



## Finding Misconduct-Based Suspension and Debarment Cases

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### What is a Misconduct-Based Case?

- All suspension and debarment actions are based on misconduct that indicates a lack of present responsibility.
- For this presentation, we are using misconduct as a shorthand for cases where you do not have a criminal conviction, indictment, or civil judgment.
- We will now explore: 1) where you find the cases; 2) which stakeholders you should engage; and, 3) what roles the different parties can and should play.

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### Finding Misconduct

- Declined Criminal Cases
- Civil False Claims Act Cases, including declined and intervened Qui Tam Actions
- FAR Mandatory Disclosures (or failures to disclose)
- Litigation Documents
- Search Warrants/Arrest Warrants
- Admissions
- Subpoena Returns
- Bid Protests

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### **Finding Misconduct**

- Terminations for Default/Grant Terminations
- Suspension/Debarment Appeals or Fact Proceedings
- Hotline Cases
- Outstanding Debts/Tax Delinquencies for Contractors
- Program Officials/Certification Divisions
- Problems Detected by Internal Controls

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### **Key Point for Finding Misconduct**

- Know the transactions at your Agency where evidence of misconduct arises or is reported.

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### **Government Stakeholders**

- Suspension and Debarment Officials
- Office of the Inspector General
- Program Officials
- Contract and Grant Officials
- Civil Division of the Department of Justice
- Criminal Division of the Department of Justice
- Assistant United States Attorneys
  - Civil
  - Criminal

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### **Additional Stakeholders**

- The Respondent
- The Respondent's Employees (if applicable)
- Respondent's Counsel
- Respondent's Competitors
- Respondent's Primes (if Respondent is a subcontractor)
- Respondent's Subs (if Respondent is a prime contractor)
- Respondent's Clients and Customers

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### **Ultimate Stakeholder**

### **The Taxpayer**

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### **Key Points for Stakeholders**

- As practical, you need to communicate with key Government stakeholders who can help, hurt or be harmed by your suspension and debarment before taking action.
- Several stakeholders are in a position to identify evidence of a lack of present responsibility. Make sure those stakeholders have a general understanding of suspension and debarment and know where to report potential cases.

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### The Take-Away

- **KNOW WHERE MISCONDUCT OCCURS.** Where are people most likely to lie, cheat, show incompetence and steal?
- **DO NOT REINVENT THE WHEEL.** Use existing findings or other material as appropriate.
- **ENGAGE STAKEHOLDERS.** Coordinate within the Government.
- **IT IS ALL ABOUT THE ADMINISTRATIVE RECORD.** A good administrative record can minimize the likelihood of harm to an ongoing investigation, reduce the need for fact-finding proceedings and protect the SDO's decision on appeal.

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### DOJ Parallel Proceedings Policy

- January 30, 2012, AG Holder issued new guidance reinforcing DOJ's longstanding policy in favor of coordination of remedies
- Underscores importance of DOJ criminal and civil attorneys coordinating with agency re administrative remedies
- Encourages case appropriate coordination at Intake, Investigation and Resolution

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### When You Will Hear From Civil?

- When a *qui tam* is filed, complaint sent to agency; often to office advising SDO
- DOJ / USAO civil attorneys should seek agency position at key decision points of civil case: *qui tam* intervention election/filing suit/settlement
- When defendants ask where agency stands on suspension or debarment. Agency should address that question; not DOJ's backyard.

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**When and How Main Justice  
Criminal Division Gets Involved**

- Rarely will I be calling you. If I am calling , it's usually because a prosecutor has contacted me for guidance or to find out what's going on.
- Usually, it's the other way around: The agency is calling me – either because a pre-indictment suspension is about to expire and the agency needs the AAG's approval for an extension of suspension under FAR 9.407- 4(b). Or, because an AUSA has included language in a plea agreement that goes beyond his or her authority.

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**Most Prosecutors Don't Have Much  
Experience with S&D**

- They are focused on their investigations and usually don't get involved; they let their agents deal with S&D issues.
- They see S&D as a diversion and distraction
- They don't want to lose momentum or control of their cases and they fear that S&D could result in litigation/unwanted discovery that might undercut the criminal case
- There hasn't been much DOJ policy in this area

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**Many Prosecutors Don't Know  
How Agencies Can Help Them**

- They are unfamiliar with the S&D process and don't know the players
- They don't trust agencies and don't understand how the agencies can help them. From their perspective, agencies either (1) act prematurely and work out administrative agreements - taking away the extra leverage the prosecutors may have had. Or, (2) they decide not to debar a contractor – also taking the cloud away

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### **The Baggage of Prior Bad Experiences**

- Prosecutors may have had a bad or mixed experience with a victim agency that misbehaved, or was inflexible or uncooperative, or gotten its back up about who is in charge.
- One prosecutor complained that S&D officials are “DC-centric” and have their “model” on how to do things: they don’t always talk/listen to agents and prosecutors.

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### **Talk to Prosecutors**

- This prosecutor complained about a case where the agency “stood tall” on debarment in discussions with the defense and ended up derailing plea agreements.
- This prosecutor didn’t like that the SDO had made up his mind and didn’t want to hear what the prosecutor had to say.
- The learning here: Prosecutors know that the relevant SDOs are the decision makers; they just want to be part of the conversation.

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### **There is no value for the Government not to work together**

- Is it ever a good thing for two agencies pursuing the same contractor not to be working well together? Never. It is never in the Govt’s interests not to have civil, criminal and administrative remedies well coordinated.
- Pre-indictment suspensions are great when they need to be done. But if S&D officials are not going to wait on the public event (indictment, conviction), they can screw up the criminal case

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### **A Prosecutor's Worst Fears**

- Tipping off people who don't know that they are targets of a criminal investigation
- Assets being dissipated
- Inventories being hidden
- Interviewing witnesses the prosecutors haven't talked to
- Creating bad Jencks statements in witness interviews

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### **What Plea Agreements Ought To Say**

- This Agreement is limited to the USAO and cannot bind any other federal, state or local prosecuting, administrative or regulatory authorities.
- The defendant understands and acknowledges that this Plea Agreement is limited to the undersigned parties and cannot bind any other federal authority, or any state or local authority.

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### **Plea Should Say that Admin and Civil Remedies Not Affected**

- The Defendant should acknowledge that:
  - No representations have been made regarding any civil or admin consequences of defendant's guilty plea because such matters are solely within the discretion of the Gov't agency involved; and,
  - Defendant may be subject to administrative action by federal or state agencies other than the DOJ, as a result of guilty plea, and plea agreement does not limit such action.

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**Non-negotiable Language in Health Care Cases**

The defendant understands and acknowledges that as a result of this plea, the defendant will be excluded from Medicare, Medicaid, and all Federal health care programs. The defendant agrees to complete and execute all necessary documents provided by any department or agency of the federal government, including but not limited to the United States Department of Health and Human Services, to effectuate this exclusion within 60 days of receiving the documents. This exclusion will not affect defendant's right to apply for and receive benefits as a beneficiary under any Federal health care program, including Medicare and Medicaid.”

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**DOJ Reps At Plea Re S&D**

- With respect to defendant X's present reliability and responsibility as a Gov't contractor, the DOJ agrees to cooperate with defendant X, in a form and manner to be agreed, in bringing facts relating to the nature of the conduct underlying this Agreement and X's cooperation and remediation to the attention of governmental and other debarment authorities.

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**At Plea, Information Prosecutors Agree to Provide Agency SDOs**

The United States agrees that it will inform the appropriate officials of the (federal agency) and any other federal agency with which the defendant has contracted, of the timeliness and value to the United States of the defendant's cooperation as provided for herein.

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## Civil Agreements

- Civil FCA settlement agreements expressly reserve and do not release suspension and debarment rights of any agency.

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## Other Take-Aways

- **THE GOAL IS THE BALANCED AND EFFECTIVE USE OF ALL APPROPRIATE REMEDIES.** DOJ doesn't want prosecutors to forego taking advantage of S&D in those cases where the Gov't should be protecting its business interests.
- **EACH CASE IS DIFFERENT.** Each case must be closely examined to make sure that everyone's interests are continually protected and that the Gov't's interests are advanced.

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## Case Study 1

- Special Agent learned the target of an investigation was about to receive a substantial contract.
- Special Agent believed the target was acting as a front company, depriving legitimate participants in the 8(a) Business Development Program opportunities to perform contracts reserved for 8(a) concerns.
- Target recently learned of the investigation but did not know the scope of the investigation.
- OIG carved a case out of the ongoing investigation based upon evidence obtained through OIG subpoenas and referred the matter to the Suspending Official.

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### Case Study 1 Continued

- Agency suspended the Respondent before contract award.
- The full criminal investigation and related proceedings took more than one year after the imposition of a suspension.
- AAG Requested the SDO extend the suspension.
- Respondent entered a guilty plea and was convicted.
- Although the suspension eventually lapsed, the Respondent did not seek further Federal involvement and was ultimately debarred for three years after a criminal conviction.

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### Case Study 2

- Special Agent received criminal and civil declinations on a case involving a loan agent who instructed borrowers not to disclose certain fees in violation of SBA regulations.
- OIG prepared a declaration for the agent based upon the prosecution referral report and referred the matter to the Debarring Official.

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### Case Study 2 Continued

- Debarring Official imposed a three year debarment, citing Respondent's explicit direction to program participants, which resulted in those participants failing to disclose fees notwithstanding SBA regulations.

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### Case Study 3

- Agency proposed a loan officer for debarment based upon the findings of a monitoring review at an FHA lender.
- Respondent's appeal raised material, disputed facts.
- Debarring official referred the case to an Administrative Judge for resolution of the disputed facts.

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### Case Study 3 Continued

- The Government took the Respondent's deposition in the fact-finding proceeding.
- During the deposition, the Respondent inadvertently admitted to several previously undisclosed regulatory violations.
- Government counsel referred a new notice of proposed debarment to the Debarring Official, based solely upon the transcript of Respondent's deposition. Contemporaneously, the Government moved for, and was granted, a stay in the proceedings underway for the first notice.

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### Case Study 3 Continued

- Respondent did not appeal the second notice.
- The Debarring Official found the second notice identified sufficient, independent cause for debarment and imposed a three year debarment.
- The Debarring Official withdrew the first notice.

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