their staffs and the Office of the General Counsel attorneys to develop cases.<sup>12</sup>

A centralized division should be established to develop policies and procedures to ensure the regulations are consistently applied. USDA's suspension and debarment decisions have been inconsistently applied, which has been recognized by a Federal court. In one case, USDA's decision to suspend was overturned by a Federal court because it was arbitrary and capricious.<sup>13</sup> A more consistent, centralized process is needed to correct these problems. For example, a centralized division could relieve agency administrators by processing case actions; provide training and guidance to agency officials in implementing the authorities; and ensure more timely and uniform case processing and decision making.

### USDA Needs to Actively Use Suspension and Debarment for its Procurement Programs

The Department has not effectively implemented a suspension and debarment process for its procurement activities. The Office of Procurement and Property Management (OPPM) was assigned responsibility by the Secretary for overseeing Departmental implementation of the procurement regulations relating to suspension and debarment. However, OPPM assigned only

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<sup>11</sup> The Food, Conservation, and Energy Act of 2008 created the National Institute of Food and Agriculture. It replaced the former Cooperative State Research, Education, and Extension Service.

<sup>12</sup> The FS was unique in the Department in that the Chief of the FS delegated suspension and debarment responsibilities to the Associate Deputy Chief, National Forest System. However, suspension and debarment was not implemented in FS' other mission areas. See Finding 5.

<sup>13</sup> *Lion Raisins, Inc. v. United States*, 51 Fed. Cl. 238 (Fed. Cl. 2001).

one staff official to handle procurement suspension and debarment cases as one of a number of the official's collateral duties, and that official was relatively inexperienced in suspension and debarment actions. In addition, OPPM had not provided suspension and debarment training to the Department's contracting officers.<sup>14</sup> OPPM stated that suspension and debarment training is included in several procurement courses required for all contracting specialists and officers. Therefore, OPPM did not consider providing this training as part of its responsibility. However, the required training has not been effective in ensuring that the contracting officers implement the suspension and debarment provisions in the FAR. From 2004 to 2007, USDA undertook no procurement suspension cases and only two debarment cases.

This lack of activity contrasts with other Federal departments where procurement suspension and debarment is pursued much more aggressively. For example, GSA has taken actions in high profile cases of large contractors in the past 2 years and uses the process as a deterrent to ensure its contractors abide by their contracts. Although GSA had a greater volume of procurement transactions, GSA and USDA dealt with roughly the same number of contractors in 2007 and 2008. GSA used 14,985 contractors in 2007 and 15,044 contractors in 2008; whereas, USDA used 15,158 contractors in 2007 and 15,253 contractors in 2008.<sup>15</sup> However, GSA currently, as of March 2010, has numerous active suspensions and debarments listed on GSA's EPLS: 26 actions to date in 2010, 68 actions in 2009, 70 actions in 2008, and 12 actions in 2007. These numbers do not include GSA actions that have expired and are now archived in GSA's EPLS listing. By contrast, USDA has taken few suspension and debarment actions involving procurement cases.

Recent Congressional interest in suspension and debarment, due to the magnitude of Federal spending on contracts and high-profile cases of contractor misconduct, has led to the enactment of new laws related to suspension and debarment.<sup>16</sup> Most relevant to USDA was the part of the 2008 Farm Bill that strengthened the authority of the Secretary to permanently debar an individual, organization, corporation, or other entity convicted of a felony for knowingly defrauding the United States in connection with any program administered by USDA from any subsequent participation in USDA programs. OCFO included this statutory debarment authority in its May 25, 2010, interim final rule for nonprocurement suspension and debarment. Nonetheless, even though the 2008 Farm Bill now contains statutory language allowing permanent debarment, this authority extends only to USDA programs and does not provide for Governmentwide debarment. Therefore, USDA needs to fully implement the Governmentwide suspension and debarment authorities to protect other Federal agency programs.

Some USDA agency officials have expressed concerns that older USDA program statutes do not incorporate the Governmentwide suspension and debarment authorities. However, in the absence of express authority in program statutes, agencies also possess inherent authority to

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<sup>14</sup> After our fieldwork was completed, one OPPM official attended formal suspension and debarment training and the office has begun to conduct some training for procurement staff.

<sup>15</sup> For example, in 2008, USDA dealt with 15,253 contractors and GSA dealt with 15,044. In terms of transactions for 2008, USDA had 56,909 transactions with its contractors valued at \$5 billion; whereas, GSA had 880,967 transactions with its contractors valued at \$12 billion.

<sup>16</sup> These laws include requirements for: (1) contractors to notify agency officials of overpayments or Federal crimes in connection with the award or performance of government contracts; (2) the creation of a database with information about contractors beyond that in GSA's EPLS, e.g., administrative agreements and terminations for default; and (3) contractors that have been found to have intentionally affixed a "Made in America" inscription on ineligible products to be debarred.

debar program violators that is incidental to the effective administration of their programs. This inherent authority was recognized by the District of Columbia Circuit Court.<sup>17</sup>

USDA should strengthen its efforts to implement both nonprocurement and procurement suspension and debarment within the Department. This should include (1) removing or justifying USDA's program exclusions from nonprocurement suspension and debarment, (2) centralizing the organization of the suspension and debarment program, and (3) more effectively implementing suspension and debarment for its procurement programs.

### **Recommendation Summary**

Issue a secretarial directive to all agencies, directing that they fully implement both procurement and nonprocurement suspension and debarment, according to the FAR, President's Executive orders, and OMB's guidance. Clarify, in that directive, that those who abuse transactions excluded from covered transaction status in the suspension and debarment regulations can still be suspended and debarred so that they cannot abuse other Federal programs covered by the regulations.

As part of Departmental efforts to fully implement the authorities, finalize USDA's May 2010 interim final rule for nonprocurement suspension and debarment. This should include the removal of noncovered programs and program transactions from USDA's suspension and debarment rules unless they are adequately justified. For programs and transactions to be excluded from the application of the suspension and debarment rules, provide statutory language justifying the exclusions or an acceptable program rationale supporting their noncovered status.

Establish a centralized division that specializes in suspension and debarment procedures for both procurement and nonprocurement; provides coordination, guidance, and training to all relevant agency officials; promotes consistency in handling the Department's suspension and debarment cases; and processes case referrals for all actions.

In accordance with control standards and guidance issued by the centralized division and those standards outlined in the FAR, direct OPPM and Departmental contracting officials to develop and implement internal controls to identify and refer cases warranting consideration for procurement suspension and debarment to the centralized division.

### **Agency Response**

We received written responses from Departmental Management, Office of Procurement and Property Management; Office of the Chief Financial Officer; Farm Service Agency; Forest Service; Rural Development; and Food and Nutrition Service. These responses are included at the end of this report.

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<sup>17</sup> *Gonzalez v. Freeman*, 334 F. 2d 570 (D.C. Cir.1964).

## **OIG Position**

We accept the management decisions on Recommendations 1, 4, 5, 6, 8, 9, 16, 18, 19, 20, 21, 23, 24, 26, and 27. The actions needed to reach management decisions on Recommendations 2, 3, 7, 10, 11, 12, 13, 14, 15, 17, 22, and 25 are provided in the OIG Position section after these recommendations.

## Background & Objectives

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### Background

Debarment and suspension are tools used by the Government to ensure that it does business with only responsible persons and entities. A debarment is an action taken to exclude persons or entities from doing business with the Government generally for periods up to 3 years for certain causes,<sup>18</sup> such as commission of a fraud or certain other crimes, or violations of certain statutes. Suspension, which can precede a debarment, is a temporary action. It can be used pending completion of an investigation or legal proceeding. Suspension and debarment actions may be pursued concurrently with civil or criminal proceedings. These remedies have been part of the Federal procurement system since the 1940s, but lacked a consistent and uniform regulatory structure until the enactment of the Federal Acquisition Regulation (FAR) in 1983. Subpart 9.4 of the FAR covers suspension and debarment; these regulations are supplemented at the Department of Agriculture (USDA) through the USDA Acquisition Regulation, 48 *Code of Federal Regulations* (CFR), subpart 409.4.<sup>19</sup>

Recognizing that a significant part of Federal monies is also expended on nonprocurement activities and programs such as grants, loans, loan guarantees, and other Federal assistance programs, efforts were also undertaken to incorporate the suspension and debarment remedies into the nonprocurement area. In 1986, the President signed an Executive order directing Federal departments and agencies to participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. In May 1987, the Office of Management and Budget (OMB) implemented the Executive order with its issuance of guidelines for nonprocurement suspension and debarment. In May 1988, 27 agencies, not including USDA, published a common rule that set forth a uniform system of suspension and debarment in the nonprocurement area. USDA's nonprocurement suspension and debarment rule became effective March 1, 1989.<sup>20</sup> In August 1989, the President ordered suspension and debarment actions under the FAR and the nonprocurement common rule to have reciprocal effect.<sup>21</sup>

The nonprocurement regulations parallel the FAR procurement rules on significant process issues such as notice, opportunity to contest, and requirements for cause to exist. Both suspended and debarred contractors and program participants are listed on the General Service Administration's (GSA) Excluded Parties Listing System (EPLS). Federal agencies are required

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<sup>18</sup> The suspension and debarment regulations provide agencies broad authority to take actions to protect public programs against any individual or entity that presents a rational business risk to the Government's programs. 68 Federal Register 66,533, 66,542 (Nov. 26, 2003). For example, agency officials may debar due to serious conduct resulting in a criminal conviction or civil judgment, violation of Federal statutes or the terms of public agreements, a history of failure to perform or unsatisfactory performance on a public agreement, or any other cause serious enough to affect the present responsibility of the individual. 2 CFR 180.800.

<sup>19</sup> See also 48 CFR pt. 432.006; 48 CFR section 423.506; 48 CFR section 449.106.

<sup>20</sup> Apart from the March 1, 1989, rule that provided administrative suspension and debarment authority, many USDA agencies also have statutory authority to sanction, fine, and disqualify those who abuse their programs. For example, the Risk Management Agency (RMA) may disqualify those who intentionally violate its crop insurance statutes. Disqualification under such authority is limited to the particular program and agency in which the abuse occurred. In contrast, suspensions and debarments have Governmentwide effect. Nevertheless, the regulations require that disqualification actions be listed on the GSA's Excluded Parties Listing System, which will give effective notice to other agencies of the disqualification. 7 CFR 3017.515, 3017.520.

<sup>21</sup> When a program violator is debarred from obtaining new contracts, grants, or other assistance under the nonprocurement common rule, the violator is also debarred from obtaining new procurement contracts regulated by the FAR, and vice versa.

to consult this listing before granting new benefits or issuing new contracts<sup>22</sup> so that they may be certain they are dealing with responsible persons and entities.

USDA implemented the President's Executive orders and OMB guidance for nonprocurement suspension and debarment in 7 CFR 3017 and has defined covered transactions to be transactions at the primary tier between a Federal agency and a person; and at the lower tier between a participant in a covered transaction and another person.<sup>23</sup> The regulation defined nonprocurement transactions<sup>24</sup> as grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurances, payments for specified uses, and donation agreements. The regulation further stated that a nonprocurement transaction at any tier does not require the transfer of Federal funds. The USDA regulation also listed the transactions excluded from covered transaction status in the nonprocurement suspension and debarment rules by the President's 1986 Executive order and OMB guidance to include:

- statutory entitlements or mandatory awards;
- direct awards to foreign government entities or public international organizations;
- benefits to an individual as a personal entitlement;
- Federal employment;
- incidental benefits derived from ordinary Governmental operations;
- permits, licenses, and certificates issued to regulate public health;
- transactions pursuant to national or agency-recognized emergencies or disasters; and
- other transactions where the application of the guidelines would be prohibited by law.

In USDA's implementation of the nonprocurement common rule, including subsequent modifications to its rule, the Department excluded numerous major programs and program transactions from implementation, either because the programs were entitlements or required mandatory awards, or due to the Department's position that the program exclusions were necessary and in the public interest. See exhibit A for a detailed discussion of the history of implementation of the suspension and debarment authorities within USDA.

### Recent USDA Suspension and Debarment Actions

USDA has recently taken suspension and debarment actions in at least two high-profile cases.

- In February 2009, the Agricultural Marketing Service (AMS) suspended the Peanut Corporation of America for delivering peanut products containing salmonella as part of the National School Lunch Program.
- In December 2006, the Foreign Agricultural Service (FAS) took debarment actions against the Australian Wheat Board because of evidence indicating the Board engaged in bribery and kickbacks.

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<sup>22</sup> 2 CFR 180.300, 180.425, 180.430; 7 CFR 3017.425, 3017.430, 3017.505.

<sup>23</sup> 7 CFR 3017.200.

<sup>24</sup> 7 CFR 3017.210 and 3017.970.

USDA's actions in this foreign case reflect the upswing in using suspension and debarment in cases of international fraud and corruption. For example, between 1999 and 2008, the World Bank debarred 343 firms and individuals from doing project-related development work due to corrupt practices—in many cases permanently. Also, the European Commission adopted new public procurement directives in 2004 containing provisions for mandatory exclusion of candidates for participating in criminal organizations, corruption, fraud, and money laundering.

### New Laws Strengthen Suspension and Debarment

According to the Congressional Research Service, Congressional interest in suspension and debarment has dramatically increased due to recent high profile cases of contractor misconduct including failure to pay taxes, bribery, falsifying Government records, and poor contractor performance. Since 2007, Congress has enacted new legislation to make suspension and debarment more effective.<sup>25</sup>

In the 2008 Farm Bill, Congress granted the Secretary authority to permanently debar individuals, organizations, corporations, or other entities convicted of a felony for knowingly defrauding the United States in connection with any USDA program from any subsequent participation in USDA programs. The Secretary may reduce the permanent debarment to a period of 10 years and exclude food assistance programs as appropriate. However, this is not Governmentwide debarment. Therefore, USDA needs to fully implement Governmentwide debarment authorities to protect other Federal agency programs.

On May 25, 2010, the USDA Office of Chief Financial Officer (OCFO) published a new interim final rule for implementing Governmentwide nonprocurement debarment and suspension that includes the above new statutory authority. After discussions with agency officials, OCFO has tentatively decided to retain the majority of its program exclusions in the new rule to implementing suspension and debarment, with two exceptions.

First, USDA is narrowing its exclusions for nonprocurement and some limited procurement transactions<sup>26</sup> below the primary tier in its export credit guarantee and foreign assistance programs.<sup>27</sup> These exclusions will apply only to lower tier transactions implemented outside the United States which usually involve foreign language contracts and foreign contractors. While there will be no covered transactions below the primary tier transaction in these programs, USDA will still require primary tier participants in the programs to check GSA's EPLS and not enter into a transaction exceeding \$25,000 at the first lower tier with a person who is excluded or disqualified. For example, a United States private voluntary organization in a food aid program would be prohibited from entering into, at the first lower tier, an agreement with a subrecipient

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<sup>25</sup> These laws include requirements for: (1) contractors to notify agency officials of overpayments or Federal crimes in connection with the award or performance of government contracts; (2) the creation of a database with information about contractors beyond that in GSA's EPLS, e.g., administrative agreements and terminations for default; and (3) contractors that have been found to have intentionally affixed a "Made in America" inscription on ineligible products to be debarred.

<sup>26</sup> OCFO's interim final rule is for nonprocurement suspension and debarment. Procurement suspension and debarment is regulated by the FAR subpart 9.4. However, some procurement transactions are covered by the nonprocurement rule. These are procurement contracts awarded by non-Federal program participants needed to carry out their nonprocurement contracts, e.g., purchases of goods and services. 2 CFR section 417.220.

<sup>27</sup> 7 CFR 3017.215(i) and 7 CFR 3017.220(c).

or procurement contract, above \$25,000, with an entity listed as excluded or disqualified on GSA's EPLS.

Second, OCFO proposed to remove the exclusion applied to transactions under USDA's conservation programs, warehouse licensing programs, and programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.<sup>28</sup> With regard to USDA's conservation and commodity programs, the May 25, 2010, interim final rule states that USDA has determined that the interests of the United States are not adequately protected if persons who have been suspended or debarred are allowed to participate in these programs. Regarding the warehouse licensing programs, these would continue to be excluded from covered transaction status under another section of the rule<sup>29</sup> which excludes the receipt of licenses, permits, certificates, and indemnification under regulatory programs conducted in the interest of public health and safety. With respect to programs providing statutory entitlements and loans to agricultural producers, personal entitlement transactions would remain excluded from covered transaction status in the rule. For example, an agricultural producer would continue to be eligible for a loan related to an emergency or natural disaster that is classified as a personal entitlement even though the producer was suspended or debarred from other Federal programs covered by the suspension and debarment regulations. Other traditional agricultural loans, including farm ownership and operating loans, would be covered by suspension and debarment.

## **Objectives**

Our overall objective was to assess USDA agencies' awareness and use of the suspension and debarment authorities and regulations. Specifically, we determined if the authorities and regulations were being effectively utilized and if they were enforced so that Government programs are protected from harm and losses.

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<sup>28</sup> 7 CFR 3017.215(j).

<sup>29</sup> See 2 CFR 417.215(a)(3).

## ***Section 1: Nonprocurement Suspension and Debarment***

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### **Finding 1: USDA Needs to Finalize New Regulations Implementing a More Active Nonprocurement Suspension and Debarment Program**

When USDA implemented suspension and debarment in its nonprocurement programs in the late 1980s and 1990s, it established in regulation a wide range of program exclusions that compromised the Department's participation in this important Federal initiative. In fiscal year (FY) 2007, due to these exclusions, the agencies did not implement suspension and debarment in programs comprising \$98 billion of the Department's \$124 billion budget (79 percent). As we discuss in Findings 2, 3, and 4, the agencies have provided reasons for why their programs should be excluded. However, we question the agencies' reasons. These reasons may not be advisable and the agencies' program exemptions may not be applied appropriately. USDA's program exclusions do not parallel the practices of other Federal agencies who implement suspension and debarment in similar programs specifically to protect the public interest. Finally, the agencies have not submitted adequate statutory language supporting their exclusions. Even in cases where the exclusions are justifiable, the exclusions have been misinterpreted to mean that nonresponsible parties cannot be debarred based on the misconduct at issue. Senior Departmental officials published a new interim final rule for suspension and debarment on May 25, 2010. However, the new interim final rule retains the majority of the agencies' existing program exclusions. Swift and effective action to implement the suspension and debarment authorities is important because, at present, USDA is suspending and debarring very few program violators. Of the 1,073 convictions the OIG Office of Investigations reported to USDA agencies from FYs 2004 to 2007, only 38 individuals (4 percent) were debarred.<sup>30</sup>

In 1986, the President signed an Executive order directing all Executive departments and agencies to develop a regulatory system to suspend and debar from Federal programs and activities individuals and entities that proved themselves nonresponsible by violating or otherwise abusing Federal programs.<sup>31</sup> The President authorized the Director of OMB to issue guidelines to Executive Departments and agencies governing which programs and activities are covered by the order, and setting forth other details for effective administration of the guidelines. Suspensions and debarments are intended to protect the public interest by ensuring that Federal programs conduct business with responsible persons and entities. Administrative suspension and debarment may not be used for the purpose of punishment.<sup>32</sup> If an individual abuses a Government program, then that person can be excluded from the program through statutory disqualification within that program, or punished through criminal prosecution. Suspension and debarment protects the entire Government by preventing program abusers from entering into future Government contracts and nonprocurement transactions with that agency and other agencies or Departments.

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<sup>30</sup> Between 2004 and 2007, USDA agencies performed 27 fact-based debarments of individuals due to program violations, contract abuse, or procurement transactions. See figures 2-4 on pages 16-18. These debarments were initiated for causes other than conviction of a crime; generally, debarments based on convictions of crimes do not require a separate fact finding.

<sup>31</sup> Executive Order 12549, February 18, 1986.

<sup>32</sup> 7 CFR 3017.110.

According to the President’s Executive order and OMB’s guidance, certain assistance and benefit transactions were classified as noncovered by the suspension and debarment regulations. Those included personal entitlements such as social security and food assistance benefits, Federal employment, and incidental benefits resulting from ordinary Government operations such as use of the U.S. Postal Service or national forests. Nonresponsible persons might continue receiving statutory entitlements, such as food assistance, from a noncovered program, yet those persons can still be suspended and debarred for misconduct from other Federal programs that are covered by the regulations.

As USDA implemented these Executive orders and OMB guidance from 1989 to 1995, it excluded most of its programs from suspension and debarment,<sup>33</sup> as illustrated below.

**Figure 1: USDA Dollars (in billions) Excluded from Suspension and Debarment (79 percent - shown in Red) and Included in Suspension and Debarment (21 percent - shown in Green)<sup>34</sup>**

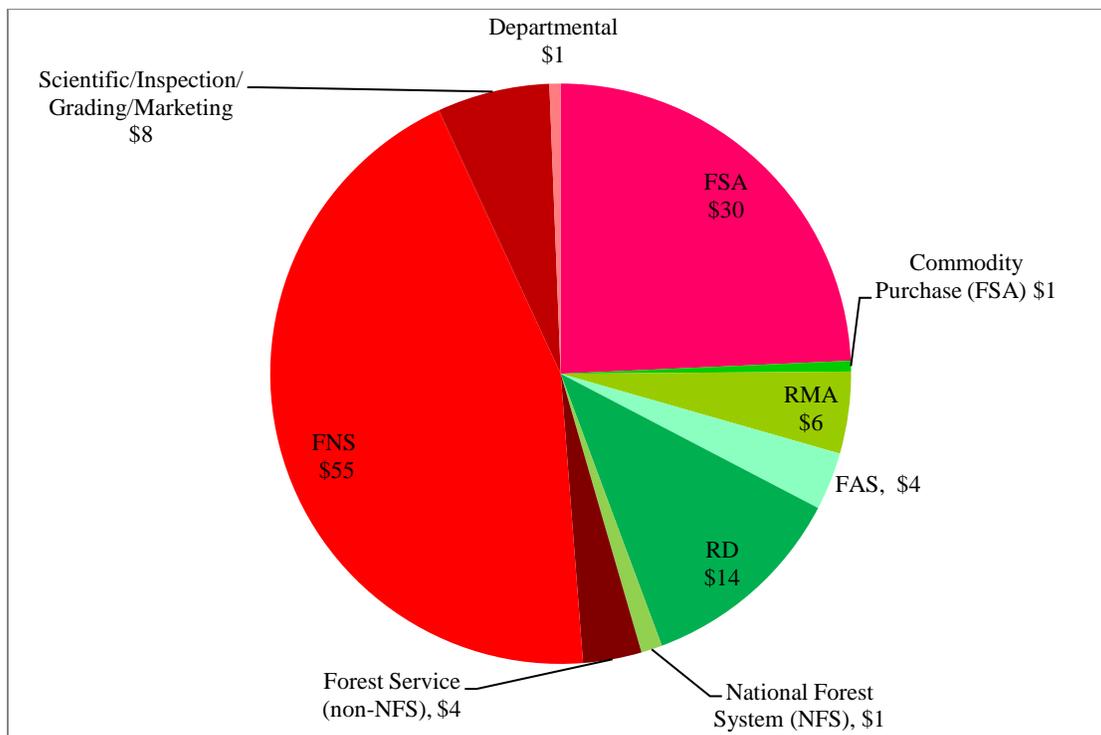


Figure 1 above is a pie chart that shows the FY 2007 USDA budgetary program dollars excluded from suspension and debarment implementation in red. Budgetary program dollars included in suspension and debarment implementation are in green. In 2007, 79 percent of USDA’s \$124 billion program budget (\$98 billion) was excluded from implementation while 21 percent (26 billion) was included in implementation. The following agency programs are shown in red in the pie chart and were excluded as follows.

<sup>33</sup> For simplicity’s sake, we have summarized the history of these exclusions in exhibit A.

<sup>34</sup> Figure Source: USDA FY 2009 Budget Summary and Annual Performance Plan: 2007 Actual Program Level. Wildland Fire Activities are included in Forest Service (non-National Forest System) because those activities do not fall under the Deputy Chief for the National Forest System, where suspension and debarment was implemented.

|   |                     |
|---|---------------------|
| Departmental  | \$1 billion         |
| Scientific/Inspection/Grading/Marketing               | \$8 billion         |
| Food and Nutrition Service                            | \$55 billion        |
| Forest Service (non-National Forest Service Programs) | \$4 billion         |
| Farm Service Agency                                   | <u>\$30 billion</u> |
| Total Excluded  | \$98 billion        |

The following agency programs are shown in green in the pie chart and were included as follows.

|  |                    |
|--|--------------------|
| Farm Service Agency (Commodity Purchase) | \$1 billion        |
| Risk Management Agency                   | \$6 billion        |
| Foreign Agricultural Service             | \$4 billion        |
| Rural Development                        | \$14 billion       |
| Forest Service (National Forest System)  | <u>\$1 billion</u> |
| Total Included                           | \$26 billion       |

|                        |               |
|------------------------|---------------|
| Total 2007 USDA Budget | \$124 billion |
|------------------------|---------------|

As we demonstrate in Findings 2, 3, and 4, many of these program exclusions are questionable—we discuss individual exclusions within the context of the relevant agency. As USDA moves forward to finalize its new interim final rule on nonprocurement suspension and debarment, the Department should remove exclusions that are not adequately justified. For programs the agencies continue to exclude from suspension and debarment, the agencies need to provide statutory language justifying their exclusions, or acceptable program rationale supporting the exclusions. The Department should seek to minimize its program exclusions from suspension and debarment to more fully implement its authorities.

Additionally, we found that USDA misinterpreted the concept of exclusions. It interpreted an exclusion to mean that, if individuals have abused a noncovered program, then they will not be subject to any suspension and debarment action. However, OMB guidance provides that program abusers should be suspended or debarred even while they continue to receive benefits from a noncovered program. This is the reason why suspension and debarment have Governmentwide effect—to protect other Federal agencies and departments from individuals who have abused one program and are likely to repeat such behavior.

Yet, in general, we found that USDA agencies did not use suspension and debarment to protect other USDA and Federal agencies. For example, the Food and Nutrition Service (FNS) fined, sanctioned, and disqualified those who abused its programs, but it did not suspend or debar nonresponsible individuals. Nor did FNS list program abusers it disqualified in compliance with its program statutes on GSA's EPLS to alert other Federal agencies as required by USDA's suspension and debarment regulation. Farm Service Agency (FSA) and Rural Development agency officials told us they did not see the need to protect other Federal agencies from nonresponsible program recipients they had disqualified from their own programs. They cited as reasons for their inaction their limited resources and interest only in their assigned programs.

Even in cases where the agencies obtained convictions against abusers for program fraud, the agencies did not initiate any action to suspend and debar them.

Several agency officials stated their internal statutory program sanctions and disqualifications were sufficient to address the misconduct of program violators. They stated these sanctions and disqualifications frequently put the violators out of business and further debarment actions were unnecessary. However, statutory program sanctions (including disqualifications) and suspension and debarment actions have different purposes and are not mutually exclusive. Statutory program sanctions are punitive in nature and address a program participant's misconduct in violating an agreement or contract. These sanctions typically protect the resources of the current agency program or programs being violated. In contrast, the suspension and debarment regulations are not punitive. Suspensions and debarments protect other USDA and Federal agencies when the agencies make future business decisions about awarding new Federal contracts or assistance. The agencies can identify previous program abusers who have been debarred and protect their program resources by awarding their new contracts or assistance to other responsible parties.

Other agency officials told us their older program statutes do not include Governmentwide suspension and debarment authorities. However, in the absence of express authority in program statutes, the agencies also possess inherent authority to debar program violators that is incidental to the effective administration of their programs. This inherent authority was recognized by the District of Columbia Circuit Court in 1964 in a case involving the Commodity Credit Corporation (CCC).<sup>35</sup> The CCC had debarred a private firm from participating in CCC contracts for 5 years. The contractor challenged CCC's authority to debar because there was no explicit statutory authorization for this restriction. In rejecting the contractor's broad statutory argument, the court ruled that the power to debar contractors is "inherent and necessarily incidental to the effective administration of CCC's statutory scheme." Following this case, the only impediments to USDA agencies' implementation of suspension and debarment were the lack of regulatory standards and uniform procedures for providing notice to contractors proposed for debarment and an opportunity to respond. USDA established its suspension and debarment regulations and case procedures in 1989.

How USDA responded to program participants convicted of committing a crime against the Government is an important gauge of the Department's implementation of suspension and debarment, because a conviction is an established basis to debar a proven nonresponsible individual from future Federal programs.<sup>36</sup> If a debarment action is based on a conviction, the standard of proof for debarment is met. Further fact finding is not required. Therefore, if the Department aggressively pursued suspension and debarment, it would have debarred more of its program participants convicted of crimes. Instead, of the 1,073 individual convictions the Office of Inspector General's (OIG) Office of Investigations reported to the agencies from FYs 2004 to

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<sup>35</sup> *Gonzalez v. Freeman*, 334 F. 2d 570 (D.C. Cir. 1964).

<sup>36</sup> USDA's suspension and debarment regulation, 7 CFR 3017.800, states that, "We may debar a person for--(a) Conviction of or civil judgment for--(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction; \* \* \*."

2007,<sup>37</sup> only 38 individuals (4 percent) were debarred, and 27 of these debarments were conducted by the Risk Management Agency (RMA)—the only USDA agency with an active and comprehensive suspension and debarment program.

**Figure 2: Cases, Convictions, and Debarments by Agency, FYs 2004 – 2007 for Farm, Food Assistance, and Disaster Payments (Findings 2 and 3)**

| Agency  | OIG/I Cases with Convictions | OIG/I Individual Convictions | Debarments Reported by Agency (Based on Convictions) |
|---|------------------------------|------------------------------|--|
| FSA <sup>38</sup>   | 84                           | 147                          | 0  |
| FNS (wholesalers and retailer)                                    | 208                          | 615                          | 0  |
| FNS – Supplemental Nutrition Assistance Program (SNAP) recipients | 28                           | 136                          | 0  |

Figure 2 above shows the cases, convictions, and debarments by agency for FYs 2004 to 2007 for USDA farm, food assistance, and disaster payments. These agency suspension and debarment practices are discussed in findings 2 and 3. The first column lists the agency; the second column lists the number of OIG Investigation cases where convictions were obtained; the third column lists the number of individual convictions; the fourth column lists the number of debarment actions reported by the agencies based on those convictions.

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<sup>37</sup> We obtained a listing of convictions of violators of USDA programs for FYs 2004 through May 2007 from OIG’s Office of Investigations. During fieldwork between July 2007 and April 2009, we provided these convictions to the agencies to determine whether they had taken suspension or debarment actions.

<sup>38</sup> FSA performed no nonprocurement debarments. FSA did make three fact-based debarments, all of which were under commodity procurement programs. These three debarments were initiated for causes other than conviction of a crime.

**Figure 3: Cases, Convictions, and Debarments by Agency, FYs 2004 - 2007 for Scientific, Inspection and Grading, Marketing and Natural Resource (Finding 4)**

| Agency  | OIG/I Cases With Convictions | OIG/I Individual Convictions | Debarments Reported by Agency (Based on Convictions) |
|---|------------------------------|------------------------------|--|
| Animal and Plant Health Inspection Service (APHIS)              | 26                           | 42                           | 1 <sup>39</sup>                                      |
| AMS <sup>40</sup>   | 4                            | 16                           | 0  |
| Agricultural Research Service (ARS) <sup>41</sup>               | 5                            | 6                            | 9  |
| National Institute of Food and Agriculture (NIFA) <sup>42</sup> | 1                            | 1                            | 0  |
| Food Safety and Inspection Service (FSIS)                       | 15                           | 23                           | 0  |
| Grain Inspection, Packers and Stockyards Administration (GIPSA) | 1                            | 6                            | 0  |
| Natural Resources Conservation Service (NRCS)                   | 5                            | 10                           | 0  |

Figure 3 above shows the cases, convictions, and debarments by agency for FYs 2004 to 2007 for USDA scientific, inspection and grading, marketing and natural resources agencies. These agency suspension and debarment practices are discussed in finding 4. The first column lists the agency; the second column lists the number of OIG Investigation cases where convictions were obtained; the third column lists the number of individual convictions; the fourth column lists the number of debarment actions reported by the agencies based on those convictions.

<sup>39</sup> APHIS' only debarment was for a procurement fraud case rather than a nonprocurement action. The case was pursued by the Office of Procurement and Property Management (OPPM), not by the agency itself.

<sup>40</sup> In February 2009, AMS suspended Peanut Corporation of America due to its delivery of peanut products containing salmonella as part of the National School Lunch Program.

<sup>41</sup> ARS referred nine individuals for debarment action to OPPM between 2004 and 2007. The nine resulted from one case in which four individuals were convicted in 2003 and 2005. Although the remaining five individuals were not convicted, sufficient evidence was discovered during the investigation to debar them. However, the cases were not timely processed: debarment letters were not sent out until November 2007. These convictions were not included in the list of convictions we received from OIG Investigations, therefore they were not included here. However, since OPPM was working on the actions in FY 2007 during our audit, the nine debarments are listed in the table.

<sup>42</sup> The Food, Conservation, and Energy Act of 2008 created the NIFA. It replaced the former Cooperative State Research, Education and Extension Service.

**Figure 4: Cases, Convictions, and Debarments by Agency, FYs 2004 - 2007 for Agencies not claiming program exemptions, with totals for Figures 2 - 4**

| Agency                                    | OIG/I Cases With Convictions | OIG/I Individual Convictions | Debarments Reported by Agency (Based on Convictions) |
|---|------------------------------|------------------------------|--|
| FAS <sup>43</sup>                         | 2                            | 3                            | 0  |
| Rural Business-Cooperative Service (RBS)  | 3                            | 7                            | 0  |
| Rural Housing Service (RHS) <sup>44</sup> | 22                           | 29                           | 1  |
| RMA <sup>45</sup>                         | 17                           | 26                           | 27   |
| Rural Utility Service (RUS) <sup>46</sup> | 3                            | 6                            | 0  |
| <b>TOTALS (Figures 2 - 4)</b>             | <b>424</b>                   | <b>1,073</b>                 | <b>38</b>  |

Figure 4 above shows the cases, convictions, and debarments by agency for FYs 2004 to 2007 for USDA agencies not claiming program exemptions. The last line of the figure lists the totals for all agencies listed in figures 2-4. The first column lists the agency; the second column lists the number of OIG Investigation cases where convictions were obtained; the third column lists the number of individual convictions; the fourth column lists the number of debarment actions reported by the agencies based on those convictions.

We found that FSA officials often were unaware of the differences between the FSA and RMA regulations for internal program statutory disqualifications and nonprocurement debarment. In accordance with the Agricultural Risk Protection Act of 2000, violators of crop insurance regulations are excluded from receiving monetary or other benefits under a variety of USDA statutes for a period not to exceed 5 years. For example, FSA officials at the State level knew they had to honor an RMA disqualification action of a producer when making a decision about awarding program benefits; however, they were unsure about how to respond to an RMA debarment action. In addition, the President’s Executive order requires that agencies post their statutory disqualification actions on GSA’s EPLS along with their debarments. USDA’s nonprocurement suspension and debarment regulation also includes this requirement. However, FSA officials were not posting their disqualification actions of program abusers on GSA’s EPLS. These problems will need to be addressed before the agencies can fully implement the suspension and debarment authorities.

In April 2009, OCFO stated that it wanted to more fully implement its authority to suspend and debar program violators. On May 25, 2010, OCFO issued an interim final rule for

<sup>43</sup> FAS made two fact-based debarments not shown. They applied to a foreign quasi-governmental organization and a private voluntary organization involved in a foreign food aid program.

<sup>44</sup> RHS made eight fact-based debarments not shown (see Finding 5).

<sup>45</sup> RMA made 11 fact-based debarments not shown.

<sup>46</sup> RUS also made three fact-based debarments not shown (see Finding 5).

nonprocurement suspension and debarment. As documented in the interim final rule, OCFO decided to retain the majority of the agencies' program exclusions from implementing suspension and debarment. The interim final rule is subject to change based on comments received through July 26, 2010. We discuss the agencies' program exclusions in Findings 2, 3, and 4.

During our audit fieldwork, USDA has taken suspension and debarment actions in at least two high-profile cases.

- In February 2009, AMS suspended the Peanut Corporation of America for delivering peanut products containing salmonella as part of the National School Lunch Program.
- In December 2006, FAS took debarment actions against the Australian Wheat Board because of evidence indicating the Board engaged in bribery and kickbacks.

During 2008, USDA agencies suspended and/or debarred another 38 individuals or entities. In 2009, the agencies had suspended or debarred 38 individuals. RMA remained active in implementing the authorities. In 2008, 9 of 38 actions were taken by RMA and in 2009, 4 of 38 actions were taken by RMA. Since working with OCFO on the new interim final rule for suspension and debarment, FSA has debarred one individual in 2008 and nine in 2009.

We regard these developments as steps in the right direction. However, USDA has much to accomplish before it will have an active and effective suspension and debarment program. For example, the finalized rule for suspension and debarment must adequately justify the agencies' program exclusions that have prevented USDA from fully implementing this Governmentwide initiative and clarify how exclusions should be interpreted for program abusers in entitlement programs. In addition, OCFO and the agencies should work together to develop performance indicators and measures to assess the effectiveness of USDA's implementation of the suspension and debarment regulations. The agencies' performance results should be reported annually to OCFO.

Agency officials, and OIG, involved in the potential suspension or debarment of an indicted or convicted individual or entity should coordinate with the Department of Justice attorney handling the case. This coordination is even more critical for indictments. OIG is currently working to make this process more effective through participation on the Interagency Suspension and Debarment Committee. This Committee is drafting a Governmentwide memorandum on the coordination of suspension and debarment proceedings with concurrent civil and criminal actions. This effort addresses the need, in some cases, to pursue both criminal and civil actions concurrently with the pursuit of suspension and debarment actions. One benefit, of many, is to be able to impose suspension and debarment in a timely manner, rather than to wait for the conclusion of civil or criminal actions.

Recommendations to the Assistant Secretary for Departmental Management and Chief Financial Officer

**Recommendation 1**

Issue a secretarial directive to all agencies, directing them to fully implement nonprocurement suspension and debarment, according to the President's Executive orders and OMB's guidance. Clarify, in that directive, that those who abuse transactions excluded from covered transaction status in the suspension and debarment regulations should still be considered for suspension and debarment to protect other Federal programs that are covered by the regulations.

**Agency Response**

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Department will issue a memo to all agencies providing clarification that those who abuse excluded transactions should be suspended and debarred. OCFO will issue a new Departmental regulation on Federal Financial Assistance that will require full implementation of nonprocurement suspension and debarment requirements and clarify that those who abuse excluded transactions should be suspended and debarred.

OCFO expected corrective action to be completed by July 31, 2010. The revised regulations were approved by the Secretary of Agriculture on March 24, 2010, and published in the Federal Register by May 31, 2010. The Secretary's memorandum would be issued by July 31, 2010. On August 11, 2010, OCFO confirmed that the Departmental memorandum has not been issued and is currently in clearance.

**OIG Position**

We agree with management decision for this recommendation.

**Recommendation 2**

Direct USDA agency administrators to review their program statutes and operations to identify program transactions that are excludable from suspension and debarment implementation. For program transactions to be excluded from suspension and debarment, provide adequate statutory language justifying the exclusions or an acceptable program rationale supporting their noncovered status.

**Agency Response**

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Office of the Chief Financial Officer and Office of the General Counsel fully reviewed, with applicable agencies, all of USDA's suspension and debarment not covered transactions in the latest round of regulation updates. All transactions that remain not covered by suspension and debarment have been justified. As a result of this review, two types of transactions were removed from the listing. They are:

- With respect to the Department of Agriculture’s export and foreign assistance programs, any transaction below the primary tier covered transaction other than a nonprocurement transaction under the Market Access Program between a nonprofit trade association or state regional group and a United States entity; and
- Any transaction under the Department of Agriculture’s conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.

OCFO stated that corrective action would be completed May 31, 2010, when justifications were provided for all noncovered transactions and the revised regulation was published in the Federal Register. The Secretary of Agriculture approved the revised regulation on March 24, 2010.

### **OIG Position**

As reported in this finding, USDA’s program exclusions do not parallel the practices of other Federal agencies who implement suspension and debarment in similar programs to protect the public interest. Moreover, the agencies could not provide to us during our audit fieldwork adequate statutory language supporting the agencies’ exclusions.

To reach management decision, OCFO needs to provide the written justifications provided by the agencies and OGC to support the exclusions that remain in the interim final rule published on May 25, 2010. The written justifications should provide adequate statutory language supporting the exclusion or an acceptable program rationale supporting their non-covered status.

### **Recommendation 3**

As part of Departmental efforts to fully implement the authorities, finalize USDA’s new rule concerning nonprocurement suspension and debarment. This should include the removal of noncovered programs and program transactions from USDA’s suspension and debarment rule unless they are adequately justified by program statutory language or acceptable program rationale.

### **Agency Response**

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Secretary of Agriculture has approved the revised rule and it is awaiting publication in the Federal Register. The Office of the Chief Financial Officer and Office of the General Counsel fully reviewed, with applicable agencies, all of USDA’s suspension and debarment not covered transactions in the latest round of regulation updates. All transactions that remain not covered by suspension and debarment have been justified. As a result of this review, two types of transactions were removed from the listing. They are:

- With respect to the Department of Agriculture’s export and foreign assistance programs, any transaction below the primary tier covered transaction other than a nonprocurement

transaction under the Market Access Program between a nonprofit trade association or state regional group and a United States entity; and

- Any transaction under the Department of Agriculture's conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.

OCFO stated corrective action would be completed by May 31, 2010, when the regulation was published in the Federal Register. The Secretary of Agriculture approved the revised regulation on March 24, 2010.

### **OIG Position**

As reported in this finding, USDA's program exclusions do not parallel the practices of other Federal agencies who implement suspension and debarment in similar programs to protect the public interest. Moreover, the agencies could not provide to us during our audit fieldwork adequate statutory language supporting the agencies' exclusions.

To reach management decision, OCFO needs to provide the written justifications provided by the agencies and OGC to support the exclusions that remain in the interim final rule published on May 25, 2010. The written justifications should provide adequate statutory language supporting the exclusion or an acceptable program rationale supporting their non-covered status.

### **Recommendation 4**

Require timely referrals by agency officials of indicted and convicted program violators to suspension and debarment officials for case determination. Also, require USDA agency debarring officials to prepare an annual report of suspension and debarment actions taken in cases of indictments and convictions, including reasons where no suspension and debarment action was taken for indictment and conviction cases.

### **Agency Response**

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Department will issue a memo to all agencies requiring timely referrals by agency officials of indicted and convicted program violators to suspension and debarment officials for case consideration. The letter will also require agencies to justify not taking suspension and debarment action in quarterly reports. OCFO will develop supplementary guidance that will be issued as a [Chief Financial Officer] CFO bulletin.

OCFO stated corrective action would be completed January 31, 2011. The memorandum would be issued July 31, 2010, and the CFO Bulletin would be issued September 30, 2010. On August 11, 2010, OCFO confirmed that the Departmental memorandum has not been issued and is currently in clearance.

## **OIG Position**

We agree with management decision for this recommendation.

### **Recommendation 5**

Require the agencies to develop performance indicators and measures to assess the effectiveness of the agencies' implementation of the suspension and debarment regulations. Agencies should report their performance to OCFO.

### **Agency Response**

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Department will issue a memo to all agencies creating the Debarment and Suspension Council and reestablishing the Federal Financial Assistance Committee (FFAC). The letter will also require reporting of performance indicators. The council and committee will have participation from all agencies and will develop recommended performance indicators and a required reporting schedule. OCFO will develop supplementary guidance that will be issued as a CFO bulletin.

OCFO stated corrective action will be completed January 31, 2011. The FFAC held its first meeting April 29, 2010. The first Debarment and Suspension Council meeting was originally planned for June 30, 2010. OCFO is now in the process of establishing membership roles and formulating the meeting parameters. The Council meeting will be scheduled as soon as these tasks are completed. FFAC will develop performance indicators and issue its FFAC Charter July 31, 2010. A CFO Bulletin will be issued September 30, 2010. The first performance metrics are to be reported to OCFO October 30, 2010.

On August 12, 2010, OCFO informed OIG that the FFAC had completed its charter and the debarment and suspension performance indicators before July 31, 2010, as planned.

## **OIG Position**

We agree with management decision for this recommendation.

### **Recommendation 6**

Provide Departmental clarification and guidance concerning the differences between Governmentwide suspension and debarment actions and internal agency statutory disqualification actions and how the actions are to be used in response to program violations. Require the agencies to report their statutory disqualification actions in GSA's EPLS in accordance with USDA's suspension and debarment regulation.

### **Agency Response**

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Department will issue a memo to all agencies clarifying the differences between Governmentwide suspension and debarment actions and internal agency statutory disqualifications actions. The memorandum will also require agencies to report their statutory disqualification actions in the General Services Administration Excluded Parties List System in accordance with USDA's suspension and debarment regulation.

OCFO stated corrective action was to be completed July 31, 2010. On August 11, 2010, OCFO confirmed that the Departmental memorandum has not been issued and is currently in clearance.

### **OIG Position**

We agree with management decision for this recommendation.

## **Finding 2: FSA Needs to Implement a Nonprocurement Suspension and Debarment Program**

Responsible for approximately one quarter of USDA's annual budget, FSA used the \$31 billion it received in FY 2007 to make a wide variety of program payments to farmers and ranchers. We found, however, that FSA did not effectively implement a suspension and debarment process protecting these funds—officials did not understand that recipients under noncovered programs should still be considered for suspension or debarment. FSA officials instead believed that their programs were statutory entitlements or mandatory awards, and were excluded from all suspension and debarment action. Due to this confusion about the suspension and debarment process, FSA suspended or debarred few program abusers. Of the 147 individuals who were convicted of abusing FSA's programs as reported by OIG's Office of Investigations between FYs 2004 and 2007, the agency debarred none.

In 1986, the President's Executive order directed all departments and agencies to participate in the system for suspension and debarment from programs and activities involving Federal financial and nonfinancial assistance and benefits. USDA implemented the President's Executive order and OMB guidance for nonprocurement suspension and debarment in 7 CFR 3017 and defined covered transactions to be transactions at the primary tier between a Federal agency and a person and at the lower tier between a participant in a covered transaction and another person.<sup>47</sup> The regulation defined nonprocurement transactions<sup>48</sup> as grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurances, payments for specified uses, and donation agreements. The regulation further stated that a nonprocurement transaction at any tier does not require the transfer of Federal funds. The USDA regulation also listed the transactions excluded from covered transaction status in the nonprocurement suspension and debarment rules by the President's Executive order and OMB guidance which included statutory entitlements or mandatory awards among other transactions.

OMB issued guidance in 1988 to implement the President's Executive order which explained that only certain transactions—not entire programs—including statutory entitlement transactions

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<sup>47</sup> 7 CFR 3017.200 and 3017.100.

<sup>48</sup> 7 CFR 3017.210 and 3017.970.

or mandatory awards were to be excluded from suspension and debarment enforcement. In cases of excluded transactions, an individual's abuse of a statutory entitlement or mandatory award would not prevent that individual from receiving the statutory entitlement or mandatory award, but such an individual should be considered for debarment based on the misconduct related to the statutory entitlement or mandatory award. As a result of the debarment, the individual would be prohibited from participating in other Federal programs covered by the suspension and debarment regulations.

We found, however, that FSA excluded all of its programs from suspension and debarment, including the agency's conservation programs, warehouse licensing programs, and farm loan programs. These exclusions were made because FSA officials concluded that all payments made to agricultural producers are entitlements or mandatory awards. In our discussions with senior FSA officials, they affirmed their position that all agricultural loans were also excluded.<sup>49</sup> Some of FSA's program transactions may be classified in their program statutes as entitlements or mandatory awards; and if so, such transactions are properly considered noncovered by suspension and debarment. For example, some FSA loans may be entitlements. However, not all of the agency's programs are classified in this manner. FSA's farm ownership and operating loans are traditional business loans, not entitlements, and are covered by the suspension and debarment regulations.

Recently, the Department has agreed with this principle and has further questioned if excluding all of FSA's programs from suspension and debarment is justifiable. OCFO has been working with FSA and the Office of the General Counsel (OGC) to review FSA's program exclusions. In the May 25, 2010, interim final rule for nonprocurement suspension and debarment, FSA removed the exclusions which applied to transactions under the agency's conservation programs, warehouse licensing programs, and programs that make loans to individuals and entities as producers of agricultural commodities. With regard to USDA's conservation and commodity programs, the rule states that USDA has determined that the interests of the United States are not adequately protected if persons who have been suspended or debarred are allowed to participate in these programs. With respect to programs providing statutory entitlements and loans to agricultural producers, personal entitlement transactions would remain excluded from covered transactions status in the rule. For example, an agricultural producer would continue to be eligible for a loan related to an emergency or natural disaster that is classified as a personal entitlement even though the producer was suspended or debarred from other Federal programs covered by the suspension and debarment regulations. Other traditional agricultural loans, including ownership and operating loans, would be covered by suspension and debarment.

Removing these exclusions brings the Department closer to more fully implementing suspension and debarment, but the interim rule may not yet cover all FSA transactions that should not be excluded. For example, while the rule eliminates the exclusion from covered transaction status for transactions in warehouse licensing programs, these transactions will continue to be excluded from covered transaction status under another section of the rule<sup>50</sup> which excludes the receipt of

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<sup>49</sup> 7 CFR 3017.215(j) exempted from coverage any transaction that "make[s] available loans to individuals and entities in their capacity as producers of agricultural commodities."

<sup>50</sup> See 2 CFR 417.215(a)(3).

licenses, permits, certificates, and indemnification under regulatory programs conducted in the interest of public health and safety.

As USDA finalizes this rule, it should identify all transactions that are not statutory entitlements or mandatory awards, and justify their classification as excluded from suspension and debarment. Clarifying exactly which FSA program transactions are statutory entitlements or mandatory awards and how the agency will respond to other agencies' suspensions and debarments is another important step to move USDA towards fuller implementation of suspension and debarment. Also, as presented in Finding 1, FSA should recognize its responsibility to consider suspending and debarring violators of its noncovered program transactions. Even though violators may continue receiving the mandatory FSA program benefits, they should not receive future awards from other Federal programs. For example, we identified six cases involving eight individuals who were convicted of violations of FSA's emergency loan and disaster program transactions, which are considered noncovered transactions, between FYs 2004 and 2007; yet FSA undertook no debarment actions.

We found that RMA was more actively suspending and debarring nonresponsible agricultural producers, and it used violations of both RMA and FSA regulations as support for these actions. Between 2004 and 2007, RMA completed 42 suspensions and 38 debarments of producers, insurance adjusters, and agents, often citing violations of FSA's programs as support. In contrast, FSA considered these same violators and violations excluded from suspension and debarment. In 2008, RMA suspended or debarred 9 of 38 individuals excluded by USDA agencies; and in 2009, RMA debarred or suspended an additional 4 of 38 individuals excluded by USDA agencies.

The fact that RMA enforced the suspension and debarment regulations, while FSA did not, resulted in inconsistent enforcement among USDA agencies. For example, in June 2007, RMA debarred a producer who pled guilty to charges he made false statements regarding an insurance policy within the Federal Crop Insurance Program. RMA notified FSA of the debarment, but FSA instructed State and county officials that certain farm programs are excluded from debarment and advised consultation with OGC should a question arise about the producer's eligibility for future FSA program participation. Thus, while other Federal agencies will respect RMA's debarment of this producer, FSA is uncertain about its own position should the respondent apply for future farm program benefits.

In addition to the suspension and debarment regulations, RMA has statutory authority to disqualify program violators for willfully and intentionally providing false or inaccurate information with respect to a policy or plan of crop insurance. Under this statutory authority, disqualified persons are also prohibited from receiving monetary or other benefits under several other USDA statutes.<sup>51</sup> FSA is bound to honor RMA's statutory disqualifications. However, an

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<sup>51</sup> Under the Agricultural Risk Protection Act of 2000 (Public Law 106-224, Section 121, 114, Stat. 358, 375-76), disqualified producers and other entities are excluded from purchasing catastrophic risk protection or receiving non-insured assistance for up to 2 years, or other crop insurance program benefits for up to 10 years. Fines not to exceed \$10,000 may also be imposed. The Act also excludes violators from receiving monetary or other benefits under a variety of USDA statutes for up to 5 years. These USDA statutes include the Agricultural Market Transition Act, Agricultural Act of 1949, Commodity Credit Corporation Charter Act, Agricultural Adjustment Act of 1938, Title XII of the Food Security Act of 1985, Consolidated Farm and Rural Development Act, and any law that provides assistance to a producer affected by crop loss or a decline in commodity prices.

FSA official told us that FSA officials are uncertain as to how they should respond to a statutory disqualification of a producer versus a suspension or debarment action.

Disqualifications are punitive internal program sanctions to respond to violations of current contracts and are only effective within USDA. In contrast, suspensions and debarments are not punitive, but administrative actions to protect both USDA and other Federal agencies when they make business decisions about awarding future contracts. The President's Executive order and USDA's suspension and debarment regulation require agencies to post disqualifications, suspensions, and debarments on GSA's EPLS. Agencies are required to check GSA's EPLS prior to awarding contracts to ensure that bidding contractors have not been debarred before awarding contracts. This action also serves to warn other USDA and Federal agencies about disqualifications within the Department.

We also noted that FSA needs to improve its database used for tracking indictments and convictions of program participants. FSA officials explained that they had not established a tracking system within its Direct Loan System database to record producers' convictions into their program histories because they believed their local county employees' knowledge of producers in their area was adequate to prevent subsequent payments to producers convicted of a crime. However, between FYs 2004 and 2007, we found that FSA made additional program payments totaling \$1.4 million to 19 producers after they were convicted of program violations. Since indictments and convictions are compelling reasons for suspension and debarment actions, FSA will need to improve its database system to track these legal actions. Agency officials will then need to refer indicted and convicted producers to the suspension and debarment official for case determinations.

Finally, FSA programs are carried out by State and county committees at the local level with the assistance of FSA headquarters and State officials. Therefore, FSA needs to train these individuals to ensure compliance with the suspension and debarment regulations. The agency then needs to conduct followup reviews to validate that the procedures are effectively implemented.

Since working with OCFO on the new proposed suspension and debarment regulation, FSA has increased its suspension and debarment actions against program violators. In 2008, FSA debarred one individual and in 2009, FSA has debarred nine additional individuals.

#### Recommendations to the FSA Administrator

##### **Recommendation 7**

In collaboration with OGC and OCFO, review all FSA program transactions to determine if they should be classified as noncovered by suspension and debarment according to the President's Executive orders and OMB's guidance. For program transactions to be excluded from covered transaction status for suspension and debarment, provide adequate statutory language justifying the exclusions or acceptable program rationale supporting their noncovered status.

## **Agency Response**

In its May 13, 2010, response, FSA stated the following:

FSA agrees with the need to identify those FSA program transactions that should be classified as noncovered by suspension and debarment. On April 29, 2010, FSA was notified that the Secretary cleared a substantial revision to Departmental suspension and debarment regulations. This revised rule will be published in the Federal Register. It is anticipated that many of FSA's nonprocurement programs will no longer be exempt from the suspension and debarment process. Within 180 days from the date the revised regulations are published, FSA will work with OCFO and OGC to review what program transactions should be classified as noncovered by suspension followed by debarment.

## **OIG Position**

We cannot agree with management decision for this recommendation.

In its response above to this recommendation, FSA agrees that further review is needed to identify those FSA program transactions that should be classified as noncovered by suspension and debarment, and FSA plans to work with OCFO and OGC within 180 days after the regulations are published to review what program transactions should be classified as noncovered by suspension and debarment. We agree that due to the number and complexity of farms programs administered by the agency, detailed review of farm program statutes and transactions is necessary to appropriately implement the suspension and debarment authorities. FSA's response, however, is not consistent with the actions reported by OCFO in response to Recommendation 2. OCFO's May 14, 2010, response explains that the OCFO and OGC fully reviewed with applicable agencies, all of USDA's suspension and debarment not covered transactions. All transactions that remain not covered by suspension and debarment have been justified.

To reach management decision, FSA needs to provide the written justifications it and OGC provided to support the exclusions that remain in the interim final rule published on May 25, 2010. The written justifications should provide adequate statutory language supporting the exclusion or an acceptable program rationale supporting their non-covered status.

## **Recommendation 8**

Issue guidance to agency officials clarifying that those who abuse any noncovered program should still be considered for suspension and debarment to protect other Federal programs that are covered by the suspension and debarment regulations.

## **Agency Response**

In its May 13, 2010, response, FSA stated the following:

FSA understands that suspension and debarment is a serious action used to protect the public interest and is reserved for the most serious cases where immediate suspension, followed by debarment, serves as a tool to ensure integrity of the Government's programs by conducting

business only with responsible persons. As discussed in Recommendation 7 above, the Secretary has cleared revised suspension and debarment rules that will be published in the Federal Register. FSA recognized that, following publication of the new rule, there may be very few noncovered transactions. Within 180 days of publication of the revised rules, FSA will issue guidance to agency officials implementing the new regulations. This guidance will outline the purpose of suspension and debarment and that FSA program transactions determined to be noncovered should be considered for suspensions followed by debarment in order to protect the integrity of other covered Federal programs.

### **OIG Position**

We agree with management decision for this recommendation.

### **Recommendation 9**

Implement a tracking system within the Direct Loan System to record indictments and convictions of agricultural producers so that FSA officials will be alerted if convicted producers should reapply for farm program benefits. Establish controls and procedures to ensure that indicted, convicted, and other nonresponsible program violators are referred to the suspension and debarment official for case determinations.

### **Agency Response**

In its May 13, 2010, response, FSA stated the following:

FSA does not agree with the recommendation to implement a tracking system to record indictments and convictions of agricultural producers within the Direct Loan System (DLS). FSA's DLS is limited to tracking the Farm Loan Programs' direct loan application and loan making process, and loan servicing activities. This web-based system is not used by FSA to track the application and payment process, and compliance activities for FSA's direct subsidy and non-credit commodity loan programs. Further, due to the sensitive nature of the information contained in DLS that concerns FSA's direct farm loan borrowers, only FSA employees responsible for Farm Loan Programs have access to the database. Employees responsible for Farm Programs, such as the County Executive Director, do not have access to DLS. OIG found that between FYs 2004 to 2007, 19 producers received additional program payments after they were convicted of program violations. A total of 19 cases in the span of 4 years, in relation to the billions of dollars of direct subsidy payments and loan disbursements issued by FSA to millions of participants in that same timeframe does not justify the substantial cost to enhance DLS in order to track participants who are indicted, convicted, or otherwise determined to be irresponsible.

FSA agrees with the recommendation to establish controls and procedures that will help ensure that program violations are referred to the designated suspension and debarment official in order to determine if suspension and debarment is warranted. Within 180 days from the date of publication of the revised regulations in the Federal Register, FSA will develop and establish the necessary controls and procedures for determining when to refer program participants who have been indicted, convicted, or otherwise determined to be irresponsible to FSA's designated suspension and debarment official.

## **OIG Position**

We agree with management decision for this recommendation.

### **Recommendation 10**

Provide training to FSA headquarters and State officials, and State and county committees, about suspension and debarment; develop and implement procedures to refer the violators for case determinations for suspension and debarment actions; and conduct followup reviews to ensure effective implementation.

### **Agency Response**

In its May 13, 2010, response, FSA stated the following:

FSA agree[s] with the recommendation. FSA will consider the use of the Agriculture Learning (Aglearn) System and other tools to provide the necessary training to all FSA headquarters and State office officials about suspension and debarment. Automation modernization programs currently in development within FSA will also be considered when designing training. Further, training will also be provided to FSA State and county committees. FSA will issue directives based on applicable Departmental regulations to all FSA offices that outline the procedures for referring violators for suspension and debarment determinations.

After suspension and debarment training and issuance of referral procedures throughout FSA, followup reviews will be conducted as necessary.

The actions listed above will begin after the revised suspension and debarment rules have been published in the Federal Register.

## **OIG Position**

We agree with FSA's proposed corrective actions; however, to reach management decision, FSA needs to provide timeframes for providing suspension and debarment directives and training to FSA headquarters and State officials and county committees and conducting reviews to determine the effectiveness of the agency's implementation of the suspension and debarment authorities.

### **Finding 3: FNS Needs to Implement a Nonprocurement Suspension and Debarment Program**

Responsible for almost half of USDA's annual budget, FNS used the \$55 billion it received in FY 2007 to provide food assistance through a number of programs. We found, however, that FNS did not effectively implement a suspension and debarment process for protecting Government funds. FNS officials did not believe suspension and debarment should apply to FNS programs since they believed the programs were entitlements. Therefore, they excluded FNS programs from suspension and debarment. In particular, FNS did not recognize that three broad categories of program violators should be subject to debarment: (1) recipients of food aid

and disaster benefits who have been convicted of crimes or obtained illegal benefits, (2) retailers and wholesalers convicted of crimes against USDA, and (3) retailers and wholesalers whom FNS disqualified from future participation. We found that FNS did not consider for debarment 136 food aid recipients convicted of food assistance program violations between FYs 2004 and 2007, nor did it consider for debarment fraudulent recipients of emergency and disaster aid. We also found that FNS did not consider for debarment 615 wholesalers and retailers convicted of food assistance program violations between FYs 2004 and 2007.<sup>52</sup> According to FNS' annual reports,<sup>53</sup> the agency permanently disqualified 3,981 retailers between 2004 and 2008 under FNS' own statutory program authorities.<sup>54</sup> However, the agency did not consider for debarment these wholesalers and retailers under USDA's nonprocurement regulation which would have Governmentwide effect. FNS' disqualification actions only serve to protect its own agency programs from repeat violations by the same disqualified wholesalers and retailers, whereas Governmentwide debarments would have protected other USDA and Federal agencies from repeat violations by the nonresponsible wholesalers and retailers. Also, FNS did not post its statutory disqualification actions on GSA's EPLS in accordance with the Department's suspension and debarment regulations.

In 1986, the President's Executive order directed all departments and agencies to participate in the system for suspension and debarment from programs and activities involving Federal financial and nonfinancial assistance and benefits. Entitlement benefit transactions (such as food assistance) are considered noncovered by suspension and debarment, but an individual who abuses an entitlement should be considered for Governmentwide debarment even as that person continues to receive the entitlement.

Much of FNS' budget and many of its programs—such as the SNAP, the National School Lunch and Breakfast Programs, and food disaster and emergency benefits—are considered entitlements, and USDA therefore correctly classified these program transactions as excluded from covered transaction status for suspension and debarment. However, FNS interpreted this exclusion to mean that it would not suspend or debar program violators or those convicted of crimes involving FNS programs. According to OMB guidance for implementing the President's Executive orders authorizing suspension and debarment, such individuals may continue to receive entitlements, but they can be subject to Governmentwide debarment for misconduct related to that entitlement program.

Between FYs 2004 and 2007, FNS identified and referred 136 individual food assistance recipients for prosecution that resulted in a conviction, yet the agency did not refer them for debarment consideration. Food assistance cases for individuals submitted for prosecution frequently involved illegal trafficking in food assistance benefits. We acknowledge that debarring end users of food assistance from other Federal programs may not always be practical, especially if the dollar impact is relatively small. However, weighing the magnitude of cases involving end users is entirely consistent with suspension and debarment guidance, and is one of

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<sup>52</sup> OIG found that in most of the 615 conviction cases we reviewed, FNS had disqualified the retailers and wholesalers in addition to the criminal convictions for program violations.

<sup>53</sup> FNS Benefit Redemption Division, Food Stamp Program, Annual Reports from 2004 to 2008.

<sup>54</sup> From 1994 to 2004, FNS' Child Nutrition Program staff debarred 123 dairy producers pursuant to a Department of Justice initiative to target bid rigging by dairy farmers. The Child Nutrition Program has not implemented suspension and debarment since 2004. However, FNS officials stated the agency had retained in-house expertise gained during the Department of Justice initiative that could be used as a training resource.

the regulatory factors a debarment official would consider in deciding whether to initiate a debarment. Likewise, FNS did not debar individuals who fraudulently received disaster benefits. In the aftermath of Hurricane Katrina, FNS did not refer for debarment applicants who had made false statements regarding their eligibility even though other agencies such as the Small Business Administration debarred fraudulent recipients of their disaster benefits.

Retailers and wholesalers participating in FNS' food assistance programs should also be subject to suspension and debarment. While their services are essential to this entitlement program, they are not themselves recipients of an entitlement in the same way as an end user of food assistance. Providing food benefits requires the services of these retailers, who receive food assistance payments from low-income individuals in exchange for food, and wholesalers who provide food to these retailers. As we described in Figure 2, FNS did not refer for debarment consideration 615 program recipients—primarily retailers and wholesalers—who were convicted of crimes against USDA between 2004 and 2007. Food assistance cases for retailers submitted for prosecution frequently involved illegal trafficking in food assistance benefits such as exchanging food assistance benefits for cash.

FNS disqualifies retailers and wholesalers from program participation based on a variety of reasons such as illegal trafficking and other program violations. Retailers and wholesalers who abuse food assistance programs should be more actively suspended and debarred, as there is the potential for abusing programs in other departments. In general, a program disqualification should be adequate grounds for considering these entities for debarment. From FYs 2004 through 2008, FNS permanently disqualified 3,981 retailers and wholesalers from SNAP for various violations. Despite these disqualifications, FNS did not refer these firms for suspension and debarment determination. In addition, FNS does not post its disqualification actions on GSA's EPLS in accordance with Department regulations to alert other USDA and Federal agencies.

In April 2009, the Acting Chief Financial Officer explained that the Department better understands that those who abuse entitlement programs can still be debarred while continuing to receive entitlement benefits. He stated that food assistance recipients who abuse the program will no longer be totally excluded from suspension and debarment proceedings. In addition, he stated that, along with disqualifying retailers and wholesalers who abuse the program under FNS' own authorities, FNS will now consider them for debarment under the nonprocurement regulations with Governmentwide applicability to protect the Government as a whole.

We concluded that, as USDA moves towards a fuller implementation of suspension and debarment, it needs to direct FNS to initiate suspension and debarment proceedings for its programs, particularly for: (1) recipients of food aid and disaster benefits who have been convicted of crimes against USDA or obtained illegal benefits; (2) retailers and wholesalers convicted of crimes against USDA; and (3) retailers and wholesalers whom FNS disqualified from future participation.

### **Recommendation 11**

In collaboration with OGC and OCFO, review all FNS program transactions to determine if they should be classified as noncovered by suspension and debarment, pursuant to the President's Executive orders and in OMB's guidance. For programs to be excluded from suspension and debarment, provide statutory language justifying the exclusions or acceptable program rationale supporting their noncovered status.

### **Agency Response**

In its May 24, 2010, response, the FNS Administrator stated that:

FNS has consulted with the OGC and performed a comprehensive review of FNS program transactions. FNS and OGC have determined that program benefits are transactions that are not covered by suspension/debarment rules. Departmental Regulations at 7 CFR 3017.215, list non-procurement transactions that are excluded, which includes benefit payments to individuals, and "entitlement or mandatory awards required by statute, including a lower tier entitlement or mandatory award that is required by statute."

The vast majority of program transactions conducted by FNS fall under the category of benefits, entitlements, and mandatory awards. Therefore, most of FNS' transactions are excluded from suspension and debarment activities by Departmental Regulation 3017. SNAP retailer authorizations are not program benefits, and are also not covered by suspension/debarment rules. Administrative actions taken against retailers who violate program rules include disqualification and termination. FNS has determined that (1) the possibility of administratively disqualified SNAP retailers doing business with other Federal agencies is relatively low because few Federal benefit programs provide benefits by augmenting their beneficiaries' buying power in the retail system; and (2) the initiation of suspension/debarment procedures against such entities, which have already been disqualified via program-specific sanctions, would be costly and in most cases not result in a net benefit to the Government.

FNS agrees that the need to protect the interests of other Federal agencies may necessitate initiating suspension and debarment actions (or other actions) against disqualified or terminated SNAP retailers. One example of action that could be taken would be to list such retailers on GSA's Excluded Parties Listing System (EPLS). While there are some confidentiality and administrative issues which need to be fully researched, we believe that we may be able to post some retailers with the proper notice. FNS will investigate our disqualification and termination actions to develop a protocol for initiating suspension and debarment actions, and other possible actions, against SNAP retailers where appropriate and cost effective.

## **OIG Position**

We cannot agree with management decision for this recommendation. We do not agree that retailers or wholesalers who participate in FNS programs to earn business profits have a statutory exclusion from suspension and debarment activities. FNS' authority to disqualify and terminate retailers and wholesalers does not preclude them from suspension and debarment activities. Rather, we believe that FNS should consider each disqualified retailer and wholesaler for suspension and debarment, and justify those cases where such actions are not taken.

We reviewed the language in the Food Stamp Act and concluded there is no statutory entitlement for retailers or wholesalers in the Act. Authorization of a retail food store that meets eligibility requirements is not required by statute. Rather the Secretary is required to make a "discretionary judgment" about the business integrity and reputation of the applicant, the nature of the food business, and the expected SNAP volume. In addition, while the President's Executive order provided for exclusion of benefits to an individual as a personal entitlement, benefits received in an individual's business capacity were not excluded. Therefore, we concluded that retailer and wholesaler authorizations are subject to the suspension and debarment regulations.

FNS replied that they had alternative program-specific processes that exist to protect the public interest against retailers who violate program rules. However, disqualification protects only FNS—not other USDA agencies or other Federal agencies—from the disqualified nonresponsible retailer or wholesaler. In its response, FNS questioned the benefit of suspending or debarring retailers because of the cost of the process and their doubts on whether retailers would be engaged in business with other Federal agencies. However, FNS agreed to investigate its disqualification and termination actions to develop a protocol for initiating suspension and debarment actions, and other possible actions, against SNAP retailers where appropriate and cost effective.

To reach management decision, FNS needs to provide the timeframe for completing its investigation into the agencies disqualification and termination actions. In addition, FNS needs to provide the written justifications the agency and OGC developed to support the exclusions that remain in the interim final rule published on May 25, 2010. The written justifications should provide adequate statutory language supporting the exclusion or acceptable program rationale supporting their non-covered status.

## **Recommendation 12**

Issue guidance to FNS officials at headquarters and in its regional offices as well as State agency officials clarifying that those who abuse entitlement programs should be considered for suspension and debarment for misconduct related to those entitlement programs.

## **Agency Response**

In its May 24, 2010, response, the FNS Administrator stated the following:

FNS has no specific responses at this time to Recommendations 12-14, as these recommendations stipulate administrative actions for FNS to undertake that are contingent upon the results of the review called for in Recommendation 11.

We believe it would be more appropriate for the OIG to hold off on making specific recommendations at this time pending the results of our review described above and our consultations with OGC.

### **OIG Position**

We will consider management decision for the recommendation when FNS submits a response with its plan and timeframes for implementing the recommended actions to implement the suspension and debarment authorities.

### **Recommendation 13**

Post all FNS disqualification, suspension, and debarment actions on GSA's EPLS as required.

### **Agency Response**

In its May 24, 2010, response, the FNS Administrator stated the following:

FNS has no specific responses at this time to Recommendations 12-14, as these recommendations stipulate administrative actions for FNS to undertake that are contingent upon the results of the review called for in Recommendation 11.

We believe it would be more appropriate for the OIG to hold off on making specific recommendations at this time pending the results of our review described above and our consultations with OGC.

### **OIG Position**

We will consider management decision for the recommendation when FNS submits a response with its plan and timeframes for implementing the recommended actions to implement the suspension and debarment authorities.

### **Recommendation 14**

Provide training and guidance to State agencies who administer FNS entitlement programs to require enforcement of the suspension and debarment regulations and perform followup reviews to ensure effective implementation.

### **Agency Response**

In its May 24, 2010, response, the FNS Administrator stated the following:

FNS has no specific responses at this time to Recommendations 12-14, as these recommendations stipulate administrative actions for FNS to undertake that are contingent upon the results of the review called for in Recommendation 11.

We believe it would be more appropriate for the OIG to hold off on making specific recommendations at this time pending the results of our review described above and our consultations with OGC.

### **OIG Position**

We will consider management decision for the recommendation when FNS submits a response with its plan and timeframes for implementing the recommended actions to implement the suspension and debarment authorities.

## **Finding 4: USDA's Scientific, Inspection and Grading, Marketing, and Natural Resources Agencies Need to Implement a Nonprocurement Suspension and Debarment Program**

Responsible for 11 percent of the Department's budget, USDA's scientific, inspection and grading, marketing, and natural resources agencies—APHIS, FSIS, ARS, GIPSA, AMS, NIFA, Forest Service (FS), and NRCS—spent the \$13 billion they received in FY 2007 on a wide range of program activities including inspecting and grading food; researching new technologies; certifying and licensing stockyards and slaughter houses; permitting new uses of biotechnology; issuing permits and licenses; and transacting exchanges and other acquisitions of real property, rights of way, and easements under natural resource management programs. We found, however, that USDA excluded many of these agencies' programs from application of the nonprocurement suspension and debarment regulations, justifying the exclusions because the programs are mandatory awards; vital for animal, plant, and public health and safety; or necessary for agricultural commerce.<sup>55</sup> Due to these exclusions, USDA's scientific, inspection and grading, marketing, and natural resources agencies did not subject violators of their programs to suspension and debarment. For example, APHIS is a multi-faceted agency with a broad mission that includes protecting and promoting the United States' agricultural health, regulating genetically engineered organisms, administering the Animal Welfare Act, and carrying out wildlife damage management. However, we found that 42 individuals had been convicted for violating APHIS program statutes, yet only 1 individual was referred for suspension or debarment. Thus, 41 convicted violators who have the ability to impact American agriculture and other Federal agency programs in the United States have not been considered for debarment to prevent their repeated illegal activities.

In 1986, the President's Executive order directed all departments and agencies to participate in the system for suspension and debarment from programs and activities involving Federal financial and nonfinancial assistance and benefits. Subsequently, in letters to the USDA Office of Finance and Management between November 1989 and July 1990, USDA's scientific, inspection and grading, marketing, and natural resources agencies explained that many of their

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<sup>55</sup> 7 CFR 3017.215 (a) through (p).

programs should be excluded from the nonprocurement debarment and suspension rules for a variety of reasons. APHIS, FSIS, GIPSA, and AMS excluded from covered transaction status their programs related to the receipt of licenses, permits, certificates, and grading and inspection services under regulatory programs in the interest of animal, plant, and public health and safety, and ensuring fair trade practices. FS excluded its natural resource management programs related to inspections, permits, licenses, and exchanges and acquisitions of real property and rights of way. ARS excluded any transaction determined by its agency head to be exempt including memoranda of understanding and research, cooperative, and development agreements. NIFA (which was then the Extension Service and Cooperative State Research Service) excluded its cooperative extension and mandated program awards as statutory entitlements or mandatory awards. At the time, OGC and the Department accepted these reasons, and implemented the requested exclusions in the Department's suspension and debarment regulations.<sup>56</sup>

In May 2010, OCFO published an interim final rule for nonprocurement debarment and suspension. As written, the new rule would remove some program exclusions limiting the implementation of the authorities by the Department's agencies. However, the new rule would not make changes to the scientific, inspection and grading, marketing, and natural resources agencies' current policies allowing exclusions.

The scientific, inspection and grading, marketing, and natural resources agencies have relied on the above exclusions to covered transaction status to exclude their programs from suspension and debarment implementation. However, the agencies have broadly interpreted the exclusions which are intended to mainly allow the Government to conduct its daily business. This business includes such things as issuing permits for national forest use, issuing licenses for animal and plant import and exports, inspecting and grading food without the agencies needing to check GSA's EPLS to avoid providing services to suspended or debarred persons. These steps would be required if a program is subject to the suspension and debarment regulations. Nevertheless, the OMB guidance quoted below specifically cautions that violations that threaten health and safety should be considered for debarment.<sup>57</sup>

Although the causes for debarment do not specifically identify by name violations that threaten the health and safety of workers or threaten the environment, serious violations of these laws and regulations have always been subject to suspension or debarment \* \* \*. Any violation of law, regulation or agreement; or any conduct, failure to perform or other event that seriously threatens a Federal nonprocurement or procurement activity, is subject to potential suspension and debarment under this rule.\* \* \*

For example, FS issues thousands of free and nominal value permits for forest uses and products, e.g., firewood removal, Christmas trees, and recreation. An individual violation of one of these free or nominal value permits may not rise to the level of a serious violation capable of threatening the permitted activity. FS would need to review these types of transactions to determine if they are significant enough to warrant suspension and debarment action. At the same time, FS also issues commercial/industrial permits for timber sales, concession operators,

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<sup>56</sup> 7 CFR 3017.215 (a) through (p).

<sup>57</sup>68 Federal Register 66,533, 66,542 (Nov. 26, 2003).

etc. These permits are frequently of considerable monetary value and the privileges granted to the permit recipients directly impact the natural resource areas involved. FS will need to review its permits and licenses to identify those permits which are high dollar, commercial or industrial in nature, and directly impact the resource area involved. These types of permits should be considered for suspension and debarment implementation.

The above agencies should reevaluate the breadth of their noncovered transactions to focus only on specific transactions that are adequately justified for exclusion. Even if a program transaction is not covered, as we have noted in previous findings, a participant who abuses a noncovered transaction may still be considered for debarment for misconduct related to that transaction. For example, the former Environmental Protection Agency (EPA) debarment official explained that EPA excludes licenses needed to regulate pollution from suspension and debarment, but routinely suspends and debars polluters who violate clean air and water statutes.

We found that by excluding so many of its scientific, inspection and grading, marketing, and natural resources programs, USDA was excluding from its nonprocurement suspension and debarment program the types of violators who are routinely debarred by other Federal agencies. For example, laboratory research misconduct has become both a domestic and international problem, and other Federal agencies have used suspension and debarment to protect themselves from nonresponsible researchers. From January 1995 to March 2010, EPA suspended or debarred 18 research or laboratory firms. Other Federal agencies conducting research—the National Science Foundation, the Army, the Air Force, Defense Logistics Agency, Office of Personnel Management, and the Departments of Transportation, Housing and Urban Development, and Health and Human Services—currently, as of March 2010, list on GSA’s EPLS, debarment actions for a total of 51 laboratory and research firms. In contrast, USDA’s ARS reported no suspensions or debarments between FY 2004 and 2007, even though during this period, OIG’s Office of Investigations reported convicting six individuals involving violations of ARS programs. In a May 1990 letter to the USDA Office of Finance and Management, ARS had cited statutory non-assistance authorities to exclude any transaction determined by its agency head to be exempt as well as memoranda of understanding and research support agreements. While ARS officials during our audit may not have been aware of this history, these long-standing program transaction exclusions from suspension and debarment have continued in the agency. We found in one ARS case of laboratory misconduct at the University of California, ARS excluded the principal researcher from that particular grant agreement. However, ARS took no action to debar the researcher, so the nonresponsible researcher was free to seek other USDA and Federal research grants.

From FY 2004 through 2007, USDA’s scientific, inspection and grading, marketing, and natural resources agencies received notice from OIG’s Office of Investigations of 104 individuals convicted of crimes involving their programs, yet they only initiated debarment actions in

10 cases.<sup>58</sup> Even in cases where the agencies had programs that were covered, they had not established processes to implement the regulations.

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<sup>58</sup> Nine of the 10 actions referred by ARS to OPPM were related to convictions that occurred between 2003 and 2005 (see Finding 6). However, the cases were not timely processed. OPPM sent out notices of proposed debarment to the nine respondents in November 2007. Also,

As USDA moves forward to implement its new rule on suspension and debarment, it should remove any noncovered transactions for its scientific, inspection and grading, marketing, and natural resource agencies that are not adequately justified by program statutory language or acceptable program rationale.

### Recommendations to the Assistant Secretary for Departmental Management

#### **Recommendation 15**

Require USDA scientific, inspection and grading, marketing, and natural resources agencies to reassess their program transactions not covered by the suspension and debarment regulations, and amend the interim final rule for nonprocurement suspension and debarment to reclassify transactions that are currently considered noncovered and are not adequately justified. For program transactions to be excluded from suspension and debarment, provide adequate statutory language justifying the exclusions or acceptable program rationale supporting their noncovered status.

#### **Agency Response**

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation:

\*\*\* [OCFO] and \*\*\* [OGC] fully reviewed, with applicable agencies, all of USDA's suspension and debarment not covered transactions in the latest round of regulation updates. All transactions that remain not covered by suspension and debarment have been justified. As a result of this review, two types of transactions were removed from the listing. They are:

- With respect to \*\*\* [USDA's] export and foreign assistance programs, any transaction below the primary tier covered transaction other than a nonprocurement transaction under the Market Access Program between a nonprofit trade association or State regional group and a \*\*\* [United States] entity; and
- Any transaction under \*\*\* [USDA's] conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.

OCFO stated that the revised regulation was approved by the Secretary of Agriculture on March 24, 2010. Corrective action would be completed May 31, 2010, when justifications would be provided for all noncovered transactions and the revised regulation would be published in the Federal Register.

#### **OIG Position**

As reported in Finding 1, USDA's program exclusions do not parallel the practices of other Federal agencies who implement suspension and debarment in similar programs to protect

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convictions of those abusers violating FS programs are not included in these numbers, which represent convictions reported to USDA agencies by OIG's Office of Investigations. FS has its own internal law enforcement officers who report separately to FS management. Also, see Finding 5.

the public interest. Moreover, the agencies could not provide to us during our audit fieldwork adequate statutory language supporting the agencies' exclusions.

To reach management decision, OCFO needs to provide the written justifications provided by the agencies and OGC to support the exclusions that remain in the interim final rule published on May 25, 2010. The written justifications should provide adequate statutory language supporting the exclusion or an acceptable program rationale supporting their non-covered status.

### **Recommendation 16**

Direct the administrators of USDA's scientific, inspection and grading, marketing, and natural resources agencies to issue guidance to agency officials clarifying that those who abuse noncovered entitlement programs or mandatory awards are subject to consideration for suspension and debarment from other Federal programs covered by suspension and debarment.

### **Agency Response**

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Department will issue a memo to all agencies providing clarification that those who abuse noncovered entitlement programs or mandatory awards are subject to consideration for suspension and debarment from other Federal programs covered by suspension and debarment.

OCFO stated corrective action would be completed July 31, 2010, when the memorandum of direction is issued. On August 11, 2010, OCFO confirmed that the Departmental memorandum has not been issued and is currently in clearance.

### **OIG Position**

We agree with management decision for this recommendation.

### **Recommendation 17**

Provide training and guidance to USDA scientific, inspection and grading, marketing, and natural resources agency officials regarding the suspension and debarment regulations. Require the agencies to establish controls and procedures to identify fraud and misconduct related to their programs and to refer for suspension and debarment determination indicted, convicted, and other nonresponsible program violators. Perform followup reviews to ensure effective implementation of the regulations.

### **Agency Response**

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Debarment and Suspension Council will develop Departmental debarment and suspension training to be posted on Aglearn. The Debarment and Suspension Council will

also develop and require reporting of performance indicators. The Debarment and Suspension Council will use the performance indicators to ensure implementation of the regulations and determine when additional actions may be required. Finally, the Secretary's memorandum will include guidance regarding the suspension and debarment regulations.

OCFO stated corrective action will be completed October 30, 2010. OCFO will issue the Department memorandum and FFAC will develop performance indicators July 31, 2010. Performance metrics are to be reported to OCFO October 30, 2010.

On August 12, 2010, the OCFO informed OIG that the FFAC had approved its debarment and suspension performance indicators at its July 8, 2010, meeting.

### **OIG Position**

We agree with the proposed corrective actions. However, to reach management decision, the OCFO needs to provide a plan or timeframes to require agency officials to:

- study the suspension and debarment training provided on Aglearn and to certify the training is completed or a plan to monitor and ensure that all agency officials who may be impacted by the suspension and debarment regulations have completed the training;
- establish controls and procedures to identify fraud and misconduct related to their programs and to timely refer for suspension and debarment determinations indicted, convicted, and other nonresponsible program violators, and
- develop and perform followup reviews at agencies to ensure effective implementation of the regulations.

## ***Section 2: Organization of Suspension and Debarment Activities***

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### **Finding 5: USDA Needs to Centralize its Overall Organization for its Nonprocurement Suspension and Debarment Program**

The Secretary delegated oversight and guidance responsibility for nonprocurement suspension and debarment to OCFO, but that office did not develop internal controls to identify cases for suspension and debarment; provide direction, training, and guidance to responsible agency officials; or review the results of the Department's efforts. Although OCFO has recently become more active in advocating USDA's implementation of a nonprocurement suspension and debarment program consistent with applicable Executive orders and OMB guidance, that office has not historically emphasized the suspension and debarment program. Also, neither OGC nor OCFO endorsed the creation of a centralized suspension and debarment division when it was considered in 1997, citing concerns about whether there would be enough work for such a division. Without guidance from OCFO, agency officials have implemented the program inconsistently, and in some cases not at all. Just as we found wide variances in agency officials' knowledge, experience, and inclination in the area of suspension and debarment, we also found wide variability in how their agencies were attempting to apply the regulations. As a result, USDA implemented an inconsistent and decentralized nonprocurement suspension and debarment program.

In 1986, the President's Executive order directed all departments and agencies to participate in the system for suspension and debarment from programs and activities involving Federal financial and nonfinancial assistance and benefits.

For a department to implement an effective suspension and debarment program, it must (1) develop an internal control plan for identifying and processing cases, (2) provide written policy guidance for applying that plan throughout the department, (3) train all appropriate department and agency officials in that plan, (4) monitor the effectiveness of the suspension and debarment program through a system of reviews,<sup>59</sup> and (5) improve controls over awards to assure that debarred entities do not participate in covered transactions. We found that USDA's suspension and debarment program did not meet these minimum standards.

The lack of a coherent and consistent suspension and debarment process led to the decentralized and ineffective suspension and debarment program that exists at USDA. At present, the Department has 21 suspension and debarment officials, usually agency administrators. In the agencies we reviewed, the suspension and debarment officials had not received formal training in suspension and debarment regulations and procedures. In addition, the officials were unaware of the overall Federal suspension and debarment environment, including current practice and legal precedent. They relied heavily on their OGC attorneys, but we found that the OGC attorneys were separately attempting to develop form letters and gain experience with the process as they

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<sup>59</sup> "The George Washington University Law School, Public Law and Legal Theory Working Paper No. 88, Suspension and Debarment: Emerging Issues in Law and Policy," Public Procurement Law Review (Draft) Volume 13; "Emerging Issues in Suspension and Debarment: Some Observations from an Experienced Head," Richard J. Bednar, Senior Counsel, Crowell & Moring LLP, Washington, D.C., former Army debarment official. These papers derive from a November 20, 2003, colloquium at the George Washington University Law School.

handled individual cases. Thus, the individual agency actions were uncoordinated and subject to inconsistencies in processing and determinations on final actions.

Decentralizing the process has resulted in some notable inconsistencies in those agencies that attempted to implement suspension and debarment without Departmental guidance. For example, Rural Development's attempt to implement a nonprocurement suspension and debarment program has been ineffective. From 2004 to 2007, Rural Development State offices and its Financial Management Division received 42 notices from OIG's Office of Investigations that individuals participating in Rural Development programs had been convicted of crimes involving those programs. However, none of these cases were brought to the attention of the agency's suspension and debarment coordinator by the Financial Management Division. Therefore, no debarment actions were taken in response to 40 of the 42 convictions to debar these individuals from Federal programs.<sup>60</sup> While debarment actions were not taken in the 40 cases, agency officials stated their notification policies and other administrative program actions were taken.

Without Departmental guidance, USDA agencies were also inconsistent in how they initiated suspension and debarment actions. For instance, Rural Housing Service (RHS) considered debarment of 14 firms for defective work. One case that was referred cost just \$5,412 to correct, even though other cases—costing as much as \$75,000 to correct—were not referred for debarment. Meanwhile, FS had established an effective system of suspension and debarment but limited its reach to only one area: timber sales. FS was unique in the Department, in that the Chief of the FS delegated responsibility for suspension and debarment below the head of agency level to the Associate Deputy Chief, National Forest System. Thus, an active suspension and debarment program was established within the National Forest System mission area for timber sales. Between FY 2004 and 2007, FS officials stated they debarred 27 and suspended 18 individuals and/or entities respectively. These actions are not included in Figure 3 on page 17 because OIG's Office of Investigations did not refer the cases to the agency. FS has its own separate law enforcement officers. Even though FS established an effective suspension and debarment operation within the National Forest System mission area for timber sales, it did not implement suspension and debarment within its procurement or other mission areas.

Such apparent inconsistencies can leave USDA's debarment decisions open to challenges in court, as occurred in *Lion Raisins, Inc., v. United States*.<sup>61</sup> In that case, a Federal court overturned a suspension because it found USDA's actions were arbitrary and capricious, and therefore punitive.<sup>62</sup> Having a centralized division to process all suspension and debarment actions would help to build consistency. In addition, a centralized division would add more credibility to the process by establishing independence between those experts who identify the violations and prepare the case referral packages for suspension and debarment actions and the suspension and debarment official in the centralized division who must make a determination on the cases.

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<sup>60</sup> For 2 of the 42 convictions, State officials referred the cases directly to the suspension and debarment coordinator without going through the Financial Management Division. In one case, the violator was debarred; the other violator accepted a voluntary exclusion.

<sup>61</sup> 51 Fed. Cl. 238 (Fed. Cl. 2001).

<sup>62</sup> Suspension and debarment cannot be for purposes of punishment. Rather, suspension and debarment is a business decision made by agency officials to protect the public interest by conducting business only with responsible persons and entities. (7 CFR 3017.110)

The problems associated with decentralizing the Department's suspension and debarment activities were not limited to initiating cases for debarment. Agencies also did not always check new program applicants against GSA's EPLS to verify that they had not been debarred by other agencies. For example, Rural Development had not established computer software controls on its lending systems to require users to document that GSA's EPLS had been checked before allowing an application review to be completed. Rural Development's Management Control Reviews covering its lending programs showed that up to 100 percent of loan program applications were missing the required GSA's EPLS check documentation and up to 70 percent had not documented that recipients had certified their lower tier transactions at various offices.<sup>63</sup>

We discussed with agency officials the need for improving Rural Development's loan processing controls for checking new loan applicants against GSA's EPLS and documenting the reviews. Since the agency's manual controls for documenting the reviews have not been effective in the past, we suggested including a software control within Rural Development's automated loan processing system to require loan specialists to certify they had reviewed GSA's EPLS before the loan application could be finalized by the system. While Rural Development is in agreement that GSA's EPLS check controls need to be strengthened, officials stated the timing is not right for instituting new software controls because the current loan processing systems are now in the process of being retired. A new Comprehensive Loan Program, Common Loan Origination System is in its final planning phase. In the interim, Rural Development proposed a compensating control—a strengthened manual system to require a sign-off sheet to be completed by the loan specialist and the approving official that GSA's EPLS had been reviewed and properly documented. This compensating control would permit Rural Development to evaluate GSA's EPLS deficiency, identify the root cause, and implement both automated and manual controls to address the deficiency. Given the status of Rural Development's automated system, we will agree to the manual compensating control with the understanding that the new system will include an automated control to require loan specialists to certify GSA's EPLS has been reviewed and the review documented before the system will allow the application to be finalized.

We maintain the Department would benefit from establishing a centralized division specializing in debarment and suspension actions. OGC outlined the disadvantages of a decentralized process in a March 1997 decision memorandum to the Secretary:

The absence of a Departmentwide policy official and the decentralized arrangement for the imposition of nonprocurement debarment and suspension leaves the Department without a helmsman to guide Department policy in this important area and to coordinate the Department's interaction with the Office of Management and Budget ("OMB"), the General Services Administration ("GSA"), and other Federal agencies with respect to Governmentwide policy. The considerable day-to-day burden of coordinating the Department's debarment and suspension activities with other agencies presently is being borne by the Office of the Chief Financial Officer even though that office does not have personnel specifically dedicated to this important function.

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<sup>63</sup> Rural Development requires borrowers to certify that they have checked their suppliers and contractors and that they have not been suspended or debarred.

In 1997, neither OGC nor the Department endorsed the creation of a centralized suspension and debarment division, citing concerns about whether there would be enough work for such a division. As noted however, from FY 2004 to FY 2007, OIG notified agencies of 1,073 individuals convicted of crimes involving USDA programs. Although only 38 individuals were debarred due to a variety of reasons, such as lack of training and program exclusions, the number of convictions indicates that a centralized division would have an ample case workload. In addition, those numbers do not incorporate suspension and debarment actions that should be taken in other cases of poor or substandard contractor performance or default, or other fraudulent or wasteful actions that did not meet the U.S. Attorney's threshold for initiating an indictment or prosecution of the violator. Nor does the number of convictions include those resulting from FS law enforcement actions since these are not tracked by OIG's Office of Investigations. Finally, with only one staff official assigned part-time to suspension and debarment, OCFO will not be able to effectively train, guide, and oversee the increasing suspension and debarment caseload as all the Department's agencies begin to fully implement the nonprocurement suspension and debarment regulations.

A centralized suspension and debarment division could serve a number of functions that would help USDA better implement suspension and debarment. However, it is important to emphasize that we do not envision that the centralized division would remove the responsibility of implementing suspension and debarment authorities from agency officials and OGC. Agency officials at the headquarters, regional, and State levels are program experts and are often the first to become aware of program violations. OGC is instrumental in assisting agency officials to make determinations of wrongdoing, and these wrongdoings also form the basis for documentation in the suspension and debarment referral package. It is currently, and will continue to be, the responsibility of agency officials and OGC to develop a case referral package in cases of program violations for review by the suspension and debarment official. The purpose of the referral is to provide the relevant case facts and allow for an independent and knowledgeable determination whether the program violator has been proven to be non-responsible. Agency officials and OGC sometimes work with OIG's Office of Investigations in order to identify program violations, develop case facts, and prepare the case referral package. However, the responsibility of developing the case referral should remain with the agency program officials and OGC who have expertise in their program operations and regulations. After completion, the case referral package should be sent to the centralized suspension and debarment division to assure the case is processed by a suspension and debarment official with the requisite suspension and debarment knowledge and expertise. The centralized suspension and debarment division would add considerable value to the process, because it

- Would be responsible for developing and promulgating written Departmental policy guidance, providing necessary training and guidance to agency officials, and monitoring agencies' implementation including conducting periodic oversight reviews as warranted;
- Could develop expertise regarding legal precedents in suspension and debarment cases and apply that expertise to current cases;
- Could develop and use uniform suspension and debarment correspondence, process referrals more timely, track allowed response times, promptly schedule any hearings for matters of opposition, and timely render final decisions;

- Would have a record of the decision processes used to make similar decisions, including the lengths of suspension and debarment actions imposed in the cases, to maintain consistency in case actions across all USDA agencies; and
- Would relieve agency officials of the responsibility for carrying out the suspension and debarment actions, yet it could keep the officials informed of case progress and seek their input as necessary, therefore allowing them to concentrate their limited time and resources on their program objectives.

We note that the OGC in a January 12, 2010, letter to OIG agreed with our assessment that it will take some startup time for a centralized division to fully develop the necessary foundation of suspension and debarment knowledge and experience. The Department will need to ensure that appropriate staffing resources, funding, and training are provided to the centralized division to enable it to effectively and efficiently carry out its responsibilities. One of the fundamental weaknesses in USDA's current suspension and debarment structure is that the responsibility for implementation has been assigned to already over-burdened agency administrators as a collateral duty. To address this weakness, the Department will need to assign staff to the division that is fully dedicated to suspension and debarment. During our audit, we have observed that agencies with active suspension and debarment operations, including EPA and GSA, have separate suspension and debarment divisions with staff fully dedicated to implementing the authorities.

Finally, the centralized division would be responsible for monitoring the effectiveness of the suspension and debarment program, including:

- Requiring annual agency reports on the numbers of referrals to the division in cases of indictments and convictions of program violators, including reasons for those cases where no referrals were made;
- Requiring annual agency reports on the numbers of referrals in cases of fact-based violations or nonperformance not involving an indictment or conviction;
- Working with OCFO and the agencies to develop performance indicators and measures to track and assess the effectiveness of the Department's implementation of the suspension and debarment authorities; and
- Reporting on the agencies' progress in achieving established performance measures.

The centralized division should provide an annual report on the agency's performance in implementing suspension and debarment to the OCFO.

#### Recommendations to the Assistant Secretary for Departmental Management

##### **Recommendation 18**

Establish a centralized division that specializes in suspension and debarment; provides coordination, guidance, and training to all relevant agency officials; promotes consistency in handling the Department's suspension and debarment cases; and processes case referrals for all actions. Provide appropriate staffing resources, funding, and training to the centralized division to enable it to effectively and efficiently carry out its responsibilities.

## **Agency Response**

In its May 14, 2010, response, OCFO stated that it did not concur with the recommendation.

USDA will establish the Debarment and Suspension Council (Council), and reestablish the Federal Financial Assistance Committee (Committee). The Committee will provide coordination, guidance and training to all relevant agency officials and promote consistency in handling the Department's suspension and debarment cases. The Council will provide executive oversight over the debarment and suspension process while the Committee will provide working level knowledge to implement decisions and make recommendations to the Council. However, referrals for debarment and suspension actions will be conducted by agency program staff. USDA Federal financial assistance programs are diverse and complex. There is impressive program and legal expertise at the agency level relative to each program, making it inappropriate to consolidate this activity into a centralized unit. As a compensating control, the Council and Committee will develop performance metrics to be used in monitoring program compliance with debarment and suspension requirements.

OCFO stated corrective action would be completed June 30, 2011. [Federal Financial Assistance Committee] FFAC held its first meeting April 29, 2010. The Debarment and Suspension Council originally planned to hold its first meeting June 30, 2010. OCFO is now in the process of establishing membership roles and formulating the meeting parameters. The meeting will be held as soon as the process is completed.

## **OIG Position**

We continue to believe that a centralized division would be the most effective way to implement a strong suspension and debarment program at USDA. As noted in the finding, we agree with OCFO that program expertise resides at the agency level and legal expertise to assist in developing case referral packages resides with the OGC attorneys who work with agency legal issues on a daily basis. We also agree that case referral packages for suspension and debarment cases would continue to be developed at the agency and OGC level.

In our view these factors would not prevent the use of a centralized division to ensure consistency, effectiveness, and efficiency among the agencies of the Department in handling individual cases. However, we agree that the organizational structure proposed by OCFO for the Department to implement suspension and debarment incorporates many of the control and oversight responsibilities that OIG envisioned for the centralized unit we described in our finding and recommendation. Accordingly, we agree with the management decision for this recommendation.

## **Recommendation 19**

Require the centralized suspension and debarment division to develop and promulgate Departmental policy and an internal control plan for identifying cases to be referred for suspension and debarment consideration, and assuring suspended and debarred entities do not do business with USDA.

## Agency Response

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Debarment and Suspension Council will develop a training program, performance indicators and policy that will be issued as a CFO bulletin. In addition, each agency will be required to develop an internal review plan to identify cases to be referred for suspension and debarment consideration.

OCFO stated corrective action would be completed January 31, 2011, according to the following schedule.

|   |            |
|---|------------|
| Hold first Debarment and Suspension Council meeting<br>(The first Council meeting, originally planned for June 30, 2010, will now be held as soon as OCFO completes the process of establishing membership roles and formulating the meeting parameters.) | 6/30/2010  |
| Performance indicators developed<br>(On August 12, 2010, the OCFO informed OIG that the FFAC had approved its debarment and suspension performance indicators at its July 8, 2010, meeting.)  | 7/31/2010  |
| Agencies provide internal review plan   | 8/30/2010  |
| CFO Bulletin issued   | 9/30/2010  |
| Performance metrics are reported to OCFO  | 10/30/2010 |
| Departmental debarment and suspension training posted to Aglearn  | 11/30/2010 |

## OIG Position

We agree with management decision for this recommendation.

## Recommendation 20

Amend the Department's suspension and debarment regulations to require that the centralized division monitor how the agencies implement suspension and debarment, including establishing agency performance indicators and measures, and reporting requirements; identifying and correcting any problems detected; and reporting annually on the agencies' performance in implementing the suspension and debarment authorities to the OCFO.

## Agency Response

In its May 14, 2010, response, OCFO stated that it concurred with the recommendation.

The Debarment and Suspension Council will develop a training program, performance indicators and policy that will be issued as a CFO bulletin.

Corrective action will be completed January 31, 2011 according to the following schedule.

|   |           |
|---|-----------|
| Hold first Debarment and Suspension Council meeting | 6/30/2010 |
|---|-----------|

(The first Council meeting, originally planned for June 30, 2010, will now be held as soon as OCFO completes the process of establishing membership roles and formulating the meeting parameters.)

Performance indicators developed 7/31/2010

(On August 12, 2010, the OCFO informed OIG that the FFAC had approved its debarment and suspension performance indicators at its July 8, 2010, meeting.)

CFO Bulletin issued 9/30/2010

Performance metrics are reported to OCFO 10/30/2010

Departmental debarment and suspension training posted to Aglearn 11/30/2010

## **OIG Position**

We agree with management decision for this recommendation.

### Recommendation to the Under Secretary for Rural Development

#### **Recommendation 21**

Require the Rural Development Administrators for Business and Cooperative Programs, Housing and Community Facilities, and Rural Utility Programs to inform the agency's suspension and debarment coordinator upon notification from OIG's Office of Investigations that a program violator has been indicted or convicted.

#### **Agency Response**

In its May 21, 2010, response, the Office of the Under Secretary for Rural Development provided the following comments.

The intent of this recommendation is to expedite notification of the Agency's suspension and debarment coordinator of currently indicted and/or convicted program violators. Rural Development has implemented a process effective April 2010, which accomplishes this end result. The Financial Management Division, upon notification by the OIG Office of Investigations, is providing the Rural Development suspension and debarment coordinator with this information. The coordinator, in turn, is following up with field staff in the affected State Offices to ensure the appropriate proposed debarments/suspensions are executed.

## **OIG Position**

We agree with management decision for this recommendation.

#### **Recommendation 22**

Require the Rural Development Administrators for Business and Cooperative Programs, Housing and Community Facilities, and Rural Utility Programs to develop a manual system to be used by the loan specialist and approving official as an interim compensating control to ensure GSA's EPLS is reviewed and the review documented for new loan applicants.

## **Agency Response**

In its May 21, 2010, response, the Office of the Under Secretary for Rural Development provided the following comments.

The intent of this recommendation is to ensure a reliable process for debarment screenings of new applicants to Rural Development programs is in operation. While regulations are in place to require loan making staff to check the Excluded Parties List System (EPLS) for loan and grant applicant names, documentation of such screenings has not been consistent in many cases. To orient our newly appointed State Directors and any new loan making staff in the field, an unnumbered letter will be issued during May 2010, reinforcing the debarment screening and documentation requirements promulgated in our regulations. Direction will also be provided to our Debarment Program intranet website where a link to the EPLS web site for debarment queries is provided.

## **OIG Position**

We cannot agree with management decision for this recommendation. Rural Development's proposed action to provide a reminder to its staff regarding the required check of GSA's EPLS will be helpful. However, as described in the finding, Rural Development proposed an interim compensating control—a strengthened manual system to require a signoff sheet to be completed by the loan specialist and the approving official that GSA's EPLS had been reviewed and properly documented. To reach management decision on the recommendation, Rural Development needs to provide a plan and timeframe for establishing the manual signoff process as discussed.

## **Recommendation 23**

Require the Rural Development Administrators for Business and Cooperative Programs, Housing and Community Facilities, and Rural Utility Programs to include an automated system control in the Comprehensive Loan Program, Common Loan Origination System to require a certification by the loan specialist that GSA's EPLS has been reviewed and the review documented before the system will allow the application to be finalized.

## **Agency Response**

In its May 21, 2010, response, the Office of the Under Secretary for Rural Development provided the following comments.

The intent of this recommendation is to ensure compliance with debarment screening due diligence using an automated process. Rural Development will include an automated system control in its Common Loan Origination System, which will require debarment screening certifications by loan specialists making loans in order to finalize loan applications.

This automated system control will be accomplished by adding an input field to the Common Loan Origination System's application entry page. The loan specialist's required response to this input field will certify they reviewed EPLS and documented the certification in the applicant's file. Validation of the loan specialist's response will be performed manually.

Deployment of the Common Loan Origination System is expected to occur by September 30, 2015.

### **OIG Position**

We agree with management decision for this recommendation. Normally, final actions on management decisions are to be accomplished within 1 year of management decision. However, in this instance, the proposed automated system will not be deployed until 2015. In the interim, OIG has agreed with Rural Development to the manual control described in Recommendation 22.

### Recommendation to the Chief of the Forest Service

### **Recommendation 24**

Establish and implement a suspension and debarment program for all FS mission areas in addition to the already operating unit established for the agency's timber program.

### **Agency Response**

In its May 21, 2010, response, FS stated the following:

1. The FS concurs with this audit recommendation and will establish and implement a suspension and debarment program for all its mission areas, as applicable. The FS would also like to acknowledge that many of the recommendations in this report require a corporate approach, and the actual corrective actions have not yet been determined by the Department. In the interim, the agency will: Designate a lead to oversee this effort for the entire agency by June 30, 2010,
2. Convene its first meeting with a representative from all affected mission areas by mid August 2010 and begin formulating a plan of action that moves FS toward full implementation of this recommendation,
3. Present the plan to the ELT [FS Executive Leadership Team] for approval by October 29, 2010, and
4. Implement the suspension and debarment program in applicable mission areas by April 29, 2011.

Estimated Completion Date: April 29, 2011

### **OIG Position**

We agree with management decision for this recommendation.

### ***Section 3: Procurement Suspension and Debarment***

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#### **Finding 6: USDA Needs to Implement a More Effective Suspension and Debarment Program for its Procurement Activities**

As we have described in Findings 1 through 5, USDA did not effectively implement nonprocurement suspension and debarment—administrative proceedings that would apply to a wide range of program activities, both financial and nonfinancial. Although there are many reasons—such as lack of centralized organization—for USDA’s ineffective nonprocurement program, at the heart lies a regulatory structure that excludes many program areas from suspension and debarment rules. In contrast, the USDA procurement suspension and debarment program has had both a sound regulatory structure and a centralized office. In spite of this, the Department has not been effective in establishing a rigorous program which results in actual suspensions and debarments. The Secretary assigned responsibility for procurement suspension and debarment to OPPM, but the office provided little guidance or training to agencies’ contracting officials. OPPM stated that suspension and debarment training is included in several procurement courses required for all contracting specialists and officers. Therefore, OPPM did not consider providing this training as part of its responsibility. However, the required training has not been effective in ensuring that the contracting officers implement the suspension and debarment provisions in the FAR. OPPM also did not perform reviews of agencies’ implementation of the procurement suspension and debarment procedures. OPPM officials stated that they did not have sufficient staff to deal with this responsibility; recently, the office assigned one employee to handle procurement suspension and debarment cases as one of a number of collateral duties, but that employee is relatively inexperienced in suspension and debarment actions. As a result of OPPM’s incomplete implementation of the procurement suspension and debarment process, only two procurement debarment cases and no suspension cases were initiated by the Department’s contracting officials between FYs 2004 and 2007.

Suspension and debarment have been part of the Federal procurement system since the 1940’s but lacked a consistent and uniform regulatory structure until the enactment of the FAR in 1983. Subpart 9.4 of the FAR covers suspension and debarment; these regulations are supplemented at USDA through the USDA Acquisition Regulation, 48 CFR, subpart 409.4.<sup>64</sup> OPPM issues the USDA Acquisition Regulation which implements procurement policy for USDA, including suspension and debarment.

USDA needs a vigorous and effective system for procurement suspension and debarment because, as the National Procurement Fraud Task Force Legislation Committee indicated in a July 2007 report, Federal agencies are increasingly reliant on contractors.<sup>65</sup> USDA is no exception. In 2000, USDA used 4,199 contractors; in 2008, it contracted with 15,253. We found, however, that OPPM did little to implement suspension and debarment for the Department’s procurement activities. It had not documented its processing and handling of suspension and debarment actions at the Departmental level, provided procedural guidance on

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<sup>64</sup> See also 48 CFR, part 432.006; 48 CFR, section 423.506; 48 CFR, section 449.106.

<sup>65</sup> “Procurement and Grant Fraud: Legislative and Regulatory Reform Proposals,” by National Procurement Fraud Task Force Legislation Committee, July 9, 2007.

suspension and debarment to the contracting officers in USDA agencies, conducted followup reviews to determine the progress of the agencies' implementation efforts, or trained its own staff and agency officials regarding the procurement suspension and debarment process.

Given this lack of guidance and training from OPPM, USDA's agency contracting staffs did not sufficiently understand suspension and debarment to identify and refer contractors who violated contract terms, failed to perform contracts, or otherwise were not responsible contractors. One senior contracting agency official stated that he had not been involved in a suspension or debarment action or referral during his 30-year career. Thus, from FYs 2004 to 2007, OPPM did not receive any case referrals from its own Management Services.<sup>66</sup> In January 2010, OPPM informed us it provided training to Management Services within the past year.

When we discussed the low level of procurement suspension and debarment implementation, OPPM officials explained that they normally deal with contractors who are preapproved by GSA and are listed on the Central Contractor Registration. The OPPM official assigned part-time to suspension and debarment told us that USDA relies on these contractors, their office has a good working relationship with them, and thus, suspension and debarment has not been an issue. OPPM officials we interviewed believed that there were other procedures in place to deal with any contractor noncompliance outside of suspension and debarment.

We agree that the FAR contains mechanisms such as cure letters for dealing with contractors' non-compliance with regulations. However, in cases of material contract violations and non-compliance or poor performance that is not corrected, the FAR also anticipates use of suspension and debarment.<sup>67</sup> The Secretary delegated responsibility to the chief acquisition officer and senior procurement executive who heads OPPM to serve as the Department debarring official responsible for overseeing and ensuring implementation of the procurement suspension and debarment regulations in the FAR. Thus, the senior procurement executive and OPPM should ensure that the FAR's suspension and debarment provisions are fully implemented to protect USDA and other Federal agencies from repeated abuse by the same contractors.

As an example of how OPPM could have used suspension and debarment to supplement other contract actions, we found that a security contractor working for USDA had failed to pay employees who were assigned to protect USDA and other Federal buildings in Washington D.C. The contractor had not paid employees for a 6-week period and had not paid their benefits for up to 1 year. USDA experienced declining guard service, reaching a point where half of the security guard posts required under the USDA contract were unmanned. After warning the contractor, OPPM terminated his security contract for default because the contractor was not performing due to lack of staff, but took no action to refer the contractor for suspension or debarment case determination. Due to this inaction, the contractor could have obtained other contracts despite its irresponsible employment practices.

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<sup>66</sup> Within OPPM, Management Services, formerly the Procurement Operations Division, provides procurement contracting support for the USDA headquarters office in Washington, D.C., for the National Finance Center in New Orleans, Louisiana, and for the National Information Technical Center in Kansas City, Missouri.

<sup>67</sup> FAR, 48 CFR 9.4.

Since OPPM did not train agency contracting officials on suspension and debarment procedures, agency officials did not always check GSA's EPLS to verify that new contractors were not debarred by other Federal agencies. In four cases, USDA awarded contracts to firms that had been debarred. The Government Accountability Office identified three cases where awards were made after the vendor had been suspended or debarred.<sup>68</sup> We identified one additional case where USDA awarded a contract to a company debarred by the Air Force. The four cases involved parties that had been debarred for reasons such as Securities and Exchange Commission violations, fraudulent labeling and environmental violations, and failure to disclose a conflict of interest.

We discussed GSA's suspension and debarment activities with its suspension and debarment official. Unlike OPPM, GSA has actively used procurement suspension and debarment to ensure compliance from large and well-established contractors. In one such instance, GSA provided a "show-cause" letter to a contractor that required the contractor to explain why it should not be suspended due to its noncompliance with Federal travel regulations. GSA's warning convinced the contractor in question to correct its problems so that it could avoid the consequences of regulatory suspension actions. USDA could benefit from GSA's experience and use the suspension and debarment regulations as a tool to improve contractor compliance.

Since our fieldwork, OPPM has begun moving toward implementing its existing authorities. One OPPM official attended formal suspension and debarment training in January 2008, and the office conducted training for FS' procurement policy staff in October 2008. As stated above, OPPM officials told us that within the last year they provided training to their Management Services staff. However, OPPM has not yet provided training to USDA's heads of contracting authority, even though OPPM holds regular monthly meetings for these Departmental contracting officials who are responsible for providing suspension and debarment referrals to OPPM.

In November 2007, OPPM sent out notices of proposed debarments to nine individuals related to convictions for fraud and bribery in the bidding process for ARS contracts. We note that OPPM did not suspend the individuals in these cases in response to their earlier indictments, even though the FAR provides that an indictment of such crimes constitutes adequate evidence for suspensions.<sup>69</sup> The convictions, upon which the proposed debarments were based, occurred as early as 2003. OPPM's failure to move to debar in a more timely manner allowed convicted individuals to do business with the Government for a longer period of time. Debarment actions due to a conviction need to be taken as soon as possible following the conviction. The passage of time after the conviction can eventually give rise to legal challenge to the debarment action based on a "staleness" argument, where the offending conduct occurred so far in the past that it has questionable bearing on the individual's present responsibility.<sup>70</sup>

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<sup>68</sup> "EPLS: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds" (Report number GAO-09-174, issued February 26, 2009).

<sup>69</sup> 48 CFR 9.407-2(b).

<sup>70</sup> *The Practitioner's Guide to Suspension and Debarment, Third Edition, Committee on Debarment and Suspension Section of Public Contract Law*, American Bar Association, page 194, 195.

Also, the Department needs to make improvements in its suspension and debarment program in terms of documenting, processing, and handling of debarments; procedural guidance to contracting officials; and training. Because of the significant similarities between the procurement and nonprocurement regulations and their reciprocal effect, the Department should consider moving both functions into the same centralized division described in Finding 5. The OMB guidance issued in 1987 specifically encouraged agencies to integrate their administration of these complementary debarment and suspension programs.<sup>71</sup> Many other agencies, like EPA, have followed this model. Such centralization of both functions would provide efficiencies in terms of staffing and training.

### Recommendations to the Assistant Secretary for Departmental Management

#### **Recommendation 25**

Issue a secretarial directive to all agencies directing that they fully implement procurement suspension and debarment actions according to the FAR, the President's Executive orders, and OMB guidance.

#### **Agency Response**

In its May 14, 2010, response, OPPM stated that it concurred with the recommendation.

**OPPM Actions Planned and Taken:** In support of a vibrant suspension and debarment program in the public interest for the Government's protection, OPPM has initiated debarment and suspension training for the procurement staff of USDA agencies. OPPM will continue the training with all agencies on a regular basis. Training will include a discussion of performance and integrity issues regarding agency contractors and will stress the importance of debarment and suspension as a Government-wide practice. OPPM will also require all agencies to establish a suspension and debarment coordinator to establish and maintain internal agency procedures, provide a point of contact for OPPM, and monitor that proper practices are being followed.

#### **OIG Position**

Although we agree with the actions taken and planned, OPPM's response does not address the recommended action. A secretarial directive to all agencies is needed to emphasize the Department's strong support for implementing procurement suspension and debarment to protect the resources of USDA and other Federal agency programs.

#### **Recommendation 26**

Assign responsibility to the centralized division, established to process nonprocurement suspension and debarment actions for all USDA agencies, to also process all procurement suspension and debarment actions for all USDA agencies.

#### **Agency Response**

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<sup>71</sup> See 52 Federal Register 20360, page 11, May 29, 1987.

In its May 14, 2010, response, OPPM stated the following:

OPPM concurs with the recommendation on the condition that the differences between the FAR and the nonprocurement rule are acknowledged and that the FAR and AGAR continue to be used as the authority for suspensions and debarments regarding procurements.

### **OIG Position**

We agree with OPPM's management decision for this recommendation and expect actions to implement it will be appropriately modified to work with the alternative response offered to Recommendation 18.

### **Recommendation 27**

In accordance with control standards and guidance issued by the centralized division and those standards outlined in the FAR, direct OPPM and Departmental contracting officials to develop and implement internal controls to identify and refer cases warranting consideration for procurement suspension and debarment actions to the centralized division.

### **Agency Response**

In its May 14, 2010, response, OPPM stated the following:

OPPM concurs with the recommendation on the condition that the Heads of Contracting Activities (or their designees) are included in the process and so cited.

### **OIG Position**

We agree with OPPM's management decision for this recommendation and expect actions to implement it will be appropriately modified to work with the alternative response offered to Recommendation 18.

## ***Scope and Methodology***

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This audit evaluated USDA's implementation of suspension and debarment regulations for FYs 2004 through 2007. We reviewed USDA agencies' business plans and management's internal control structures for implementing suspension and debarment regulations. We obtained records of indictments and convictions of USDA program recipients from OIG's Office of Investigations for this time period, and evaluated what administrative actions the agencies had taken in response. Specifically, we determined if Government programs and procurement contracts were being protected from harm and dollar losses due to nonresponsible parties and habitual abusers.

Audit fieldwork was performed in Washington, D.C., at the Departmental offices of OCFO, OPPM, OGC, and at the agency's headquarters offices of RMA, FSA, Rural Development, and FNS. Audit fieldwork was performed from July 2007 through April 2009. We updated the report to incorporate recently available statistics through March 2010 and the Department's new interim final rule published on May 25, 2010.

Apart from our site visits, we submitted questionnaires to AMS, ARS, APHIS, NIFA, FSIS, FAS, FS, GIPSA, and NRCS. The questionnaires were used to establish a baseline of data about the Department's implementation of suspension and debarment. Followup interviews were conducted with these agencies' officials to obtain additional information and verify the accuracy of responses.

We selected USDA agencies for review because they were included on OIG's Office of Investigation's list of agencies whose program participants had been convicted of statutory program violations. These agencies included AMS, APHIS, ARS, NIFA, FAS, FNS, FSA, FSIS, GIPSA, NRCS, Rural Development (including RBS, RHS, and RUS), and RMA. We also selected agencies with responsibilities for the Department's major mission areas to ensure comprehensive coverage of the Department's suspension and debarment activities. Finally, we also selected agencies based on their levels of suspension and debarment activity:

- FSA was selected because of its farm program mission and because it had no nonprocurement suspension and debarment activity.
- Rural Development was selected due to its rural development mission and also because the agency is unique in having three suspension debarment officials.
- FNS was selected because of its food aid entitlement programs.
- FAS was selected due to its international programs.
- AMS, ARS, APHIS, NIFA, FSIS, GIPSA, and NRCS were chosen due to their scientific, inspection and grading, marketing, and natural resources program missions.
- FS was selected due to its forestry and rangeland mission activities and the fact that its suspension and debarment official was below the agency administrator level. The Chief of the FS delegated suspension and debarment official responsibility to the Associate Deputy Chief, National Forest System.

- RMA was selected because it operates the Department’s crop insurance program and also because it had the highest level of suspension and debarment activity in the Department.
- OCFO and OPPM were selected for review due to their responsibility for overseeing agencies’ implementation of suspension and debarment regulations for nonprocurement and procurement transactions, respectively.

To accomplish our audit objectives, we performed the following audit steps and procedures:

- At OCFO and OPPM, we interviewed agency personnel to obtain any written guidance to USDA agencies in implementing suspension and debarment; identified any training provided to agencies; determined if any oversight reviews of the suspension and debarment process were performed; and obtained Departmental statistics on the number of suspension and debarment actions completed from FYs 2004 through 2007.
- At RMA, FSA, Rural Development, and FNS, we interviewed agency personnel to obtain the agencies’ business plans and management’s internal control structures for implementing the suspension and debarment regulations; identified any guidance or training received in implementing the suspension and debarment regulations; determined programs exempted from suspension and debarment; obtained agencies’ statistics on the number of suspension and debarment actions completed from FYs 2004 to 2007; and determined what actions had been taken on cases referred by OIG Investigations.
- We interviewed officials from other Federal departments, including OMB, EPA, Departments of Transportation and Interior, the National Aeronautics and Space Administration, the Postal Service OIG, SBA, GSA, and the chairman of the Interagency Suspension and Debarment Committee, to determine Governmentwide best practices and how USDA’s suspension and debarment implementation compared to other Federal agencies.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence contained in our report provides a reasonable basis for our findings and conclusions.

## **Abbreviations**

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| AMS   | Agricultural Marketing Service                          |
| APHIS | Animal and Plant Health Inspection Service              |
| ARS   | Agricultural Research Service                           |
| CCC   | Commodity Credit Corporation                            |
| CFR   | Code of Federal Regulations                             |
| DLS   | Direct Loan System                                      |
| EPA   | Environmental Protection Agency                         |
| EPLS  | Excluded Parties Listing System                         |
| FAR   | Federal Acquisition Regulations                         |
| FAS   | Foreign Agricultural Service                            |
| FFAC  | Federal Financial Assistance Committee                  |
| FS    | Forest Service  |
| FNS   | Food and Nutrition Service                              |
| FSA   | Farm Service Agency                                     |
| FSIS  | Food Safety and Inspection Service                      |
| FY    | Fiscal Year   |
| GIPSA | Grain Inspection, Packers and Stockyards Administration |
| GSA   | General Service Administration                          |
| NIFA  | National Institute of Food and Agriculture              |
| NRCS  | Natural Resources Conservation Service                  |
| OCFO  | Office of Chief Financial Officer                       |
| OGC   | Office of the General Counsel                           |
| OIG   | Office of Inspector General                             |
| OMB   | Office of Management and Budget                         |
| OPPM  | Office of Procurement and Property Management           |
| RBS   | Rural Business-Cooperative Service                      |
| RHS   | Rural Housing Service                                   |
| RMA   | Risk Management Agency                                  |
| RUS   | Rural Utility Service                                   |
| SBA   | Small Business Administration                           |
| SNAP  | Supplemental Nutrition Assistance Program               |
| USDA  | United States Department of Agriculture                 |

## ***Exhibit A: History of USDA's Implementation of Federal Suspension and Debarment Procedures***

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Debarment and suspension are tools used by the Government to ensure that it does business with only responsible persons and entities. A debarment is an action taken to exclude persons or entities from doing business with the Government generally for periods up to 3 years for certain causes, such as commission of a fraud or certain other crimes, or violations of certain statutes. Suspension is a temporary action pending completion of an investigation or legal proceeding. These remedies have been part of the Federal procurement system since the 1940's but lacked a consistent and uniform regulatory structure until the enactment of the FAR in 1983. Subpart 9.4 of the FAR covers suspension and debarment; these regulations are supplemented at the Department of Agriculture (USDA) through the USDA Acquisition Regulation, 48 CFR Subpart 409.4.<sup>72</sup>

Recognizing that a significant part of Federal monies are also expended on nonprocurement activities and programs such as grants, loans, and loan guarantees, and other Federal assistance programs, efforts were also undertaken to incorporate the suspension and debarment remedies into the nonprocurement area. In 1986, the President signed an Executive order directing Federal Departments and agencies to participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits. The President authorized OMB to issue guidelines to Executive Departments and agencies governing which programs and activities are covered by the order, and setting forth other details for effective administration of the guidelines. In May 1987, the OMB implemented the Executive order with its issuance of guidelines for nonprocurement suspension and debarment. In May 1988, 27 agencies, not including USDA, published a common rule that set forth a uniform system of suspension and debarment in the nonprocurement area. USDA's nonprocurement suspension and debarment rule was published January 30, 1989, and became effective March 1, 1989.<sup>73</sup> In an August 16, 1989, Executive order, the President made suspension and debarment procedures under the FAR and the nonprocurement Common Rule reciprocal.

The nonprocurement regulations parallel the FAR procurement rules on significant process issues such as notice, opportunity to contest, and requirements for cause to exist. Both suspended and debarred contractors and program participants are listed on GSA's EPLS. Federal agencies are required to consult this listing before granting new benefits or issuing new contracts so that they may be certain they are dealing with responsible persons and entities.

In its May 1987 guidelines for suspension and debarment, OMB stated the common rule was to cover all domestic assistance nonprocurement transactions including grants, cooperative

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<sup>72</sup> See also 48 CFR, part 432.006; 48 CFR, section 423.506; 48 CFR, section 449.106.

<sup>73</sup> Apart from the March 1, 1989, rule that provided administrative suspension and debarment authority, many USDA agencies also have statutory authority to sanction, fine, and disqualify those who abuse their programs. For example, RMA may disqualify those who intentionally violate its crop insurance statutes. Disqualification under such authority is limited to the particular program and agency in which the abuse occurred. In contrast, suspension and debarment have Governmentwide effect. Nevertheless, disqualification should be listed on the GSA's EPLS, which will give effective notice to other agencies of the required disqualification. The basis for the listing is 7 CFR 3017.515, 520.

agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreement subawards, subcontracts, and transactions at any tier that are charged as direct or indirect costs.

Transactions that are not covered include statutory entitlements or mandatory awards; direct awards to foreign government entities; benefits to an individual as a personal entitlement; Federal employment; incidental benefits derived from ordinary Governmental operations; permits, licenses, and certificates issued to regulate public health; transactions pursuant to national or agency-recognized emergencies or disasters; and other transactions where the application of the guidelines would be prohibited by law.

In October 1987, 20 Executive Departments published a proposed common rule for implementing OMB's guidelines. Instead of joining the proposed common rule, USDA published its proposed rule in a different format. USDA excluded from coverage such areas as all international programs, the three corporations within the Department, and certain specific types of agreements such as those found in the 1985 Farm Bill relating to agricultural research, extension, and teaching activities.

On March 7, 1988, OMB provided all agencies with a draft memorandum amending its guidelines and requiring participation in the final common rule. With regard to coverage, OMB indicated that the guidelines would apply to "all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs." (OMB published this definition of coverage in its final rule for nonprocurement on January 30, 1989.) Because such expanded coverage would include all nonprocurement transactions, and because USDA agencies were concerned that the inclusion of additional transactions could adversely affect various international trade programs, regulatory programs, and resources use programs, USDA decided to limit the scope of its final rule to domestic assistance transactions.

OMB initially objected to USDA's proposed rule because of its limited coverage and other deviations from OMB guidelines, including a provision that would have exempted USDA agencies from considering the suspension and debarment actions of other agencies before making awards. On May 26, 1988, 27 Executive Departments and agencies, not including USDA, published a final common rule and OMB adopted this rule as its final guidelines. Over the next 4 months, USDA and OMB held extensive negotiations to reconcile their differences. Finally, OMB and USDA negotiated an agreement whereby USDA would, in effect, retain its desired exclusions, but would adopt certain language used by other agencies in their rules to exclude specific programs. Based on this agreement, and with OMB approval, USDA joined other Federal agencies in adopting the nonprocurement common rule by publishing its final suspension and debarment rule on January 30, 1989. The rule became effective March 1, 1989.

A second Executive order in August 1989 provided for the consolidation of the procurement and nonprocurement systems.<sup>74</sup> The Executive order defined nonprocurement activities as "all programs and activities involving Federal financial and nonfinancial assistance and benefits, as

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<sup>74</sup> Executive Order 12689, dated August 16, 1989.

covered by Executive Order No. 12549 and OMB guidelines implementing that order.”<sup>75</sup> In communications with USDA subsequent to the issuance of the second Executive order, OMB once again strongly encouraged USDA to reconsider its rule coverage. For example, in a May 2, 1990, memorandum to the OGC, OMB requested USDA reconsider a proposed rule by FAS because the rule was inconsistent with the Executive order and the common rule.

During this period, OIG conducted an audit of USDA’s implementation of suspension and debarment.<sup>76</sup> OIG found that USDA agencies had not adequately established a system for debarment and suspension for nonprocurement program participants—13 of 18 agencies reviewed had not implemented a system for nonprocurement. This was due to agency officials either not having a complete understanding of the requirements of USDA’s Title 7, CFR, part 3017, that became effective March 1, 1989; interpreting the regulations to mean that their programs were excluded; or placing a low priority on completing this task. Five of 18 agencies reviewed (AMS, APHIS, FSA then a part of the Agricultural Soil Conservation Service agency, FNS, and FSIS) excluded all their nonprocurement programs based on interpretations by OGC. However, OIG found no evidence OGC had issued a formal written opinion regarding these exclusions.

During a series of program reviews, the agencies and OGC concluded that some grants and cooperative agreements were covered transactions under the suspension and debarment rules; however, the agencies had not implemented the required system even for these transactions. Eleven USDA agencies did not obtain certifications regarding debarment and suspension prior to contract award to ensure the agencies did no business with entities already suspended and debarred by other Federal agencies.

In our June 1990 report, OIG recommended the agency officials reevaluate their policies for excluding nonprocurement programs from suspension and debarment implementation, provide the specific statutory basis to support program exclusions, and implement suspension and debarment for programs not excluded. Following the report, OIG worked with OCFO to reach agreements on the report’s recommendations. OCFO agreed to have the agencies reevaluate their program exclusions and have OGC review their determinations.

After the agencies’ reviews, in an August 27, 1990, letter, USDA’s General Counsel informed the Assistant Secretary for Departmental Management that, by incorporating the OMB guidelines in the Executive order, the President adopted the expansive interpretation of OMB regarding nonprocurement suspension and debarment. The General Counsel recommended:

Based on the definition of “nonprocurement activities” in Executive Order 12689, it is clear that the President has directed Executive departments and agencies to establish a single, Governmentwide debarment and suspension system that includes all nonprocurement activities as covered by the OMB guidelines under Executive Order No.

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<sup>75</sup> Executive Order 12689, Section 1(b) defines nonprocurement activities to mean, “all programs and activities involving Federal financial and nonfinancial assistance and benefits, as covered by Executive Order 12549 and OMB guidelines implementing that order.” Section 3 of the Executive order authorizes OMB to assist agencies in resolving differences in existing procurement and nonprocurement debarment and suspension regulations and to establish a cut-off date for the resolution of such differences.

<sup>76</sup> USDA OIG Report 50099-22-At, “Audit of USDA Debarment and Suspension Activities and Drug-Free Workplace Compliance,” issued June 25, 1990.

12549. Consequently, USDA should modify its debarment and suspension regulations by deleting the paragraph limiting its coverage to domestic assistance. Further, USDA should work with OMB to identify any additional changes in the government-wide common rule, including additional exceptions that will be necessary to implement Executive Order 12689.

In February 1991, the Assistant Secretary for Departmental Management submitted the suspension and debarment scope issue to the Department's Policy Coordination Council for a policy decision. The Council was made up of the Department's Under Secretaries and Assistant Secretaries.

Later in a December 20, 1991, letter, the Acting Secretary provided USDA's position on the rule to the OMB Director. The comments were made in response to OMB's request for comments on its draft proposed amendments to the nonprocurement common rule and FAR suspension and debarment provisions to establish reciprocal Governmentwide effect for suspension and debarment actions for both procurement and nonprocurement activities. The amendments were required by the President's 1989 Executive order. The Acting Secretary remarked that,

Because of our concern that the application of the Common Rule to certain USDA programs would have unintended detrimental effects that would outweigh the benefits of the nonprocurement debarment and suspension system, USDA limited the scope of its current nonprocurement debarment and suspension rule to USDA domestic assistance covered transactions. While USDA is strongly supportive of every executive branch effort to curb fraud, waste, and abuse in Federal programs, we continue to be concerned that the expansion in the coverage of the USDA rule that would result from USDA adoption of the common rule, as proposed for amendment, would likewise have such detrimental effects.

The Acting Secretary provided the following detailed concerns.

1. Commercial Export Programs – The Acting Secretary recommended exclusion of the export promotion, market development, and assistance programs from coverage under the rule due to potential adverse impacts on foreign sales of United States agricultural products.
2. Statutory Entitlements and Mandatory Awards – The Acting Secretary understood that the intent of the change was to provide the Government an opportunity for some administrative actions to address debarred and suspended principals who might participate in entitlement transactions, short of denying the entitlements themselves to eligible recipients. However, she found this proposed change to be confusing and unnecessarily burdensome since entitlements and mandatory awards may not be denied.
3. Inspections and Regulatory Programs – The Acting Secretary supported adding new exceptions to the rule relating to transactions under regulatory programs in the interest of public health and safety, and the receipt of public health and safety inspection services. She believed that any disruption would be so detrimental to the nation that the proposed new exceptions should be expanded to include surveillance and control activities, agricultural quarantine activities, and agricultural indemnification programs.

4. Industries with a Limited Number of Interrelated Entities – Finally, the Acting Secretary raised a point concerning the potential effect of a single debarment on industries with a limited number of interrelated entities, e.g., the grain trade where daily buying and selling among members would be imperiled by a single debarment, or national and international consortia of companies engaged in research and development and engineering highly technical systems or products.

The Acting Secretary closed her letter by noting that the common rule had had limited application to the programs of USDA to date.

In September 1995, following extended consultations with OMB, USDA revised its nonprocurement common rule. It removed the provision that limited its coverage of the rule to domestic assistance transactions. However, the Department added several additional specific program exceptions deemed to be in the public interest. These included producer entitlements, animal predator control, grading and inspections services, timber export, and the issuance of licenses, permits, and certificates in the interest of animal and plant health and safety. USDA excluded any transaction under the Department's conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.

In the draft proposed rule, USDA stated that these exemptions were necessary because for certain USDA programs, the benefits resulting from full application of the rule would be outweighed by potential programmatic harm. Thus, USDA excluded the above programs to protect agricultural producers and the public's health and safety. However, the rule stated that while the Department proposed additional exceptions from coverage, the agencies' programs were subject to existing statutes and regulations that provided exclusionary actions that may be imposed by USDA for improper conduct.

In 2004, the regulation was converted to a question and answer format to make it more understandable to, and usable by, the public. Also, as part of the revision, USDA removed a policy statement formerly in the regulation that emphasized that USDA would suspend or debar under the nonprocurement common rule to protect other Federal agencies when it excluded program recipients under USDA program statutes. The regulation has remained essentially unchanged since the 2004 revision.

At least in part, USDA's exclusions in the 1990s—especially exclusions relating to agricultural producers—arose due to the farming crisis of the 1980s. Many farmers lost their land during this period and rural populations decreased as farmers left the land in search of jobs. By 1988, USDA's Farmers Home Administration had to write off nearly one third of \$8.8 billion in delinquent farm debt. Full implementation of the Governmentwide suspension and debarment procedures in the agricultural sector as it was being affected by these crises was resisted by members of Congress and many agency officials concerned for the wellbeing of farmers across the country.

## **USDA'S**

**Office of the Chief Financial Officer**

**Departmental Management, Office of Procurement and  
Property Management**

**Rural Development**

**Forest Service**

**Farm Service Agency**

**Food and Nutrition Service**

## **RESPONSES TO AUDIT REPORT**

Office of the Chief Financial Officer  
Response



United States  
Department of  
Agriculture

Office of the Chief  
Financial Officer

1400 Independence  
Avenue, SW

Washington, DC  
20250

TO: Gil Harden  
Assistant Inspector General  
Office of Inspector General

THROUGH: Pearlie S. Reed -S- May 19, 2010  
Assistant Secretary  
for Administration

FROM: Jon M. Holladay -S- May 14, 2010  
Acting Chief Financial Officer

SUBJECT: Office of the Chief Financial Officer's Comments on Draft Audit  
Report No. 50601-14-At, "Effectiveness and Enforcement of  
Suspension and Debarment Regulations in the U.S. Department  
of Agriculture."

The Office of the Chief Financial Officer (OCFO) is responding to your request for management response on the draft report. We have some concerns with the recommendations in the report as follows:

General Comments:

We do not concur with the recommendations for establishing a centralized division that specializes in suspension and debarment. We believe agency program managers working with the Regional Offices of the General Counsel are uniquely qualified to make determinations on program violations to decide whether suspension and debarment is appropriate. We plan to provide Department-wide guidance, agency staff training, program monitoring and to require reporting by agency suspension and debarment officials to address the Office of Inspector General's concerns.

OCFO is publishing an interim rule establishing a new part 417 on nonprocurement debarment and suspension that adopts and supplements the Office of Management and Budget guidance. Part 417 of 2 CFR replaces the existing U.S. Department of Agriculture (USDA) implementation of the Governmentwide common rule on nonprocurement debarment and suspension at 7 CFR part 3017.

USDA also made adjustments in the interim rule to its current exclusions from covered transactions that will address the findings in this report. This interim rule also implements Section 14211 of the Food, Conservation, and Energy Act of 2008, P.L. 110-246 (7 U.S.C. 2209j), which requires the Secretary to debar permanently from participation in USDA programs those convicted of having knowingly committed fraud in USDA programs.

The management responses for recommendation numbers 1-6, and 15-20 are attached.

If you have any questions or need additional information, please contact my office at (202) 720-5539 or call Kathy Donaldson, at (202) 720-1893.

Thank you for the opportunity to provide management responses on the draft report.

Attachments

**Audit Recommendation No 1:**

Issue a secretarial directive to all agencies, directing them to fully implement nonprocurement suspension and debarment, according to the President's Executive orders and OMB's guidance. Clarify, in that directive, that those who abuse transactions excluded from covered transaction status in the suspension and debarment regulations should still be considered for suspension and debarment to protect other Federal programs that are covered by the regulations.

**Management Response:** We concur.

The Secretary will issue a memo to all agencies providing clarification that those who abuse excluded transactions should be suspended and debarred. OCFO will issue a new Departmental regulation on Federal Financial Assistance that will require full implementation of nonprocurement suspension and debarment requirements and clarify that those who abuse excluded transactions should be suspended and debarred.

**Date Corrective Action will be Completed:** 7/31/2010

|   |           |
|---|-----------|
| Revised regulation approved by the Secretary of Agriculture | 3/24/2010 |
| Revised regulation published in Federal Register            | 5/31/2010 |
| Issue Secretary's memorandum                                | 7/31/2010 |

**Audit Recommendation No 2:**

Direct USDA agency administrators to review their program statutes and operations to identify program transactions that are excludable from suspension and debarment implementation. For programs transactions to be excluded from suspension and debarment, provide adequate statutory language justifying the exclusions or acceptable program rationale supporting their noncovered status.

**Management Response:** We concur.

The Office of the Chief Financial Officer and Office of the General Counsel fully reviewed, with applicable agencies, all of USDA’s suspension and debarment not covered transactions in the latest round of regulation updates. All transactions that remain not covered by suspension and debarment have been justified. As a result of this review, two types of transactions were removed from the listing. They are:

- With respect to the Department of Agriculture's export and foreign assistance programs, any transaction below the primary tier covered transaction other than a nonprocurement transaction under the Market Access Program between a nonprofit trade association or state regional group and a U.S. entity; and
- Any transaction under the Department of Agriculture's conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.

**Date Corrective Action will be Completed:** 5/31/2010

|   |           |
|---|-----------|
| Revised regulation approved by the Secretary of Agriculture | 3/24/2010 |
| Provide justifications for all noncovered transactions      | 5/31/2010 |
| Revised regulation published in Federal Register            | 5/31/2010 |

**Audit Recommendation No 3:**

As part of Departmental efforts to fully implement the authorities, finalize USDA’s new rule concerning nonprocurement suspension and debarment. This should include the removal of noncovered programs and program transactions from USDA’s suspension and debarment rule unless they are adequately justified by program statutory language.

**Management Response:** We concur.

The Secretary of Agriculture has approved the revised rule and it is awaiting publication in the Federal Register. The Office of the Chief Financial Officer and Office of the General Counsel fully reviewed, with applicable agencies, all of USDA’s suspension and debarment not covered transactions in the latest round of regulation updates. All transactions that remain not covered by suspension and debarment have been justified. As a result of this review, two types of transactions were removed from the listing. They are:

- With respect to the Department of Agriculture's export and foreign assistance programs, any transaction below the primary tier covered transaction other than a nonprocurement transaction under the Market Access Program between a nonprofit trade association or state regional group and a U.S. entity; and
- Any transaction under the Department of Agriculture's conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.

**Date Corrective Action will be Completed:** 5/31/2010

Revised regulation approved by the Secretary of Agriculture  
Revised regulation published in Federal Register

3/24/2010  
5/31/2010

**Audit Recommendation No 4:**

Require timely referrals by agency officials of indicted and convicted program violators to suspension and debarment officials for case consideration. Also, require USDA agency debarring officials to prepare an annual report of suspension and debarment actions taken in cases of indictments and convictions, including reasons why no suspension and debarment action was taken for indictment and conviction cases.

**Management Response:** We concur.

The Secretary will issue a memo to all agencies requiring timely referrals by agency officials of indicted and convicted program violators to suspension and debarment officials for case consideration. The letter will also require agencies to justify not taking suspension and debarment action in quarterly reports. OCFO will develop supplementary guidance that will be issued as a CFO bulletin.

**Date Corrective Action will be Completed:** 1/31/2011

Issue memorandum  
Issue CFO Bulletin

7/31/2010  
9/30/2010

**Audit Recommendation No 5:**

Require the agencies to develop performance indicators and measures to assess the effectiveness of the agencies' implementation of the suspension and debarment regulations. Agencies should report their performance to OCFO.

**Management Response:** We concur.

The Secretary will issue a memo to all agencies creating the Debarment and Suspension Council and reestablishing the Federal Financial Assistance Committee (FFAC). The letter will also require reporting of performance indicators. The council and committee will have participation from all agencies and will develop recommended performance indicators and a required reporting schedule. OCFO will develop supplementary guidance that will be issued as a CFO bulletin.

**Date Corrective Action will be Completed:** 1/31/2011

|   |            |
|---|------------|
| Hold first FFAC meeting                             | 4/29/2010  |
| Hold first Debarment and Suspension Council meeting | 6/30/2010  |
| FFAC develops performance indicators                | 7/31/2010  |
| Issue Secretary's memorandum                        | 7/31/2010  |
| Issue CFO Bulletin                                  | 9/30/2010  |
| First performance metrics are reported to OCFO      | 10/30/2010 |

**Audit Recommendation No 6:**

Provide Departmental clarification and guidance concerning the differences between Governmentwide suspension and debarment actions and internal agency statutory disqualification actions and how the actions are to be used in response to program violations. Require the agencies to report their statutory disqualification actions in the GSA EPLS in accordance with USDA's suspension and debarment regulation.

**Management Response:** We concur.

The Secretary will issue a memo to all agencies clarifying the differences between Governmentwide suspension and debarment actions and internal agency statutory disqualifications actions. The memorandum will also require agencies to report their statutory disqualification actions in the General Services Administration Excluded Parties List System in accordance with USDA's suspension and debarment regulation.

**Date Corrective Action will be Completed:** 7/31/2010

**Audit Recommendation No 15:**

Require USDA scientific, inspection and grading, marketing, and natural resources agencies to reassess their program transactions non covered by the suspension and debarment regulations, and amend the proposed final rule for nonprocurement suspension and debarment to reclassify transactions that are currently considered noncovered and are not adequately justified. For program transactions to be excluded from suspension and debarment, provide adequate statutory language justifying the exclusions or acceptable program rationale supporting their noncovered status.

**Management Response:** We do not concur.

The Office of the Chief Financial Officer and Office of the General Counsel fully reviewed, with applicable agencies, all of USDA’s suspension and debarment not covered transactions in the latest round of regulation updates. All transactions that remain not covered by suspension and debarment have been justified. As a result of this review, two types of transactions were removed from the listing. They are:

- With respect to the Department of Agriculture's export and foreign assistance programs, any transaction below the primary tier covered transaction other than a nonprocurement transaction under the Market Access Program between a nonprofit trade association or state regional group and a U.S. entity; and
- Any transaction under the Department of Agriculture's conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.

**Date Corrective Action will be Completed:** 5/31/2010

|   |           |
|---|-----------|
| Revised regulation approved by the Secretary of Agriculture | 3/24/2010 |
| Provide justifications for all noncovered transactions      | 5/31/2010 |
| Revised regulation published in Federal Register            | 5/31/2010 |

**Audit Recommendation No 16:**

Direct the administrators of USDA's scientific, inspection and grading, marketing, and natural resources agencies to issue guidance to agency officials clarifying that those who abuse noncovered entitlement programs or mandatory awards are subject to consideration for suspension and debarment from other Federal programs covered by suspension and debarment.

**Management Response:** We concur.

The Secretary will issue a memo to all agencies providing clarification that those who abuse noncovered entitlement programs or mandatory awards are subject to consideration for suspension and debarment from other Federal programs covered by suspension and debarment.

**Date Corrective Action will be Completed:** 7/31/2010

Issue Secretary's memorandum

7/31/2010

**Audit Recommendation No 17:**

Provide training and guidance to USDA scientific, inspection and grading, marketing, and natural resources agency officials regarding the suspension and debarment regulations. Require the agencies to establish controls and procedures to identify fraud and misconduct related to their programs and to refer for suspension and debarment determination indicted, convicted, and other nonresponsible program violators. Perform followup reviews to ensure implementation of the regulations.

**Management Response:** We concur.

The Debarment and Suspension Council will develop Departmental debarment and suspension training to be posted on Aglearn. The Debarment and Suspension Council will also develop and require reporting of performance indicators. The Debarment and Suspension Council will use the performance indicators to ensure implementation of the regulations and determine when additional actions may be required. Finally, the Secretary's memorandum will include guidance regarding the suspension and debarment regulations.

**Date Corrective Action will be Completed:** 10/30/2010

|  |            |
|--|------------|
| Issue Secretary's memorandum             | 7/31/2010  |
| FFAC develops performance indicators     | 7/31/2010  |
| Performance metrics are reported to OCFO | 10/30/2010 |

**Audit Recommendation No 18:**

Establish a centralized division that specializes in suspension and debarment; provides coordination, guidance, and training to all relevant agency officials; promotes consistency in handling the Department's suspension and debarment cases; and processes case referrals for all actions. Provide appropriate staffing resources, funding, and training to the centralized division to enable it to effectively and efficiently carry out its responsibilities.

**Management Response:** We do not concur.

USDA will establish the Debarment and Suspension Council (Council), and reestablish the Federal Financial Assistance Committee (Committee). The Committee will provide coordination, guidance and training to all relevant agency officials and promote consistency in handling the Department's suspension and debarment cases. The Council will provide executive oversight over the debarment and suspension process while the Committee will provide working level knowledge to implement decisions and make recommendations to the Council. However referrals for debarment and suspension actions will be conducted by agency program staff. USDA Federal financial assistance programs are diverse and complex. There is impressive program and legal expertise at the agency level relative to each program, making it inappropriate to consolidate this activity into a centralized unit. As a compensating control, the Council and Committee will develop performance metrics to be used in monitoring program compliance with debarment and suspension requirements.

**Date Corrective Action will be Completed:** 6/30/2011

|   |           |
|---|-----------|
| Hold first FFAC meeting                             | 4/29/2010 |
| Hold first Debarment and Suspension Council meeting | 6/30/2010 |

**Audit Recommendation No 19:**

Require the centralized suspension and debarment division to develop and promulgate Departmental policy and an internal control plan for identifying cases to be referred for suspension and debarment consideration, and assuring suspended and debarred entities do not do business with USDA.

**Management Response:** We concur.

The Debarment and Suspension Council will develop a training program, performance indicators and policy that will be issued as a CFO bulletin. In addition, each agency will be required to develop an internal review plan to identify cases to be referred for suspension and debarment consideration.

**Date Corrective Action will be Completed:** 1/31/2011

|  |            |
|--|------------|
| Hold first Debarment and Suspension Council meeting              | 6/30/2010  |
| Performance indicators developed                                 | 7/31/2010  |
| Agencies provide internal review plan                            | 8/30/2010  |
| CFO Bulletin issued  | 9/30/2010  |
| Performance metrics are reported to OCFO                         | 10/30/2010 |
| Departmental debarment and suspension training posted to Aglearn | 11/30/2010 |

**Audit Recommendation No 20:**

Amend the Department's suspension and debarment regulations to require that the centralized division monitor how the agencies implement suspension and debarment, including establishing agency performance indicators and measures, and reporting requirements; identifying and correcting any problems detected; and reporting annually on agencies' performance in implementing the suspension and debarment authorities to the OCFO.

**Management Response:** We concur.

The Debarment and Suspension Council will develop a training program, performance indicators and policy that will be issued as a CFO bulletin.

**Date Corrective Action will be Completed:** 1/31/2011

|  |            |
|--|------------|
| Hold first Debarment and Suspension Council meeting              | 6/30/2010  |
| Performance indicators developed                                 | 7/31/2010  |
| CFO Bulletin issued  | 9/30/2010  |
| Performance metrics are reported to OCFO                         | 10/30/2010 |
| Departmental debarment and suspension training posted to Aglearn | 11/30/2010 |

Departmental Management, Office of Procurement  
and Property Management

**May 21, 2010**

TO: Gil H. Harden  
Assistant Inspector General  
For Audits

FROM Pearlle Reed //s//  
Assistant Secretary  
For Administration

SUBJECT Office of Inspector General Draft Audit: Effectiveness and Enforcement of  
Suspension and Debarment Regulations in the U.S.  
Department of Agriculture

The response from DM OPPM to the draft audit report is attached. Please feel free to direct any questions related to the content of this response to Donna Calacone at 202-205-4036 or at [donna.calacone@dm.usda.gov](mailto:donna.calacone@dm.usda.gov)

Attachment

**Departmental Management  
Office of Procurement and Property Management**

The Office of Procurement and Property Management (OPPM) submits these comments in response to the draft audit report issued by the USDA Office of Inspector General titled “*Effectiveness and Enforcement of Suspension and Debarment Regulations in the U.S. Department of Agriculture*,” dated April 14, 2010.

**DM OPPM Comments on Relevant OIG Recommendations:**

**a. Recommendation 25:** OPPM concurs with the recommendation.

**OPPM Actions Planned and Taken:** In support of a vibrant suspension and debarment program in the public interest for the Government’s protection, OPPM has initiated debarment and suspension training for the procurement staff of USDA agencies. OPPM will continue the training with all agencies on a regular basis. Training will include a discussion of performance and integrity issues regarding agency contractors and will stress the importance of debarment and suspension as a Government-wide practice. OPPM will also require all agencies to establish a suspension and debarment coordinator to establish and maintain internal agency procedures, provide a point of contact for OPPM, and monitor that proper practices are being followed.

**b. Recommendation 26:** OPPM concurs with the recommendation on the condition that the differences between the FAR and the nonprocurement rule are acknowledged and that the FAR and AGAR continue to be used as the authority for suspensions and debarments regarding procurements.

**c. Recommendation 27:** OPPM concurs with the recommendation on the condition that the Heads of Contracting Activities (or their designees) are included in the process and so cited.

**Additional OPPM Comments on the Draft Audit Report:**

**Executive Summary**

**1. Page 3:**

**a. “Standard of Proof”** (first paragraph, last sentence): The “standard of proof” only exists in the nonprocurement rule in 2 CFR 180. There is no “standard of proof” in the procurement rule in the Federal Acquisition Regulation (FAR) at 48 CFR Subpart 9.4.

**Recommendation:** Rewrite the sentence to read as follows:

“...even though a conviction meets the standard of proof in the nonprocurement rule that an individual could be debarred. The procurement rule in the FAR contains no standard of proof.”

**b. Permanent Debarment – World Bank** (third paragraph): Note that the permanent World Bank debarment procedure cited is done under a special authority that is not part of either the procurement rule in the FAR or the nonprocurement rule in 2 CFR 180. The FAR states that, with only two specifically limited exceptions of one and five years, “debarment should not exceed 3 years.”

**Recommendation:** In the last sentence following the words “the World Bank” add: “under special authority.”

## 2. Page 6:

**a. OPPM Suspension and Debarment Training** (first paragraph, third sentence): Suspension and debarment training is included in several procurement courses required by all contract specialists and contracting officers. Procurement training is not generally a function of a procurement policy branch. However, due to its importance, OPPM has begun to conduct training to procurement staff and will continue to do so.

**Recommendation:** Add the following sentence prior to the words “In addition:”  
“Suspension and debarment training is included in several procurement courses required by all contract specialists and contracting officers.”

**b. Comparison with GSA** (first paragraph): The paragraph compares the number of debarment actions at USDA with those at GSA. This is an inappropriate comparison since GSA is in a unique position *vis-à-vis* federal procurement including debarment and suspension. GSA maintains the Multiple Award Schedules for government-wide use. Therefore, GSA would have lead agency responsibility in making suspensions or debarments for all of these contractors. Many, and possibly the majority, of USDA’s orders are placed against these GSA contracts. In fact, GSA has a fulltime official and staff fully dedicated to suspension and debarment due to its unique situation within federal procurement.

As a side note, in a recent informal survey of 15 Executive Branch agencies, the Chair of the Interagency Suspension and Debarment Committee found that at least six agencies (departments) had made no debarments in the entire previous year.

**Recommendation:** Remove the reference to GSA.

## 3. Page 10:

**a. Permanent Debarment – World Bank** (first paragraph): See comment 1.b., above.

**b. Covered Transactions and Exclusions** (last paragraph): This paragraph refers only to the nonprocurement rule covered transactions (7 CFR 3017) and to Section 14211 of the Food, Conservation and Energy Act of 2008 (7 U.S.C. 2209j). The latter authority is separate from the authority of the procurement rule under the FAR. However, it does apply to procurement activities.

**Recommendation:** Remove the words “and procurement” from the first sentence. Specify the special separate authority cited here (7 U.S.C. 2209j).

## 4. Page 30:

**Delegation of Authority: Recommendations 15, 16 and 17:** Since these recommendations pertain to nonprocurement debarment and suspension, they fall under the authority of the Chief Financial Officer, in accordance with 7 CFR 2.28 (b)(17).

**Recommendation:** Add “Chief Financial Officer” to the heading.

## 5. Page 36:

**Delegation of Authority: Recommendations 18, 19 and 20:** Since these recommendations pertain to nonprocurement debarment and suspension, they fall under the authority of the Chief Financial Officer, in accordance with 7 CFR 2.28 (b)(17).

**Recommendation:** Add “Chief Financial Officer” to the heading.

**6. Page 38: Finding 6**

**a. OPPM Suspension and Debarment Training** (first paragraph): As stated previously in comment 2.a., above, suspension and debarment training is included in several procurement courses required by all contract specialists and contracting officers. Procurement training is not generally a function of a procurement policy branch. However, OPPM recognizes its importance and has begun to conduct training to procurement staff and will continue to do so.

**Recommendation:** Add the following sentences:

“Suspension and debarment training is included in several procurement courses required by all contract specialists and contracting officers. Although procurement training is not generally a function of a procurement policy branch, OPPM has begun to conduct training to procurement staff.”

**b. OPPM Staff Assignment** (first paragraph, third sentence from the end): The paragraph erroneously states that OPPM “assigned one part-time employee to handle procurement suspension and debarment cases.” However, the OPPM employee cited is a full-time employee for whom debarment and suspension is one of a number of collateral duties.

**Recommendation:** Correct the reference to the OPPM staff assigned debarment and suspension duties.

**7. Page 39: Finding 6** (continued)

**a. Guidance provided by OPPM:** Throughout this finding the audit report erroneously states that OPPM “provided no guidance to the contracting officers in USDA agencies.” In fact, OPPM issues the Agriculture Acquisition Regulation (AGAR), the Department’s supplement to the FAR at 48 CFR Chapter 4, Parts 401 through 453, which implements procurement policy for USDA. The AGAR provides mandatory, Department-wide policy and procedures on procurement issues including suspension and debarment.

**Recommendation:** Remove the reference that OPPM has not provided guidance. Acknowledge that OPPM provides guidance through the AGAR, 48 CFR Chapter 4, Subpart 409.4.

**b. Training:** In the past year, OPPM has provided training on debarment and suspension to contracting staff in two of its major contracting activities: the Forest Service and Departmental Management, Procurement Operations Division (formerly part of OPPM). OPPM plans to offer training to more contracting staff in the future. However, notwithstanding OPPM training, contract specialists and contracting officers receive debarment and suspension training in a number of required courses approved by the Federal Acquisition Institute.

**c. Remarks regarding Contractors** (third paragraph): The audit report cites an OPPM official as stating that “they normally deal with large contractors who are preapproved by GSA...” This official was either in error or misquoted since the majority of USDA contractors are small businesses. (From fiscal year 2004 through 2007, 72% of all USDA awards and 52% of all procurement dollars went to small businesses.) Additionally, OPPM confirms that reliance on contractors and the use of contract compliance tools and procedures in no way circumvents or replaces the need for an effective suspension and debarment program.

**d. Need for OIG Cooperation.** The report cites a case where a contractor providing guard services failed to pay employees and was not subject to suspension or debarment action.

Recently, OIG declined to investigate a similar case after receiving requests from both OPPM and the contracting activity. In this case there appeared to be serious contractor misconduct, integrity violations, and possible fraud due to the falsification of records and the contractor's refusal to pay subcontractors. It is important for OIG to be more responsive to requests from OPPM and the agencies to investigate cases.

Where there has not yet been a criminal conviction or civil judgment, the debarring official needs a background investigation to confirm that allegations are not mistaken or simply hearsay. The AGAR in 48 CFR 409.406-3 (a) states that "where the statement of facts indicates the irregularities to be possible criminal offenses, or for any other reason further investigation is considered necessary, the matter shall be referred to the HCA (Head of the Contracting Activity) who should consult with the Office of Inspector General to determine if further investigation is required prior to referring to the debarring official." The AGAR further states that the debarring official's determination is to be made "after reviewing the recommendations and consulting with the Office of Inspector General and Office of the General Counsel, as appropriate."

**Recommendation:** That OIG establish a clear line of communication with OPPM regarding the investigation of potential suspension or debarment cases. Cooperation among USDA offices is important in implementing a successful debarment and suspension program.

**8. Page 40: Finding 6 (continued)**

**EPLS (first paragraph, first sentence):** The audit report states that "agency officials did not always check the EPLS to verify that new contractors were not debarred..." and ascribes responsibility for this failure to OPPM "since OPPM did not train agency officials on suspension and debarment procedures." In fact, this is not a specific responsibility of OPPM. This is required by the FAR at 48 CFR 9.404 and every contract specialist government-wide should be aware of this since this duty is covered in numerous required contracting courses.

**Recommendation:** Remove the erroneous statement that OPPM is responsible for agency officials' lack of diligence in checking the EPLS. Delete these words from the beginning of the sentence: "...since OPPM did not train agency officials on suspension and debarment procedures..."

**9. Page 41:**

**a. Recommendation 25:** OPPM concurs with the recommendation.

**OPPM Actions Planned and Taken:** In support of a vibrant suspension and debarment program in the public interest for the Government's protection, OPPM has initiated debarment and suspension training for the procurement staff of USDA agencies. OPPM will continue the training with all agencies on a regular basis. Training will include a discussion of performance and integrity issues regarding agency contractors and will stress the importance of debarment and suspension as a Government-wide practice. OPPM will also require all agencies to establish a suspension and debarment coordinator to establish and maintain internal agency procedures, provide a point of contact for OPPM, and monitor that proper practices are being followed.

**b. Recommendation 26:** OPPM concurs with the recommendation on the condition that the differences between the FAR and the nonprocurement rule are acknowledged and that the FAR and AGAR continue to be used as the authority for suspensions and debarments regarding procurements.

**c. Recommendation 27:** OPPM concurs with the recommendation on the condition that the Heads of Contracting Activities (or their designees) are included in the process and so cited.

# Rural Development



United States Department of Agriculture  
Rural Development

TO: Gil H. Harden  
Assistant Inspector General  
for Audit

May 21, 2010

FROM: Dallas Tonsager /s/  
Under Secretary

SUBJECT: OIG Audit: Effectiveness and Enforcement of Suspension  
and Debarment Regulations in the U.S. Department of  
Agriculture (Audit No. 50601-014-AT)

Rural Development appreciates the opportunity to respond to the  
recommendations pertaining to our programs contained in the  
subject Official Draft Report dated April 14, 2010.

These responses are being submitted to reach management decision  
on the three Rural Development recommendations in the Official  
Draft Report.

**Recommendation No. 21**

OIG's Recommendation:

Require the Rural Development Administrators for Business and  
Cooperative Programs, Housing Facilities, and Rural Utility  
Programs to inform the agency's suspension and debarment  
coordinator upon notifications from OIG's Office of  
Investigations that a program violator has been indicted or  
convicted.

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OIG Audit: Effectiveness and Enforcement of Suspension and Debarment Regulations in the U.S. Department of Agriculture (Audit No. 50601-014-AT)

Agency Response:

The intent of this recommendation is to expedite notification of the Agency's suspension and debarment coordinator of currently indicted and/or convicted program violators. Rural Development has implemented a process effective April 2010, which accomplishes this end result. The Financial Management Division, upon notification by the OIG Office of Investigations, is providing the Rural Development suspension and debarment coordinator with this information. The coordinator, in turn, is following up with field staff in the affected State Offices to ensure the appropriate proposed debarments/suspensions are executed.

**Recommendation No. 22**

OIG's Recommendation:

Require the Rural Development Administrators for Business and Cooperative Programs, Housing Community Facilities, and Rural Utility Programs to develop a manual system to be used by the loan specialist and approving official as an interim compensating control to ensure the GSA EPLS is reviewed and the review documented for new loan applicants.

Agency Response:

The intent of this recommendation is to ensure a reliable process for debarment screenings of new applicants to Rural Development programs is in operation. While regulations are in place to require loan making staff to check the Excluded Parties List System (EPLS) for loan and grant applicant names, documentation of such screenings has not been consistent in many cases. To orient our newly appointed State Directors and any new loan making staff in the field, an Unnumbered letter will be issued during May 2010, reinforcing the debarment screening and documentation requirements promulgated in our regulations.

OIG Audit: Effectiveness and Enforcement of Suspension and Debarment Regulations in the U.S. Department of Agriculture  
(Audit No. 50601-014-AT)

Direction will also be provided to our Debarment Program intranet website where a link to the EPLS web site for debarment queries is provided.

**Recommendation No. 23**

OIG's position:

Require the Rural Development Administrators for Business and Cooperative Programs, Housing and Community Facilities, and Rural Utility Programs, to include an automated system control in the Comprehensive Loan Program, Common Loan Origination System, to require a certification by the loan specialist that the EPLS has been reviewed and the review documented before the system will allow the application to be finalized.

Agency Response:

The intent of this recommendation is to ensure compliance with debarment screening due diligence using an automated process. Rural Development will include an automated system control in its Common Loan Origination System, which will require debarment screening certifications by loan specialists making loans in order to finalize loan applications.

This automated system control will be accomplished by adding an input field to the Common Loan Origination System's application entry page. The loan specialist's required response to this input field will certify they reviewed EPLS and documented the certification in the applicant's file. Validation of the loan specialist's response will be performed manually. Deployment of the Common Loan Origination System is expected to occur by September 30, 2015.

If you have any questions, please contact John Purcell, Director, Financial Management Division, at (202)692-0328.

Forest Service



**File Code:** 1430/1580

**Date:** May 21, 2010

**Subject:** Response to OIG Official Draft Audit Report No. 50601-14-AT, "Effectiveness and Enforcement of Suspension and Debarment Regulations in the USDA,"

**To:** Gil Harden, Assistant Inspector General for Audit, Office of the Inspector General

Thank you for the opportunity to review and comment on OIG Official Draft Audit Report No. 50601-14-AT. The report provides an in depth analysis of the Suspension and Debarment program in USDA. The Forest Service has extensively reviewed the report and has the comments below regarding the agency's exclusions and rationale.

Export Violations:

In four Federal Register notices pertaining to rulemaking for 7 CFR 3017 published between 1995 and 2003, the Secretary of Agriculture and the Chief Financial Officer notified the public that purchasers who committed export violations would be referred for debarment under the Export Act (16 U.S.C. 620, et seq.) rather than under the government-wide non-procurement suspension and debarment regulations. The Federal Register notices included information that the Export Act provided separate statutory authority to debar persons engaged in both primary covered transactions and lower tier transactions for export violations (68 FR 66533, 66564; 67 FR 3265, 3293; 61 FR 250-51; 60 FR 49519-20, 49522). Because of the statutory scheme set up for debarment based on violations of the Export Act, we have a statutory justification and program rationale for continuing to exclude Export Act violations from the government-wide rule's coverage. The exclusions at 7 CFR 3017.215(k) should continue to remain in place. Please see the enclosed paper supporting this conclusion.

Natural Resource Permits, Licenses, Exchanges, and other Acquisitions of Real Property, Rights of way, and Easements:

The exemption for natural resource permits at 7 CFR 3017.215(p) was placed in the rule on the basis that the benefits of applying the government-wide non-procurement debarment and suspension rule are significantly outweighed by the inability to efficiently manage and administer the rule, as hundreds of thousands of permits (charge and free use permits for removal of firewood and forest products) are issued under natural resource programs annually for which nominal benefits may be received by permittees (60 FR 49519, 49522, Sept. 26, 1995). Note that fuelwood permits on many national forests provide firewood to heat homes. The public is entitled to the benefits of these activities. Specifically, we believed at the time the rule was implemented that a significant amount of time, money, and effort would be expended to prepare debarment and suspension referrals and the associated evidence, for violations that could arise on the hundreds of thousands of permits issued annually. The final rule for USDA's non-procurement debarment and suspension (7 CFR 307) published in the Federal Register on January 4, 1996, spelled out that permits under natural resource management programs were excepted transactions (61 FR 251).

We continue to believe that the nominal benefits of applying the government-wide non-procurement debarment and suspension rule are significantly outweighed by the inefficiencies of managing and administering the rule to the permit program. Specifically, natural resource permits issued to individuals by the Forest Service include permits for the removal of firewood, Christmas trees, or other forest products of nominal value or use. Permits for some forest products are issued free of charge. Furthermore, in light of the government-wide effect of the non-procurement debarment and suspension rule, and of the reciprocal effect of non-procurement and procurement debarments, we question whether



debarment and suspension of an individual who received forest products via a free permit or who received forest products that have minimal value, is appropriate given that debarment and suspension are among the most severe actions an agency can take.

There has been discussion that agency permits would be excluded from debarment under the guidance for grants and agreements found in 2 CFR 180.215(e). However, the definition found in 2 CFR 180.215(e) applies to permits issued as a means to regulate the environment, and this definition is not broad enough to include natural resource permits used by the agency which include charge and free use permits for removal of firewood and forest products, as well as recreation and range permits.

For the reasons stated above, the Forest Service has adequate statutory language and program rationale for the exclusions for Export Act violations and natural resource permits. We renew our request that these exclusions remain in 7 CFR 3017.215(k) and 7 CFR 3017.215(p) which will become 2 CFR 417.215(a)(2) and 2 CFR 417.215(a)(7) in the new agency rule.

Report Finding Number 4 acknowledges the Forest Service issues thousands of permits having no or nominal value to high value commercial/industrial permits for concessions, timber sales and other forest activities. During the Forest Service exit conference with OIG, OIG confirmed that the low value activities could be excluded from consideration for suspension and debarment. Additionally, the Forest Service response to the draft audit report submitted on January 7, 2010, provided a detailed analysis of the legislative history and rationale for exempting timber export violations and forest product permits from the rule's coverage.

Regarding Recommendation Number 24, the Forest Service will review the audit recommendation as it is directed towards high value activities, including federal financial assistance. However, to consider applying suspension and debarment to other Forest Service program areas, the agency will need to review every activity and the associated legislation and rule making to determine if statutory language or other adequate rationale exists for excluding an activity from suspension and debarment. The Forest Service program managers will review which mission areas, in addition to timber sales, warrant establishing and implementing a suspension and debarment program. The agency will designate a lead to oversee this effort of requested information, and will follow up by meeting with representatives from the affected staffs. The agency will then formulate initial procedures to train program staff and fully implement the recommendation.

If you have any questions, please contact Donna M. Carmical, Chief Financial Officer, at 202-205-1321 or [dcarmical@fs.fed.us](mailto:dcarmical@fs.fed.us).

*/s/ Hank Kashdan (for)*  
THOMAS L. TIDWELL  
Chief

Enclosures

cc: Janet M Roder, Darci Birmingham, Marie-Louise Smith, Gloria Manning, Christopher K Copenbarger, Laurie Lewandowski, Jennifer McGuire, Sherry Gardner

**Forest Resources Conservation and Shortage Relief Act of 1990, as amended**

**(16 U.S.C. §§ 620, et seq.) (Export Act)**

The Debarment Provision of the Export Act of 1990 (16 U.S.C. § 620d(d)) reads as follows:

(d) ADMINISTRATIVE REMEDIES.--

- (1) DEBARMENT.--The head of the appropriate Federal department or agency under this title may debar any person who violates this title, or any regulation or contract issued under this title, from entering into any contract for the purchase of unprocessed timber from Federal lands for a period of not more than 5 years. Such person shall also be precluded from taking delivery of Federal timber purchased by another party for the period of debarment.
- (2) CANCELLATION OF CONTRACTS.--The head of the appropriate Federal department or agency under this title may cancel any contract entered into with a person found to have violated this title or regulations issued under this title.

In 1990, when the Export Act was enacted, the Forest Service initiated debarment and suspension actions related to timber sale contracts in accordance with 36 CFR §§ 223.130, et seq.<sup>1</sup> The Forest Service debarment and suspension rules in effect in 1990 authorized debarment and suspension of timber sale purchasers and affiliates, upon a showing of the appropriate standard of evidence (36 C.F.R. §§ 223.136 & .141), for a number of causes, and would have precluded a person from (1) bidding on or being awarded a contract for unprocessed timber, (2) entering into a third party agreement with another person for the acquisition of Federal timber, or (3) renewing or otherwise extending an existing contract unless the Chief or an authorized representative determined, in writing, that a compelling reason existed for doing so (36 C.F.R. § 223.135).

In contrast to the Forest Service regulations at 36 C.F.R. §§ 223.130, et seq., the Export Act of 1990 was more restrictive. Specifically, the Act limited:

- (1) **The type of administrative action that could be taken**, i.e. the head of the appropriate Federal department or agency (Interior or USDA Forest Service) could only debar, not suspend, a person;
- (2) **The type of action (cause) that could result in administrative action**, i.e. only persons who violate the Export Act or implementing regulations and contracts could be debarred; and
- (3) **The effect of administrative action**, i.e. a debarred person could be prohibited only from purchasing unprocessed Federal timber and from taking delivery of such timber purchased by another party.

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<sup>1</sup> Forest Service debarments and suspensions were initiated under USDA Forest Service administrative (regulatory) authority. Debarments and suspensions related to timber sale contracts were not initiated pursuant to the government-wide (nonprocurement) rule until February 5, 1996. 61 Fed. Reg. 250 (1996); *see also*, 60 Fed. Reg. 49519.

In regulations implementing the Export Act of 1990, the Forest Service revised its existing debarment and suspension regulations to reflect the debarment provisions in the Act (See, *e.g.* 60 Fed. Reg. 46921 (Sept. 8, 1995)).

When amendments to the 1990 Export Act were being considered, the OGC Natural Resources Division (NRD) assisted the Forest Service with drafting suggested changes to the proposed amendments. Because the proposed amendments, in the agencies' view, would have reduced the Secretary's ability to implement and enforce the export restrictions originally enacted in 1990, the suggested revisions were intended to improve, to the extent possible, the Secretary's ability to administer and enforce the export restrictions as proposed for amendment.

Specifically, with respect to debarment, the 1997 amendments proposed a new paragraph:

....

(d)(1)(A) . . .

(B) PREREQUISITES FOR DEBARMENT.—

(i) IN GENERAL. – No person may be debarred from bidding for or entering into a contract for the purchase of unprocessed timber from Federal lands under subparagraph (A) unless the head of the appropriate Federal department or agency first finds, on the record and after an opportunity for a hearing, that debarment is warranted.

(ii) WITHHOLDING OF AWARDS DURING DEBARMENT PROCEEDINGS.—The head of an appropriate Federal department or agency may withhold an award under this title of a contract for the purchase of unprocessed timber from Federal lands during a debarment proceeding.

The 1997 amendments to the Export Act require that before a debarment is imposed, a finding, on the record and after an opportunity for a hearing, must be afforded to a person who violates the Act or its implementing regulations. Such a hearing is required regardless of whether there are material facts in dispute during the debarment proceedings. The government-wide (nonprocurement) rule authorizes immediate preclusion (suspension) upon adequate evidence of a cause (§§ \_\_\_.700 & .710). Additionally, neither suspension or debarment under the government-wide rule require a hearing, on the record, prior to imposition of suspension or debarment, unless there are material facts in dispute and the action is not based on conviction, civil judgment, or other finding by an appropriate Federal, State, or local body. (§§ \_\_\_.735 & \_\_\_.830).

In its suggested revisions to the 1997 amendments, the Forest Service and NRD provided draft language that would have eliminated the requirement for a hearing on the record under certain circumstances, including where there are no material facts in dispute, or where a person has been indicted or has received a conviction or civil judgment.<sup>2</sup>

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<sup>2</sup> The draft language reads as follows: “*Provided however, that where there are no material facts in dispute, or a person has been indicted, received a criminal conviction or civil judgment, a person may be precluded from bidding for or entering into a contract for the purchase of unprocessed timber from Federal lands under subparagraph (A).*”

In its explanation of the suggested language, the Forest Service and NRD stated: “*This suggested revision provides due process and allows the Secretary or the head of the agency concerned to immediately preclude someone who has engaged in criminal or other activity which is not disputed from bidding on or being awarded a timber sale contract for unprocessed timber.*” (emphasis added). The final amendments to the Export Act do not contain the language suggested by the agencies. See 16 U.S.C. § 620d(d).

Additional support for the idea that Congress intended a different process for debarment under the Export Act, as amended in 1997, is its statement in the House Conference Report:

*Section 492(d)(1) has been modified to ensure that a person receives due process prior to the imposition of debarment for a violation of FRCSRA or its regulations.*<sup>3</sup>

One may conclude from this language, and the other differences outlined above, that Congress intended a different scheme for debarment under the Export Act than the process provided in either the Forest Service stand-alone debarment and suspension regulations, or in the government-wide (nonprocurement) regulations.

Additional support for the idea that Congress did not intend broad application and effect of the debarment provision, and many other provisions in the Act, can more generally be found by comparing other differences between the 1990 Export Act and the 1997 amendments. For example, the 1990 Act authorized the imposition of significant civil penalties for violations of the Export Act. 16 U.S.C. § 620d(c). Monetary penalties up to \$500,000 or three times the value of the timber involved, could be imposed if the Secretary concerned found, on the record and after an opportunity for a hearing that “*a person, with willful disregard for the prohibition contained in this title against exporting Federal timber, exported or caused to be exported unprocessed timber originating from Federal lands in violation of*” the Act. 16 U.S.C. § 620d(c)(1). Penalties up to \$500,000 or three times the timber involved also could be imposed, based on varying degrees of intent, for other violations of the Act. 16 U.S.C. § 620d(c)(2).

In the 1997 amendments, Congress added language making the Secretaries’ ability to impose civil penalties more difficult. Specifically, before imposing a penalty, the appropriate Secretary is required to consider the seriousness of an offense, and consider all mitigating factors including mistake, inadvertence, and error. Based on the mitigating factors, the Secretary concerned may reduce the penalty, not impose the penalty, or “*on condition of there being no further violation under [§ 620d(c)] for a prescribed period, suspend imposition of the penalty.*” 16 U.S.C. § 620d(c)(2)(C). Further, if the Secretary concerned determines an offense is “*a minor infraction, of [the Export Act] or its regulations,*” the Act provides that the “*Secretary should delegate the matter to the contracting officer who need not impose a penalty.*” 16 U.S.C. § 620d(c)(2)(C)(ii) (emphasis added).<sup>4</sup>

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<sup>3</sup> H.R. CONF. REP. 105-337, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1997, 1997 WL 664422, 1997 U.S.C.C.A.N. 2183 (Legis. Hist.) ( See attached excerpts ).

<sup>4</sup> See also, the September 19, 1995 Congressional Record (Senate) wherein the Senate considered S13838, and Sen. Slade Gorton expressed concerns about the regulations implementing the 1990 Export Act. Sen. Gorton repeatedly stated that the implementing regulations, which included the provisions for debarment under the Forest

Comparison of other changes between the 1990 Export Act and the 1997 amendments show Congress intended to weaken, not strengthen, the Secretaries' ability to enforce export restrictions and the associated administrative and civil remedies. In its Statement of Administration Policy issued by the Office of Management and Budget on September 11, 1997 in response to the 1997 Export Act amendments, the Clinton Administration objected to the amendments and stated:

*The Committee bill includes a new Title VI, the "Forest Resources and Conservation Shortage Relief Act of 1997, which would amend restrictions on exports of raw logs harvested from Federal and State lands that were enacted in 1990 to protect American timber industry workers. The Administration has concerns that this complicated, 15-page rider has not undergone public or congressional hearings and that the requirements may inadvertently weaken, rather than improve, program implementation."<sup>5</sup> (emphasis added).*

It does not appear Congress intended violations of the Export Act would also be subject to the broad scope and effect of the government-wide debarment and suspension rules.

OGC-NRD:LPJ (12-10-09)

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Service stand-alone regulation, coupled with the civil penalties, were overly burdensome on the timber industry. The relevant portions of the Unofficial version of the Congressional Record are attached for ease of reference.

<sup>5</sup> Emphasis added. See attached Statement of Administration Policy.

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**USDA Forest Service (FS)**

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**Office of Inspector General Audit Report No. 50601-14-AT**  
**Effectiveness and Enforcement of Suspension and Debarment Regulations**  
**in the U.S. Department of Agriculture**  
**Official Draft Dated: April 14, 2010**

**Management Decision**

=====

**Recommendation Number 24:** Establish and implement a suspension and debarment program for all FS mission areas in addition to the already operating unit established for the agency's timber program.

**FS Response to Recommendation No. 24:** The FS concurs with this audit recommendation and will establish and implement a suspension and debarment program for all its mission areas, as applicable. The FS would also like to acknowledge that many of the recommendations in this report require a corporate approach, and the actual corrective actions have not yet been determined by the Department. In the interim, the agency will:

- 1) Designate a lead to oversee this effort for the entire agency by June 30, 2010
- 2) Convene its first meeting with a representative from all affected mission areas by mid August 2010 and begin formulating a plan of action that moves the FS towards full implementation of this recommendation
- 3) Present the plan to the ELT for approval by October 29, 2010, and
- 4) Implement the suspension and debarment program in applicable mission areas by April 29, 2011.

**Estimated Completion Date:** April 29, 2011

# Farm Service Agency



**United States  
Department of  
Agriculture**

Farm and Foreign  
Agricultural  
Services

Farm Service  
Agency

Operations Review  
and Analysis Staff

1400 Independence  
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Washington, DC  
20250-0540

**DATE:** May 13, 2010

**TO:** Assistant Inspector General for Audit  
Office of Inspector General

**FROM:** Philip Sharp   
Agency Liaison Officer  
for the Farm Service Agency

**SUBJECT:** Response to Audit 50601-14-AT, Effectiveness and Enforcement of  
Suspension and Debarment Regulations in the U.S. Department of  
Agriculture – Recommendations 7 through 10

This is the Farm Service Agency's (FSA) response to your April 14 memorandum requesting comments on the official draft report of the subject audit. Our response is limited to the four recommendations directed to the FSA Administrator.

**Recommendation 7**

In collaboration with OGC and OCFO, review all FSA program transactions to determine if they should be classified as noncovered by suspension and debarment according to the President's Executive orders and OMB's guidance. For program transactions to be excluded from covered transaction status for suspension and debarment, provide adequate statutory language justifying the exclusions or acceptable program rationale supporting their noncovered status.

**Agency Response**

FSA agrees with the need to identify those FSA program transactions that should be classified as noncovered by suspension and debarment. On April 29, 2010, FSA was notified that the Secretary cleared a substantial revision to Departmental suspension and debarment regulations. This revised rule will be published in the Federal Register. It is anticipated that many of FSA's nonprocurement programs will no longer be exempt from the suspension and debarment process. Within 180 days from the date the revised regulations are published, FSA will work with OCFO and OGC to review what program transactions should be classified as noncovered by suspension followed by debarment.

**Recommendation 8**

Issue guidance to agency officials clarifying that those who abuse any noncovered program should still be considered for suspension and debarment to protect other Federal programs that are covered by the suspension and debarment regulations.

**Agency Response**

FSA understands that suspension and debarment is a serious action used to protect the public interest and is reserved for the most serious cases where immediate suspension, followed by debarment, serves as a tool to ensure integrity of the Government's programs by conducting business only with responsible persons. As discussed in Recommendation 7 above, the Secretary has cleared revised suspension and debarment rules that will be published in the Federal Register. FSA recognizes that, following publication of the new rule, there may be very few noncovered transactions. Within 180 days of publication of the revised rules, FSA will issue guidance to agency officials implementing the new regulations. This guidance will outline the purpose of suspension and debarment and that FSA program transactions determined to be noncovered should be considered for suspension followed by debarment in order to protect the integrity of other covered Federal programs.

**Recommendation 9**

Implement a tracking system with the Direct Loan System to record indictments and convictions of agricultural producers so that FSA officials will be alerted if convicted producers should reapply for farm program benefits. Establish controls and procedures to ensure that indicted, convicted, and other nonresponsible program violators are referred to the designated suspension and debarment official for case determination.

**Agency Response**

FSA does not agree with the recommendation to implement a tracking system to record indictments and convictions of agricultural producers within the Direct Loan System (DLS). FSA's DLS is limited to tracking the Farm Loan Programs' direct loan application and loan making process, and loan servicing activities. This web-based system is not used by FSA to track the application and payment process, and compliance activities for FSA's direct subsidy and non-credit commodity loan programs. Further, due to the sensitive nature of the information contained in DLS that concerns FSA's direct farm loan borrowers, only FSA employees responsible for Farm Loan Programs have access to the database. Employees responsible for Farm Programs, such as the County Executive Director, do not have access to DLS. OIG found that between FYs 2004 to 2007, 19 producers received additional program payments after they were convicted of program violations. A total of 19 cases in the span of four years, in relation to the billions of dollars of direct subsidy payments and loan disbursements issued by FSA to millions of

## **Assistant Inspector General for Audit**

Page 3

participants in that same timeframe does not justify the substantial cost to enhance DLS in order to track participants who are indicted, convicted, or otherwise determined to be irresponsible.

FSA agrees with the recommendation to establish controls and procedures that will help ensure that program violations are referred to the designated suspension and debarment official in order to determine if suspension and debarment is warranted. Within 180 days from the date of publication of the revised regulations in the Federal Register, FSA will develop and establish the necessary controls and procedures for determining when to refer program participants who have been indicted, convicted, or otherwise determined to be irresponsible to FSA's designated suspension and debarment official.

### **Recommendation 10**

Provide training to FSA headquarters and State officials, and State and county committees about suspension and debarment; develop and implement procedures to refer the violators for case determination for suspension and debarment actions; and conduct followup reviews to ensure effective implementation.

### **Agency Response**

FSA agrees with the recommendation. FSA will consider the use of the Agriculture Learning (AgLearn) System and other tools to provide the necessary training to all FSA headquarter and State office officials about suspension and debarment. Automation modernization programs currently in development within FSA will also be considered when designing training. Further training will also be provided to FSA State and county committees. FSA will issue directives based on applicable Departmental regulations to all FSA offices that outline the procedures for referring violators for suspension and debarment determinations.

After suspension and debarment training and issuance of referral procedures throughout FSA, followup reviews will be conducted as necessary.

The actions listed above will begin after the revised suspension and debarment rules have been published in the Federal Register.

# Food and Nutrition Service



**United States  
Department of  
Agriculture**

Food and  
Nutrition  
Service

3101 Park  
Center Drive  
Room 803

Alexandria, VA  
22302-1500

DATE: May 24, 2010

REPLY: 50601-14-AT

TO: Gil Harden  
Assistant Inspector General for Audit

FROM: Thomas O'Connor on behalf of Julia Paradis /S/  
Administrator  
Food and Nutrition Service

SUBJECT: Effectiveness and Enforcement of Suspension and Debarment Regulations  
in the U.S. Department of Agriculture

This responds to the official draft audit report #50601-14-AT, Effectiveness and Enforcement of Suspension and Debarment Regulations in the U.S. Department of Agriculture. Specifically, I am responding to those recommendations directly addressed to the Food and Nutrition Service (FNS).

**Recommendation 11**

In collaboration with OGC and OCFO, review all FNS program transactions to determine if they should be classified as noncovered by suspension and debarment, pursuant to the President's Executive orders and in OMB guidance. For programs to be excluded from suspension and debarment, provide statutory language justifying the exclusions or acceptable program rationale supporting their noncovered status.

**Food and Nutrition Service Response:**

FNS has consulted with our Office of General Counsel (OGC) and performed a comprehensive review of all FNS program transactions. FNS and OGC have determined that program benefits are transactions that are not covered for suspension/debarment rules. In support of this determination, Departmental Regulations at 7 CFR 3017.215 list non-procurement transactions that are excluded. They include benefit payments to individuals (7 CFR Sec. 3017.215(b) of the attached Interim Final rule).

The Departmental Regulations also speak to entitlements and mandatory awards. Section 3017.215(h) excludes "entitlement or mandatory awards required by statute, including a lower tier entitlement or mandatory award that is required by statute." This passage appears on Federal Register page 3292 of the attached file.

As the audit team understands, the vast majority of program transactions conducted by FNS by nature fall under the category of benefits, entitlements and mandatory awards. Therefore, most of FNS's transactions are excluded from suspension and debarment activities by Departmental Regulation 3017. A few transactions, such as SNAP retailer authorizations, are not program benefits, but neither are they covered transactions. Administrative actions taken against retailers who violate program rules include disqualification and termination, which are administrative actions that may serve as a basis for initiation of suspension/debarment action. In our determination of whether such actions would be appropriate, FNS has considered the adequacy of administrative actions taken, the general need to protect the Federal Government from potential abuse, and the cost effectiveness of such actions. FNS has determined that, 1) the possibility of administratively disqualified SNAP retailers doing business with other Federal agencies is relatively low because few other Federal benefit programs provide their benefits by augmenting their beneficiaries' buying power in the retail system; and 2) the initiation of suspension/debarment procedures against such entities, which have already been disqualified via program-specific sanctions, would be costly and in most cases not result in a net benefit to the government.

The above being said FNS agrees there may be cases where the need to protect the interests of other federal agencies may necessitate initiating suspension and debarment actions for certain SNAP retailers. FNS will investigate our disqualification and termination actions to develop a protocol for initiating suspension and debarment actions against SNAP retailers where appropriate and cost effective.

### **Recommendations 12, 13 and 14**

FNS has no specific responses at this time to recommendations 12-14, as these recommendations stipulate administrative actions for FNS to undertake that are contingent upon the results of the review called for in Recommendation #11.

We believe it would be more appropriate for the OIG to hold off on making specific recommendations at this time pending the results of our review described above and our consultations with OGC.

Attachment



# Federal Register

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Wednesday,  
January 23, 2002

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## Part II

### **Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants); Proposed Rule**

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Office of Personnel Management  
Department of Agriculture  
Department of Energy  
Small Business Administration  
National Aeronautics and Space Administration  
Department of Commerce  
Social Security Administration  
Office of National Drug Control Policy  
Department of State  
Agency for International Development  
Peace Corps  
Inter-American Foundation  
African Development Foundation  
Department of Labor  
Federal Mediation and Conciliation Service  
Department of Defense  
Department of Education  
National Archives and Records Administration  
Department of Veterans Affairs  
Environmental Protection Agency  
General Services Administration  
Department of the Interior  
Federal Emergency Management Agency  
Department of Health and Human Services  
National Science Foundation  
National Foundation on the Arts and the Humanities  
National Endowment for the Arts  
National Endowment for the Humanities  
Institute of Museum and Library Services  
Corporation for National and Community Service  
Department of Transportation

involved in the transaction, as permitted under § .120.

**§ .210 Which nonprocurement transactions are covered transactions?**

All nonprocurement transactions, as defined in § .970, are covered transactions unless listed in § .215. (See appendix to this part.)

**§ .215 Which nonprocurement transactions are not covered transactions?**

The following types of nonprocurement transactions are not covered transactions:

- (a) A direct award to—
  - (1) A foreign government or foreign governmental entity;
  - (2) A public international organization;
  - (3) An entity owned (in whole or in part) or controlled by a foreign government; or
  - (4) Any other entity consisting wholly or partially of one or more foreign governments or foreign governmental entities.

(b) A benefit to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted). For example, if a person receives social security benefits under the Supplemental Security Income provisions of the Social Security Act, 42 U.S.C. 1301 *et seq.*, those benefits are not covered transactions and, therefore, are not affected if the person is excluded.

(c) Federal employment.

(d) A transaction that the [Agency noun] needs to respond to a national or agency-recognized emergency or disaster.

(e) A permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment, unless the [Agency noun] specifically designates it to be a covered transaction.

(f) An incidental benefit that results from ordinary governmental operations.

(g) Any other transaction if the application of an exclusion to the transaction is prohibited by law.

**§ .220 Are any procurement contracts included as covered transactions?**

Covered transactions under this part do not include any procurement contracts awarded directly by a Federal agency (those transactions are covered under the Federal Acquisition Regulation), but they do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions (see appendix to this part). Specifically, a contract for goods or services is a covered

transaction if any of the following applies:

(a) The contract is awarded by a participant in a nonprocurement transaction that is covered under § .210, and the amount of the contract is expected to equal or exceed \$25,000.

(b) The contract requires the consent of a(n) [Agency adjective] official. In that case, the contract, regardless of the amount, always is a covered transaction, and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(c) The contract is for federally-required audit services.

**§ .225 How do I know if a transaction in which I may participate is a covered transaction?**

As a participant in a transaction, you will know that it is a covered transaction because the agency regulations governing the transaction, the appropriate agency official, or participant at the next higher tier who enters into the transaction with you, will tell you that you must comply with applicable portions of this part.

**Subpart C—Responsibilities of Participants Regarding Transactions Doing Business With Other Persons**

**§ .300 May I enter into a covered transaction with an excluded or disqualified person?**

(a) You as a participant may not enter into a covered transaction with an excluded person, unless the [Agency noun] grants an exception under § .120.

(b) You may not enter into any transaction with a person who is disqualified from that transaction, unless you have obtained an exception under the disqualifying statute, Executive order, or regulation.

**§ .305 What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction?**

(a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate.

(b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded

person, unless the [Agency noun] grants an exception under § .120.

**§ .310 May I use the services of an excluded person under a covered transaction?**

(a) You as a participant may continue to use the services of an excluded person as a principal under a covered transaction if you were using the services of that person in the transaction before the person was excluded. However, you are not required to continue using that person's services as a principal.

(b) You may not begin to use the services of an excluded person as a principal under a covered transaction unless the [Agency noun] grants an exception under § .120.

**§ .315 Must I verify that principals of my covered transactions are eligible to participate?**

Yes, you as a participant are responsible for determining whether any principal of your covered transactions is excluded or disqualified from participating in the transaction.

You may decide the method and frequency by which you do so. You may, but you are not required to, check the governmentwide *List*.

**§ .320 What happens if I do business with an excluded person in a covered transaction?**

If as a participant you knowingly do business with an excluded person, we may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend you, or take other remedies as appropriate.

**§ .325 What requirements must I pass down to persons at lower tiers with whom I intend to do business?**

Before entering into a covered transaction with a participant at the next lower tier, you must require that participant to:

(a) Comply with this subpart as a condition of participation in the transaction. You may do so using any method(s), unless § .430 requires you to use specific methods.

(b) Pass the requirement to comply with this subpart to each person with whom the participant enters into a covered transaction at the next lower tier.

**Disclosing Information—Primary Tier Participants**

**§ .330 What information must I provide before entering into a covered transaction with the [Agency noun]?**

Before you enter into a covered transaction at the primary tier, you as the participant must notify the [Agency

- 3017.435 What must I require of a primary tier participant?
- 3017.440 What method do I use to communicate those requirements to participants?
- 3017.445 What action may I take if a primary tier participant knowingly does business with an excluded or disqualified person?
- 3017.450 What action may I take if a primary tier participant fails to disclose the information required under § 3017.330?
- 3017.455 What may I do if a lower tier participant fails to disclose the information required under § 3017.350 to the next higher tier?

**Subpart E—Governmentwide List of Parties Excluded or Disqualified From Federal Procurement and Nonprocurement Programs**

- 3017.500 What is the purpose of the List?
- 3017.505 Who uses the List?
- 3017.510 Who maintains the List?
- 3017.515 What specific information is on the List?
- 3017.520 Who gives the GSA the information that it puts on the List?
- 3017.525 Whom do I ask if I have questions about a person on the List?
- 3017.530 Where can I get the List?

**Subpart F—General Principles Relating to Suspension and Debarment Actions**

- 3017.600 How do suspension and debarment actions start?
- 3017.605 How does suspension differ from debarment?
- 3017.610 What procedures does the Department of Agriculture use in suspension and debarment actions?
- 3017.615 How does the Department of Agriculture notify a person of suspension and debarment actions?
- 3017.620 Do Federal agencies coordinate suspension and debarment actions?
- 3017.625 What is the scope of a suspension or debarment action?
- 3017.630 May the Department of Agriculture impute the conduct of one person to another?
- 3017.635 May the Department of Agriculture settle a debarment or suspension action?
- 3017.640 May a settlement include a voluntary exclusion?
- 3017.645 Do other Federal agencies know if the Department of Agriculture agrees to a voluntary exclusion?

**Subpart G—Suspension**

- 3017.700 When may the suspending official issue a suspension?
- 3017.705 What does the suspending official consider in issuing a suspension?
- 3017.710 When does a suspension take effect?
- 3017.715 What notice does the suspending official give me if I am suspended?
- 3017.720 How may I contest a suspension?
- 3017.725 How much time do I have to contest a suspension?
- 3017.730 What information must I provide to the suspending official if I contest a suspension?

- 3017.735 Under what conditions do I get an additional opportunity to challenge the facts on which the suspension is based?
- 3017.740 Are suspension proceedings formal?
- 3017.745 Is a record made of fact-finding proceedings?
- 3017.750 What does the suspending official consider in deciding whether to continue or terminate my suspension?
- 3017.755 When will I know whether the suspension is continued or terminated?
- 3017.760 How long may my suspension last?
- 3017.765 How may I appeal my suspension?

**Subpart H—Debarment**

- 3017.800 What are the causes for debarment?
- 3017.805 What notice does the debarring official give me if I am proposed for debarment?
- 3017.810 When does a debarment take effect?
- 3017.815 How may I contest a proposed debarment?
- 3017.820 How much time do I have to contest a proposed debarment?
- 3017.825 What information must I provide to the debarring official if I contest a proposed debarment?
- 3017.830 Under what conditions do I get an additional opportunity to challenge the facts on which the proposed debarment is based?
- 3017.835 Are debarment proceedings formal?
- 3017.840 Is a record made of fact-finding proceedings?
- 3017.845 What does the debarring official consider in deciding whether to debar me?
- 3017.850 What is the standard of proof in a debarment action?
- 3017.855 Who has the burden of proof in a debarment action?
- 3017.860 What factors may influence the debarring official's decision?
- 3017.865 How long may my debarment last?
- 3017.870 When do I know if the debarring official debar me?
- 3017.875 May I ask the debarring official to reconsider a decision to debar me?
- 3017.880 What factors may influence the debarring official during reconsideration?
- 3017.885 May the debarring official extend a debarment?
- 3017.890 How may I appeal my debarment?

**Subpart I—Definitions**

- 3017.900 Adequate evidence.
- 3017.905 Affiliate.
- 3017.910 Agency.
- 3017.915 Agent or representative.
- 3017.920 Civil judgment.
- 3017.925 Conviction.
- 3017.930 Debarment.
- 3017.935 Debarring official.
- 3017.940 Disqualified.
- 3017.945 Excluded or exclusion.
- 3017.950 Indictment.
- 3017.955 Ineligible or ineligibility.
- 3017.960 Legal proceedings.

- 3017.965 List of Parties Excluded or Disqualified From Federal Procurement and Nonprocurement Programs.
- 3017.970 Nonprocurement transaction.
- 3017.975 Notice.
- 3017.980 Participant.
- 3017.985 Person.
- 3017.990 Preponderance of the evidence.
- 3017.995 Principal.
- 3017.1000 Respondent.
- 3017.1005 State.
- 3017.1010 Suspending official.
- 3017.1015 Suspension.
- 3017.1020 Voluntary exclusion or voluntarily excluded.

**Subpart J [Reserved]**

**Appendix to Part 3017—Covered Transactions**

**Authority:** 5 U.S.C. 301; Pub. L. 101–576, 104 Stat. 2838; Sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12698 (3 CFR, 1989 Comp., p. 235); 7 CFR part 2, subpart D, § 2.28.

2. Part 3017 is further amended as set forth below:

a. “[Agency noun]” is removed and “Department of Agriculture” is added in its place wherever it occurs.

b. “[Agency adjective]” is removed and “Department of Agriculture” is added in its place wherever it occurs.

c. “[Agency head or designee]” is removed and “the Secretary of Agriculture or designee” is added in its place wherever it occurs.

3. Section 3017.50 is further amended by adding a sentence to the end of paragraph (c) to read as follows:

**§ 3017.50 How is this part written?**

(c) \* \* \* The “Covered Transactions” chart in the appendix to this part shows the general model for the levels or “tiers” at which the Department of Agriculture enforces an exclusion under this part. However, the chart in the appendix shows only the general model and the model will vary for certain categories of transactions in accordance with the exclusions from covered transactions in §§ 3017.215 and 3017.220.

4. Section 3017.215 is further amended by adding paragraphs (h) through (p) to read as follows:

**§ 3017.215 Which nonprocurement transactions are not covered transactions?**

\* \* \* \* \*

(h) An entitlement or mandatory award required by a statute, including a lower tier entitlement or mandatory award that is required by a statute.

(i) With respect to the Department of Agriculture’s export and foreign assistance programs, any transaction below the primary tier covered transaction other than a nonprocurement transaction under the

Market Access Program between a nonprofit trade association or state regional group and a U.S. entity, as defined in part 1485 of this title.

(j) Any transaction under the Department of Agriculture's conservation programs, warehouse licensing programs, or programs that provide statutory entitlements and make available loans to individuals and entities in their capacity as producers of agricultural commodities.

(k) The export or substitution of Federal timber governed by the Forest Resources Conservation and Shortage Relief Act of 1990, 16 U.S.C. 620 *et seq.* (The "Export Act"), which provides separate statutory authority to debar.

(l) The receipt of licenses, permits, certificates, and indemnification under regulatory programs conducted in the interest of public health and safety, and animal and plant health and safety.

(m) The receipt of official grading and inspection services, animal damage control services, public health and safety inspection services, and animal and plant health and safety inspection services.

(n) If the person is a State or local government, the provision of official grading and inspection services, animal damage control services, animal and plant health and safety inspection services.

(o) The receipt of licenses, permit, or certificates under regulatory programs conducted in the interest of ensuring fair trade practices.

(p) Permits, licenses, exchanges and other acquisitions of real property, rights of way, and easements under natural resource management programs.

5. Section 3017.220 is amended by adding paragraph (d) to read as follows:

**§ 3017.220 Are any procurement contracts included as covered transactions?**

\* \* \* \* \*

(d) The contract is for the procurement of ocean transportation in connection with the Department of Agriculture's foreign assistance programs. With respect to the Department of Agriculture's export and foreign assistance programs, such contracts are the only procurement contracts included as covered transactions, notwithstanding the provisions in paragraphs (a) through (c) of this section.

6. Section 3017.440 is added to read as follows:

**§ 3017.440 What method do I use to communicate those requirements to participants?**

To communicate the requirement, you must include a term or condition in the

transaction requiring the participants' compliance with Subpart C of this part and requiring them to include similar term or condition in lower-tier covered transactions.

7. Section 3017.755 is further amended by adding a sentence at the end of paragraph (a) to read as follows:

**§ 3017.755 When will I know whether the suspension is continued or terminated?**

(a) \* \* \* However, the record will remain open for the full 30 days, as called for in § 3017.725, even when you make a submission before the 30 days expire.

\* \* \* \* \*

8. Section 3017.765 is added to subpart G to read as follows:

**§ 3017.765 How may I appeal my suspension?**

(a) An appeal may be filled only after the respondent has exhausted the option to contest the suspension in § 3017.720. The appeal must be filed within 30 days of receiving the decision required § 3017.755 and it must specify the basis of the appeal. The respondent must file the appeal in writing to the Hearing Clerk in the Office of Administrative Law Judges (OALJ), United States Department of Agriculture (USDA), Washington, DC 20250. The decision of a suspending official under § 3017.700 may be vacated by the assigned appeals officer only if the officer determines that the decision is:

- (1) Not in accordance with law;
- (2) Not based on the applicable standard of evidence; or
- (3) Arbitrary and capricious and an abuse of discretion.

(b) The appeals officer will base the decision solely on the administrative record.

(c) Within 90 days of the date the appeal is filed with USDA's OALJ Hearing Clerk, the appeals officer will notify, in writing, the respondent(s) and the suspending official, who took the action being appealed, of the decision.

(d) The appeals officer's decision is final and it not appealable within USDA.

9. Section 3017.800 is further amended by adding paragraph (e) to read as follows:

**§ 3017.800 What are the causes of debarment?**

\* \* \* \* \*

(e) Notwithstanding paragraph (c) (1) of this section, within the Department of Agriculture a nonprocurement debarment by any Federal agency taken before March 1, 1989.

10. Section 3017.870 is further amended by adding a sentence to the end of paragraph (a) to read as follows:

**§ 3017.870 When do I know if the debarring official debar me?**

(a) \* \* \* However, the record will remain open for the full 30 days, as called for in § 3017.820, even when you make a submission before the 30 days expire.

\* \* \* \* \*

11. Section 3017.890 is added to subpart H to read as follows:

**§ 3017.890 How may I appeal my debarment?**

(a) An appeal may be filed only after the respondent has exhausted the option to contest the debarment in § 3017.815. The appeal must be filed within 30 days of receiving the decision required § 3017.870 and it must specify the basis of the appeal. The respondent must file the appeal in writing to the Hearing Clerk in the Office of Administrative Law Judges (OALJ), United States Department of Agriculture (USDA), Washington, DC 20250. The decision of a debarring official under § 3017.800 may be vacated by the assigned appeals officer only if the officer determines that the decision is:

- (1) Not in accordance with law;
- (2) Not based on the applicable standard of evidence; or
- (3) Arbitrary and capricious and an abuse of discretion.

(b) The appeals officer will base the decision solely on the administrative record.

(c) Within 90 days of the date the appeal is filed with USDA's OALJ Hearing

Clerk, the appeals officer will notify, in writing, the respondent(s) and the debarring official, who took the action being appealed, of the decision.

(d) The appeals officer's decision is final and it not appealable within USDA.

12. Section 3017.935 is further amended by adding paragraph (b) to read as follows:

**§ 3017.935 Debarring official.**

\* \* \* \* \*

(b) Within USDA, the Secretary has designated the Administrators of program agencies to be the debarring official, *i.e.* Administrator, Food and Nutrition Service. Further, the Secretary authorizes these officials to delegate any and all functions except for making the final decision. Final decision includes the decision to initiate, maintain, or continue a debarment.

13. Section 3017.1010 is further amended by adding paragraph (b) to read as follows:

**§ 3017.1010 Suspending official.**

\* \* \* \* \*