FRAUD, DEBARMENT AND SUSPENSION

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PART I. FRAUD

A. FEDERAL FALSE CLAIMS ACT

1. Statistics – Fiscal Year 2014

	FY 2015	FY 2014
Total Settlements & Judgments	$3.58 Billion	$5.69 Billion
Qui Tam Settlements & Judgments	$2.8 Billion	$2.99 Billion
New *Qui Tam* Matters	632	713
All New Matters	737	804
Recovery in Procurement Fraud	$1.1 Billion	$65 Million
Recovery in Nonintervened Cases	$1.1 Billion	$80 Million

2. Notable Settlements

a. The Justice Department reached 70 settlements involving 457 hospitals in 43 states for more than $250 million related to cardiac devices that were implanted in Medicare patients in violation of Medicare coverage requirements. The settlement stemmed from a *qui tam* suit brought by a cardiac nurse and a health care reimbursement consultant.

b. **DaVita Healthcare Partners, Inc**. The country's largest provider of dialysis services agreed to pay $450 million to resolve claims that it violated the FCA by knowingly creating unnecessary waste in administering the drugs Zemplar® and Venofer® to dialysis patients, and then billing the federal government for such avoidable waste. The government had elected not to intervene in the lawsuit despite two years of investigating.

c. **MetLife Home Loans LLC**. MetLife has agreed to pay $123.5 million to resolve allegations that MetLife Bank violated the FCA by knowingly originating and underwriting mortgage loans insured by the Federal Housing Administration that did not meet applicable requirements.

d. **UFC Aerospace**. The aerospace supply chain company and its former president agreed to pay $20 million to resolve a suit alleging that the company fraudulently said it was a women-owned small business in order to procure $48 million in government contract

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work. According to the amended complaint-in-intervention, UFC falsely certified to Government contractors that UFC was a woman-owned small business (WOSB) when UFC at no point met either requirement for WOSB status under the Small Business Act.

e. **Novartis AG**. In November the company tentatively agreed in principle to pay out $390 million to settle a *qui tam* suit alleging that improper kickbacks were made to pharmacies in order to boost sales of several prescription drugs.

f. **United Parcel Service**. UPS agreed to pay $25 million to settle allegations that it concealed its failure to comply with its overnight service contracts for state and federal government packages. The company allegedly recorded inaccurate delivery times and engaged in other fraudulent actions to conceal from the government when UPS had actually delivered the parcels.

g. **Sprint Communications**. The wireless telecommunications company agreed to pay $15.5 million to resolve allegations that it overbilled the federal government for costs it incurred executing court-issued wiretaps, pen registers, and trap devices. Sprint allegedly included unallowable network infrastructure costs in its reimbursement requests to the Government.

h. **University of Florida**. The university agreed to pay $19.8 million to settle allegations that the university improperly charged the U.S. Department of Health and Human Services for salary and administrative costs on hundreds of federal grants.

i. **APL Limited**. Ocean carrier APL agreed to pay the government $9.8 million to resolve allegations that it violated the FCA in connection with a contract to provide GPS tracking of shipping containers in Afghanistan. APL's DoD contract required it to affix a satellite tracking device to each shipping container transported from Karachi, Pakistan to U.S. military bases in Afghanistan. The government alleged that APL billed the DoD for tracking services despite knowing that the tracking devices completely or partially failed to transmit data.

j. **Boeing Company**. Boeing paid the United States $18 million to settle allegations that the company submitted false claims for labor charges on maintenance contracts with the U.S. Air Force for the C-17 Globemaster aircraft.

k. **L-3 Communications Corporation**. L-3 agreed to pay $4.63 million to resolve allegations that it inflated labor hours for time spent by independent contractors at the military's Continental U.S. Replacement Centers (CRC) in Fort Benning, Georgia, and Fort Bliss, Texas, preparing to deploy to overseas posts to support U.S. military operations abroad. The Government alleged that L-3 knowingly overcharged the Government for time their independent contractors spent at the CRCs by billing for each individual not based on the actual time that individual spent at the CRC, but based instead on the earliest arrival or latest departure time of any other individual who also processed through the center that same day.

l. **U.S. Investigations Services Inc**. USIS and its parent company, Altegrity, agreed to settle allegations that USIS violated the FCA for conduct involving a contract for background investigations that USIS held with the U.S. Office of Personnel Management. In exchange for a release of liability under the FCA, the companies have

agreed to forgo their right to collect payments that they claim were owed by OPM, valued at least at $30 million.

m. **LB&B Associates Inc**. LB&B and its principals agreed to pay $7.8 million to resolve allegations that they made false statements to obtain contracts through the SBA's 8(a) program. The Government alleged that in seeking certification under SBA's 8(a) Program, LB&B falsely represented that one of the principals—who satisfied the criteria for a socially and economically disadvantaged person under the program—controlled the operations of LB&B.

n. **Sandia Corporation**. Sandia paid $4.7 million to resolve allegations that the company violated the FCA and the Byrd Amendment by using federal funds to lobby Congress and federal agencies to secure contract renewals.

3. Supreme Court

a. **Supreme Court Limits Wartime Suspension of Limitations Act (WSLA) to Criminal Offenses but Narrows Application of First-to-File Bar to Pending Cases.** In *Kellogg Brown & Root v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), the Court reversed the Fourth Circuit's extension of the WSLA's tolling provision to civil actions involving fraud, which provision the court of appeals held suspended the civil FCA's six-year statute of limitations. The WSLA applies to any "offense…involving fraud or attempted fraud against the United States or any agency thereof." 18 U.S.C. § 3287. The Court focused its interpretation of the statute on the word "offense" in finding that the "text, structure, and history of the WSLA show that the Act applies only to criminal offenses." The Court also decided an important issue concerning the scope of the FCA's first-to-file bar, which provides that "no person other than the government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). Circuit courts had split on whether the bar's application lasts only while the earlier-filed suit remains pending or in perpetuity. The Court affirmed the Fourth Circuit's holding that the bar is only temporary and no longer bars a related action once the first-filed suit has been dismissed or resolved. In sum, the Court agreed that the use of the word "pending" limited the bar's applicability to actions currently pending in court and rejected petitioners' argument that "pending" was merely "used as a short-hand for the first filed action." *See* 57 G.C. ¶ 169.

b. **Supreme Court Agrees to Hear Implied Certification Case.** The Supreme Court granted review in *Universal Health Servs. v. United States ex rel. Escobar*, an implied certification case from the First Circuit. By agreeing to hear the case, the Court appears set to resolve a circuit split over the "implied certification" theory of legal falsity under the FCA. Specifically, the court will consider: (1) whether the implied certification theory of legal falsity under the FCA is viable; and (2) if so, whether a government contractor's reimbursement claim can be legally false when the claimant failed to comply with a statute, regulation, or contractual provision that is deemed "material" to the government's decision to pay the claim, even when the statute, regulation or contractual provision does not expressly state that compliance with that provision is a condition of payment.

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In 2015, the circuit split on implied certification widened as circuit courts applied varying tests and reached opposite results. In *United States ex rel. Omar Badr v. Triple Canopy*, 775 F.3d 628 (4th Cir. 2015), the Fourth Circuit held that liability under the implied certification theory could arise if a contractor—with the requisite scienter—withheld information about noncompliance with material contractual requirements. In applying a materiality test, the Fourth Circuit joined the First Circuit in departing from the "express condition of payment" test applied by a number of circuits in implied certification cases. *See* 57 G.C. ¶ 24; 57 G.C. ¶ 252. In *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015), the Seventh Circuit rejected the implied certification theory in a case which involved a condition of participation rather than a condition of payment. The Seventh Circuit did not address whether it would adopt the implied certification theory if presented with a clear condition of payment case. *See* 57 G.C. ¶ 224. At present, eight of the thirteen circuits have accepted the implied certification theory in some form, but the eight circuits have reached varying conclusions about the appropriate scope of the theory.

4. Courts of Appeals

a. **Knowingly False Promise in a Program Participation Agreement Could Be Material to the Government's Decision to Pay.** In *United States ex. rel Miller v. Weston Educational Inc.*, 784 F.3d 1198 (8th Cir. 2015), the Eighth Circuit overturned a district court's grant of summary judgment in favor of the defendant, a for-profit college which had signed a Program Participation Agreement (PPA) with the Government to participate in programs that provide federal financial assistance to students. Based on a theory of fraudulent inducement, relators alleged that defendant induced the Department of Education to provide funds by falsely promising to keep accurate student records of performance and eligibility for financial assistance. Instead, relators alleged, defendant intended to manipulate the grades of students to keep them eligible for federal loans and grants and permit the college to continue collecting the students' federally funding. The district court found that the falsified records did not cause the improper distribution of funds and therefore were not material to the Government's funding decision. The Eighth Circuit, however, found a "causal link" between the for-profit college's promise to maintain adequate records and the Government's disbursement of funds. Specifically, it found that the for-profit college could not have executed the PPA without stating it would maintain adequate records because the relevant statute, regulation, and contractual agreement all explicitly condition participation and payment on compliance with the requirements that relators allege the college knowingly disregarded. Without the PPA, the for-profit college could not have received any federal funds. In September, the defendant filed a cert petition at the Supreme Court.

b. **Reasonable Interpretation of an Ambiguous Regulation Precludes Finding of Scienter Absent Authoritative Guidance Warning Defendant Away From Its Interpretation.** In *United States ex rel. Purcell v. MWI Corp.*, -- F.3d – (D.C. Cir. Nov. 24, 2015), the D.C. Circuit overturned a jury verdict and ruled in favor of MWI Corporation, represented by Crowell & Moring, in a long-running civil FCA lawsuit in which the government asserted claims for approximately $225 million in trebled damages (plus additional civil penalties). The Government alleged that false claims and statements were submitted to the Export-Import Bank of the United States in connection

with eight loans to the government of Nigeria for the purchase of MWI's water pumps. The key issue was whether MWI's certification that the commissions it paid its sales agent in connection with the sales were "regular" was knowingly false. MWI argued that its certification could not have been knowingly false because the term "regular commissions" was ambiguous, MWI made the certification based on a reasonable interpretation of the term, and the agency never defined "regular commissions" or authoritatively clarified its meaning. The unanimous panel agreed and held that MWI could not have acted "knowingly" where there was no evidence that the government "had officially warned MWI away from its otherwise facially reasonable interpretation of [an] undefined and ambiguous term," citing the Supreme Court's decision in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 69–70 & n.20 (2007). In addition, the court rejected the government's subjective intent and "duty to inquire" arguments, explaining both that (a) subjective intent was irrelevant because the defendant's interpretation of the term was reasonable and that (b) a failure to seek a legal opinion from the Bank did not support a finding that MWI acted recklessly under the FCA. Thus, this case establishes important precedent that, where a defendant adopts an objectively reasonable or plausible interpretation of an ambiguous regulatory term and the agency has not officially warned the defendant from its interpretation via authoritative guidance, the FCA scienter element cannot be established. *See* 57 G.C. ¶ 393.

c. **Eleventh Circuit Addresses Scienter Requirement.** In *Urquilla-Diaz v. Kaplan University*, 780 F.3d 1039 (11th Cir. 2015), the district court granted summary judgment for Kaplan University on the relators' allegations that it falsely certified to the Government that it was complying with various federal statutes and regulations to receive federal-aid funds under Title IV of the Higher Education Act of 1965. The for-profit college signed a PPA with the Government to participate in the program. Affirming the district court, the Eleventh Circuit found that the university did not execute the PPA with reckless disregard for whether its policies violated the applicable statute or regulations because the university employee that certified compliance reasonably relied on the work of his subordinates and an independent employment lawyer, and the university regularly held compliance trainings. Consequently, no duty of inquiry was triggered – the employee was not required, under the circumstances presented, to independently verify that the university's policies complied with the applicable statute and regulations.

d. **Damages Award Overturned for Failure to Consider the Role of Competition in Setting of Prices**. In *United States v. United Technologies, Inc.*, 782 F.3d 718 (6th Cir. 2015), the court vacated a $657 million damages award against UTC, represented by Crowell & Moring, because the district court did not account for the fair market value of the goods and services received by the government and the role of competition in setting a fair market value. The Sixth Circuit concluded that the district court erroneously held that competition between Pratt and GE was irrelevant to the government's claim for damages. Rather, a comparable sales analysis is the "preferred method" for establishing fair market value and the method "applies even though the market for fighter jet engines is heavily regulated…, has two sellers, and [] results in few sales per year." The court concluded that GE's "engine prices are… a natural place to look for evidence of the value the government received" and "[t]he only question is whether those engines are adequately comparable to Pratt's." The "proper approach" for the district court "was to start with GE's prices and make adjustments for any material differences between the

engines." The Sixth Circuit instructed the district court to recalculate its damages under the benefit-of-the-bargain method to determine whether the government got what it paid for in spite of the misstatements. *See* 57 G.C. ¶115; 29 Nash & Cibinic Rep. ¶ 67.

e. **Eighth Circuit Limits Relators' Ability to Recover Award from Separate Proceedings**. In *Rille v. PricewaterhouseCoopers LLP*, 803 F.3d 368 (8th Cir. Oct. 5, 2015), the Eighth Circuit, in an *en banc* decision, vacated a relators' share award made after the government intervened and settled several claims against two contractors, including some brought by the relators. The district court based the relator's share on the value of the entire settlement, but the Eight Circuit reversed. The court held that "when the government proceeds with an action brought by a relator under the [FCA], and then settles both the claim brought by the relator and a different claim that does not overlap factually with the claim brought by the relator," the relator is only entitled to recover "from the proceeds of the settlement of the claim that he brought." In reaching its decision, the Eighth Circuit focused on the text of the statute and distinguished between instances in which the FCA refers to an "action" and instances in which the FCA refers to a "claim" to conclude that "[t]he settlement language of 3730 (d)(1)… does not extend to a different claim that is settled by the government when that claim was not originally 'brought by' the relator. The relators' right to recovery is limited to a share of the settlement of the claim that they brought." The Eighth Circuit determined that the district court failed to "make adequate factual findings to allow appellate review of whether the settlement was based on claims that factually overlapped with the claims brought by the relators[]" and remanded for further proceedings. *See* 57 G.C. ¶ 318.

f. **Criminal Conviction Results in Mandatory Dismissal of *Qui Tam* Relator and Recovery Bar.** In *Schroeder v. United States*, 793 F.3d 1080 (9th Cir. 2015), the court found that a criminal conviction of a *qui tam* relator related to the underlying fraud requires dismissal of that relator from the suit, and bars his or her recovery. Schroeder, the relator, had previously pled guilty to one felony count of conspiracy to commit fraud, a conviction that stemmed from the claims underlying his *qui tam* suit. Under 31 U.S.C. § 3730(d)(3)'s provision regarding *qui tam* actions, "If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of § 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action." Schroeder argued that he should not be dismissed because his role in the fraudulent scheme was only "minor." The court rejected this argument, finding that the purpose of the 1988 amendment that codified § 3730(d)(3) was to restrict eligibility of relators in just such cases and that the statute by its plain language provided no exception to dismissal where a conviction was involved.

g. **Disclosure to the Government is not "Public" Disclosure.** Two circuits joined the majority of others in holding that disclosures to government officials alone do not trigger the public disclosure bar. In *United States ex rel. Whipple v. Chattanooga-Hamilton County Hospital Authority*, 782 F.3d 260 (6th Cir. 2015), the Sixth Circuit held that the disclosure of a company's internal investigation concerning improper Medicare billing to the Office of the Inspector General did not constitute a "public disclosure." The Court rejected defendant's contention that the auditors retained by defendant were "strangers to the fraud," noting that the only disclosures made were to the government and that the auditors were under obligation to keep all information confidential. In so doing, the

Court expressly rejected the Seventh Circuit's holding in *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), that disclosure to a government official authorized to act for the government can trigger the bar. *See* 56 G.C. ¶ 136. The Fourth Circuit similarly rejected the Seventh Circuit's minority view in *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 777 F.3d 691(4th Cir. 2015), holding that a "public disclosure" requires "that there be some act of disclosure *outside of the government.*" The Court found that various reports, including audits, were not publicly disclosed when delivered to county, state, and federal agencies. Nor was their mere availability via a public records request enough to put them into the public domain. *See* 57 G.C. ¶ 44.

h. **9th Circuit Removes Additional "Original Source" Requirement for Relators.** In *United States ex rel. Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121 (9th Cir. 2015), the 9th Circuit held that a relator is not required to have played a role in the public disclosure of the allegations that are a part of his suit to be deemed an "original source." *See* 57 G.C. ¶ 233. In so doing, the court abrogated its 23-year old ruling in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), in which it had announced that requirement as part of a three-part original source test. *See* 34 G.C. ¶ 732. The first two prongs parallel the statutory language and require the relator to show that (1) he has direct and independent knowledge of the information on which the allegations…are based and (2) he has voluntarily provided the information to the Government before filing his civil action. The Ninth Circuit relied on the Supreme Court's decision in *Rockwell Int'l v. United States*, 549 U.S. 457 (2007), as well as the plain meaning of § 3730(e)(4)(B), in finding that *Wang* improperly "read a non-existent, extra-textual third requirement" into the statute from the FCA's legislative history in requiring that the relator also have had a hand in the public disclosure of the allegations that are a part of his suit. *See* 48 G.C. ¶ 425.

i. **11th Circuit Strengthens Original Source Requirement.** In *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805 (11th Cir. 2015), the Eleventh Circuit for the first time interpreted the amended "original source" provision of the FCA, which defines an original source as someone who has "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B) (2012). The prior version required "direct and independent knowledge" and, thus, the amendment was largely viewed as lowering the bar for a relator to qualify as an original source. In *Osheroff*, however, the court applied the amended language similarly to its prior precedent, holding that the relator's only independent knowledge did not materially add to the publicly disclosed allegations because it was merely background information or provided additional details. The court expressly noted that the public disclosures themselves were already sufficient to give rise to an inference of the fraud alleged in the suit.

j. **Violation of Seal Provision Does Not Require Dismissal.** In *United States ex rel. Rigsby v. State Farm Fire Cas. Co.*, 794 F.3d 457 (5th Cir. 2015), the Fifth Circuit held that the relators' violations of the FCA's seal requirements did not mandate dismissal. The Fifth Circuit acknowledged the divergent opinions of the Second, Sixth, and Ninth Circuits, rejected the Sixth Circuit's *per se* rule of mandatory dismissal, and applied the three factor balancing test from the Ninth Circuit: 1) the harm to the Government caused

by the disclosure, 2) the nature of the violation, and 3) the existence or non-existence of bad faith or willfulness. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995). The Fifth Circuit determined that the *Lujan* factors weighed in relators' favor and that dismissal was inappropriate.

In *Smith v. Clark/Smoot/Russell*, 796 F.3d 424 (4th Cir. 2015), the Fourth Circuit concluded that the relators' violations of the seal requirements did not mandate dismissal of their complaint, and applied the Second Circuit's frustration of purpose analysis. In its analysis, the Fourth Circuit identified the purposes served by the seal requirements: (1) to permit the United States to determine whether it already was investigating the fraud allegations (either criminally or civilly); (2) to permit the United States to investigate the allegations to decide whether to intervene; (3) to prevent an alleged fraudster from being tipped off about an investigation; and (4) to protect the reputation of a defendant in that the defendant is named in a fraud action brought in the name of the United States, but the United States had not yet decided whether to intervene. The Fourth Circuit determined that the violations did not incurably frustrate those stated purposes.

4. District Courts

a. **First Ever Bifurcated FCA Trial**. In *United States v. AseraCare Inc.*, No. 2:12-CV-245-KOB (N.D. Ala. May 20, 2015), the court issued the first ever order bifurcating the falsity and scienter elements in an FCA trial. In bifurcating the trial, the court agreed with the defense that allowing information about the company's marketing practices would be unduly prejudicial to AseraCare and ruled that the government could not present evidence of general corporate practices during the phase one trial focused on falsity. A likely evidentiary concern underlying the bifurcation order was the court's prior pretrial ruling authorizing the use of statistical sampling and extrapolation to prove falsity. After a ten-week trial and nine days of deliberations on phase one, the jury sided with the government and the relators and found that almost of the claims in the patient sample were objectively false. But just four days later, the court held a hearing, *sua sponte*, to discuss the instructions the court had provided to the jury. At the hearing, Judge Bowdre stated that she should have instructed the jury, as requested in AseraCare's proposed jury instructions, that a mere difference of opinions among physicians, without more, is insufficient to show falsity under the FCA. AseraCare moved for a new trial, which the court granted.

b. **Use of Statistical Sampling to Prove Liability and Damages Rejected and Ruling Certified to Fourth Circuit**. In *United States ex rel. Michaels et al. v. Agape Senior Community, Inc., et. al*, 2015 WL 3903675, No. 0:12-3466-JFA (D.S.C. Jun. 25, 2015), the district court rejected the use of statistical sampling to prove liability and damages. This stands in contrast to a 2014 case in which a court approved of statistical sampling not only to prove damages, but also to prove liability, including the falsity and knowledge elements. *United States ex rel. Martin v. Life Care Centers of America, Inc*., No. 1:08-cv-251 (E.D. Tenn. Sept. 29, 2014). In *Agape*, relators argued that defendants submitted false claims to federal healthcare programs for nursing home-related services that were not medically necessary. During discovery, relators argued that due to the large number of claims at issue, their experts should review a small percentage of the claims, determine what percentage of those claims were not medically necessary, and extrapolate across the

population of submitted claims. The court concluded that it would not allow plaintiffs to use statistical sampling because sampling was a permissible method only if the individual review of claims was impossible, rather than simply time-consuming and expensive. Because of the effect of the statistical sampling ruling on the outcome of the case, the court certified its ruling for interlocutory appeal to the Fourth Circuit in order to address the question of whether sampling is an appropriate means of establishing liability and damages. In September, the Fourth Circuit agreed to hear the appeal.

B. CRIMINAL CHARGES, CONVICTIONS, AND PLEAS

1. **"Yates Memo" Prioritizes Prosecution of Corporate Employees.** On September 9, 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum to federal prosecutors titled "Individual Accountability for Corporate Wrongdoing." The memo— known as the "Yates Memo"— articulates DOJ's policy of prioritizing the investigation and criminal prosecution of individual employees in matters involving corporate misconduct. Specifically, the memo outlines six "key steps" to guide DOJ attorneys in their pursuit of individuals responsible for corporate wrongdoing. The first of the six policy objectives is perhaps the most notable: "To be eligible for <u>any</u> cooperation credit, corporations must provide the Department all relevant facts about the individuals involved in corporate misconduct." This guideline for federal prosecutors raises the bar for corporate defendants seeking cooperation credit, and corporations subject to criminal liability must be prepared to confront this heightened standard. Additionally, the implementation of the Yates Memo policies will likely result in an increased need for individual legal counsel in corporate investigations. As federal prosecutors alter their priorities in accordance with these new policy objectives, corporations and their employees must adapt their own strategies in navigating federal investigations and prosecutions.

2. **Pharmaceutical Executive's Indictment Illustrates Yates Memo's Policy Objective of Holding Individuals Accountable.** W. Carl Reichel, the former president of pharmaceutical company Warner Chilcott, was indicted in October in Massachusetts federal court for allegedly conspiring to pay kickbacks to physicians. Warner Chilcott agreed to plead guilty to health care fraud, resulting in a $23 million criminal fine, and it also settled for $102 million to resolve civil False Claims Act violations. Several other individuals were also charged with offenses related to the company's conduct, which involved providing money, gifts, and dining to physicians in exchange for prescribing the company's drugs.

3. **Former CEO of Chicago Public Schools Pleads Guilty.** Barbara Byrd-Bennett, who served as the CEO of the Chicago Public Schools from 2012 to 2015, pleaded guilty on October 13, 2015, to one count of wire fraud relating to her role in a bribery and kickback scheme. Bennett's conduct involved steering $23 million worth of no-bid contracts to two education consulting firms in exchange for $2.3 million in bribes and kickbacks. As part of her plea agreement, Bennett must cooperate with the Government against the owners of the two consulting firms, who also face criminal charges in connection with the scheme. Prosecutors recommended that Bennett serve 7 ½ years in prison.

4. **Contractor Pleads Guilty to Bribing Navy Officials.** Leonard Glenn Francis, a Malaysian ship-supply contractor known as "Fat Leonard," pleaded guilty in January to bribery, conspiracy to commit bribery, and conspiracy to defraud the United States. Four Navy officials have also pled guilty to charges related to their interactions with Francis, which involved accepting cash, prostitution services, travel expenses, and other gifts in exchange for aiding Francis's scheme to overbill the Navy for ship supplies and dockside services. Two of Francis's employees have also pled guilty to conspiracy charges. Francis faces up to 25 years in prison and must pay upwards of $35 million in restitution.
5. **Eight-Year Prison Sentence for Violation of Arms Export Control Act.** Mozaffar Khazaee pleaded guilty in February to one count of unlawful export and attempted export of defense articles from the U.S. in violation of the Arms Export Control Act. Khazaee, a 61-year-old former resident of Manchester, Connecticut, was employed by three separate defense contractors between 2001 and 2013. From 2009 through 2013, Khazaee obtained trade secret, proprietary and export-controlled defense technology from his employers and offered to provide it to gain employment with state-controlled technical universities in Iran. The confidential material consisted of technical manuals, specification sheets, test results, technical drawings, and other proprietary material related to U.S. military jet engines. In October, U.S. District Judge Vanessa L. Bryant of the District of Connecticut sentenced Khazaee to 97 months in prison and imposed a $50,000 fine.
6. **Former SAP Executive Pleads Guilty to FCPA Violations.** Vincente Garcia, former head of Latin American sales for SAP International Inc., pleaded guilty in August to violations of the Foreign Corrupt Practices Act (FCPA). The one-count criminal information in the Northern District of California charged Garcia with conspiracy to violate the FCPA's anti-bribery provisions. Garcia also settled civil FCPA charges brought by the SEC. The violations stem from Garcia's involvement in a scheme to bribe Panamanian Government officials to secure Government technology contracts for SAP from 2009 to 2013. Garcia's sentencing is scheduled for December 16, 2015 before U.S. District Judge Charles Breyer.
7. **Individuals Charged in Kickback Scheme Involving Boeing Subsidiary.** In April, the U.S. Attorney's Office for the Central District of California announced that it had charged seven individuals in a kickback scheme involving roughly $750,000 in payments to a procurement official at Boeing's Space and Intelligence Systems (BSIS). BSIS supplies satellites and satellite parts to NASA, the U.S. Department of Defense, the National Reconnaissance Office, and the U.S. Air Force. The Government alleges that A&A Fabrication and Polishing Inc., a subcontractor to BSIS, paid kickbacks to a BSIS procurement officer in exchange for confidential information that gave A&A a competitive advantage in the bidding process, resulting in the award of $4.5 million worth of BSIS purchase orders between 2005 and 2012. At least four of the seven defendants have pleaded guilty, including the BSIS procurement officer who received the kickbacks.

Part II - SUSPENSION AND DEBARMENT

A. DOD STATISTICS

The DOD statistics, reported annually in this review since 1992, in 2015 continued to show aggressive enforcement, but with notable variations.

	FY 2013	FY 2014	FY 2015
Air Force			
Suspensions	42	109	18
Proposed Debarments	205	177	123
Debarments	185	138	100
Total Actions	432	424	241
Army			
Suspensions	71	131	143
Proposed Debarments	316	392	434
Debarments	258	279	456
Total Actions	645	802	1156
Navy			
Suspensions	137	145	147
Proposed Debarments	189	262	574
Debarments	109	208	435
Total Actions	437	615	1156
DLA			
Suspensions	18	15	48
Proposed Debarments	190	164	325
Debarments	167	110	149
Total Actions	375	259	522

B. REGULATORY DEVELOPMENTS

New regulations expanded the potential causes for suspension, debarment, or ineligibility for award based on initiatives from Congress and the Obama Administration. Among them:

1. Proposed Fair Pay and Safe Workplace Rule and Guidance, 80 Fed. Reg. 30547, 30573; 56 G.C. ¶ 176, 189. On May 28, 2015 the FAR Council proposed a rule, and the Department of Labor issued proposed guidance to implement President Obama's executive order entitled Fair Pay and Safe Workplaces, E.O. 13673, 266 56 GC, dated July 31, 2014. The E.O.'s goal is "to increase efficiency and cost savings in the work performed" by federal contractors by "ensuring that they understand and comply with labor laws." Most significantly, the order requires contracts (and subcontracts) over $500,000 to include a requirement for representations whether there has been any administrative determination, arbitral decision, or civil judgment within the preceding three years for violations of 14 labor laws and equivalent State laws. The representation is to be updated every 6 months. The order requires that COs and newly created Labor Compliance Advisors (LCAs) evaluate the violations to determine whether a contractor has a satisfactory record of integrity and business ethics – and to determine whether the disclosed violations or failure to disclose are cause for referral to this agency debarring official. The proposed FAR rule and DOL guidance, as well as the executive order itself, have provoked great controversy and industry resistance. See 57 G.C. ¶ 279.

2. Inverted Domestic Corporations. Under continuing pressure from Democratic Senators, the Administration tightened the statutory prohibition against contracting with inverted domestic corporations. On December 15, 2014, the FAR Council proposed an interim rule and a proposed rule, "to state more clearly whether a corporation is covered by this prohibition," in particular to eliminate "unclear references and discussion" that were argued to narrow the definition and avoid the ban. 79 Fed. Reg. 74554 (Dec. 15, 2014); 57 G.C. ¶ 6(a).

3. DOD Whistleblower Ban on Contractor Confidentiality Agreements. Implementing Sec 743 in the 2015 Consolidated and Further Continuing Appropriations Act, Pub. L 113-325, and extending its application beyond, DOD on October 29, 2015 issued a deviation to promulgate a new clause entitled "Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements." See DFARS §§252.203-7996-97.

4. OMB's Uniform Administrative Requirements or "Super Circular." Effective December 26, 2014, the Super Circular consolidates and supersedes separate OMB circulars, to provide a single set of regulations governing all financial assistance agreements with non-federal agencies. See 79 Fed. Reg. 78590 (Dec. 26, 2013); 57 G.C. ¶ 39. Perhaps most significantly, the Circular includes a new mandatory disclosure requirement, see 2 C.F.R. §200.112, that is similar to, but not identical to the FAR disclosure requirement (e.g. does not cover civil or FCA on overpayments, is not restricted to Title 18 crimes, and poses its own interpretive challenges. Failure to disclose could raise the risk of debarment.

C. ANNUAL REPORT OF THE ISDC

On March 31, 2015, the Interagency Suspension and Debarment committee issued its annual report, as required by law, reporting on the status of the Federal suspension and debarment system in FY 2015. As in prior years, the Committee reported its efforts to build , maintain, and improve the system. It briefly recounted the improvements and expansion of "active and effective" programs, including "an active referral process." The report set forth in appendices the details of individual agency activity for FY 2014, which, it summarized, "shows an increase in suspensions and debarments from the prior year (e.g., 1,929 debarment in FY 2014 compared to 1,696 in FY 2013) and a continued upward trend compared to FY 2009, when the ISDC formally began to collect data on suspension and debarments. Agencies also reported a significant number of referrals commensurate with the levels seen in FY 2013 (i.e., 3,465 referrals in FY 14 vs. 3,942 in FY 13)." Additional interesting government-wide statistics were 2,241 proposed debarments, 161 show cause notices, and 47 administrative agreements. Thus, 2014 continued the extraordinary growth of federal suspensions and debarment – and the resulting increase in the number of contractors and individuals facing this powerful government sanction.

Once again, the ISDC appropriately disclaimed the numbers as "a metric of success" stating that

> ..the ISDC reminds its members to regularly review their own actions to determine if the level of activity is reflective of what is necessary to protect their agency and the government from harm. In addition, the ISDC continues to emphasize that suspension and debarment are tools to protect the government's interest – not punishment – which must be applied following principles of fairness and due process set forth in the Federal Acquisition Regulation and 2 C.F.R. Part 180…

D. POSSIBLE LESSONS TO BE LEARNED FROM RECENT JUDICIAL REACTIONS

It is worth considering whether these regulations provide sufficient protections to insure fundamental fairness under the expanded, activist programs that now exist. Given the number of actions, is it fair to ask whether they are being considered as the "drastic sanctions" that they are. Isn't it clear that the standard for "suspicion upon adequate evidence" set by Horne Brothers, Inc. v Laird in 1972 – "a probable cause showing necessary to support a search warrant" – is wholly inadequate to support the severe, even irreparable harm caused by a suspension or the ineligibility that comes with a proposed debarment? Do the remarkable number of actions suggest that the "immediate need" required for a suspension is being handled perfunctorily or assumed? Or that imputation to affiliates or to individuals for whom there is only a secondary suspicion is being handled similarly?

The relevance and timeliness of these questions is underscored by a set of OIG training powerpoints found on Google presenting "A Fun and Easy Primer for OIG Staff" on suspension and debarment, including the following:

> S&D can put a world of hurt on a bad guy, even though it's not a punitive measure – losing access to Federal contracts or grants can shut a company down or ruin a career
>
> Thus, a recommendation for suspension or debarment is a REALLY effective motivator when you want someone to get their financial affairs in order
>
> As you'll see in the following slides, S&D is fast and "easy"
>
> A respondent can …file suit for review under the Administrative Procedures Act… Good luck with that

Perhaps some lessons can be learned from judicial reactions.

1. Inchcape Shipping Holdings LTD et al v. United States, COFC, No. 1:13-cv-00953-JFM (TRO entered Jan. 2, 2014).

a. The Suspension and the Complaint. On November 26, 2013, the Navy SDO suspended Inchcape and numerous affiliates, based on purported failures to reconcile accounts properly and to disclose findings of overbillings in an internal contract audit dated March 5, 2008. The audit was not formally produced until required by court order in November 2012 (which order noted that the government had informally obtained a copy prior to June 9, 2011). Inchcape complained that the suspension did not meet the standards of FAR 9.407-1(b)(1) that the suspension be based on "adequate evidence" and that "immediate action is necessary to protect the Government's interests." Inchcape sought a temporary restraining order.

b. The Court's Ruling. Judge Merow granted the TRO, finding that Inchcape had a likelihood of success and would otherwise suffer irreparable harm. With respect to the requirement for "adequate evidence," the court noted that FAR 9-407-1(b)(1) requires that

> [i]n assessing the adequacy of the evidence, agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are

> corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence.

The court noted "from plaintiff's filings that a myriad of additional, potentially relevant documents relating to both account reconciliation and disclosures of overbilling were in the Navy's possession at the time of the suspension, but were not considered." "The SDO's failure to examine them raises serious doubts about the merits of the government's position." Thus, "[i]t does not appear that the SDO conducted any meaningful examination of the matter."

With respect to "immediate need," the court found that "the SDO's statement is conclusory and has questionable support in the record." Noting again that the government first learned of the audit at some time prior to June 9, 2011 and acknowledging the SDOs claim that it was not permitted to use it until the District Court order in November 2012, Judge Merow found that the SDO "waited more than a year to suspend Inchcape," and concluded that the "delay casts serious doubt on the government claim that immediate action was necessary." The court was not persuaded that "there is any evidence of an ongoing threat against which the government needed to be protected. There is no explanation in the record as to why this matter became an emergency in November 2013." The court's ruling on" irreparable harm" noted that Inchcape had already been barred from competing for two contracts and "if injunctive relief is not granted, it would be barred from several more" in the near term. "Such lost opportunities to compete constitute irreparable harm."

As a result of the Court's ruling, the Navy took "corrective action" by terminating the suspension, based on an Administrative Agreement with Inchcape.

2. <u>Metcalf et al v. Winter, D.D.C., No. 1:07-cf-01839-RMC (Stipulation of Settlement and Dismissal ordered February 20, 2008)</u>

a. <u>The Debarment Proceedings</u>. On May 1, 2007 Metcalf received the Navy's Notice of Proposed Debarment which consisted of a two page cover letter incorporating a four page memorandum by an associate counsel in the Navy OGC. The referral alleged that "more than 98% of the costs" claimed in an REA was "unsupported, based on factual inaccuracies, unrelated to the subject of the REA, or constituted double billing for work already paid and/or required by the contracts" – an allegation based solely on a determination by the ROICC, who had previously allowed only $101,434 in response to the REA's total of $5,214,760.

The Proposed Debarment Letter summarized the basis as follows:

> Requesting compensation under a federal government contract for work that a contractor is already required to perform and/or has already been paid to perform, i.e., double billing, constitutes a false claim against the United States. Whether the double billing contained in the REA was the result of fraud by MCCI and Terry Metcalf, or the result of Terry Metcalf's inability to comprehend and adhere to applicable law, MCCI's REA and pursuit of over $5M in non-compensable costs call into question its responsibility, honesty, and credibility as a contractor…Conduct of this nature

> constitutes a cause for debarment so serious that it affects MCCI and Terry Metcalf's present responsibility as contractors.

The Letter concluded that the "Administrative Record contains adequate evidence to support the proposed debarment." Pursuant to FAR 9-405(a), Metcalf was suspended immediately. Metcalf requested the complete administrative record, including any evidence of fraud. Navy counsel identified as the entire record the REA and the ROICC's determination, without any evidence that Metcalf knowingly submitted a false claim.

Metcalf acknowledged minor duplications, including by subcontractors, but stated the duplication was inadvertent. The Navy, responding to Metcalf's request for a fact-finding hearing, required Metcalf to identify material issues in dispute. Metcalf provided such a list, among which was "whether more than 98% of costs claimed…were unsupported, based on factual inaccuracies, unrelated to the subject of the REA, or constituted double billing for work already paid and/or required by the contract," as contended in the Proposed Debarment Letter. The SDO denied requests for a fact-finding proceeding, stating that "the majority" of the identified issues involved "legal determinations rather than determinations of fact." The SDO also stated that he was "narrowing his responsibility analyses" to four discrete issues, including certain subcontractor costs. According to Metcalf, the total dollar value of these issues was $257,409 or 5% or the REA.

Before Metcalf could respond, Metcalf received the SDO's Debarment Decision. (By this time, Metcalf had been suspended for over 4 months.) The Debarment Decision consisted of a two-page letter and a fifteen page associate counsel's memorandum to the SDO. The SDO decision stated that "I find the facts to be as stated in the enclosed Memorandum," which included that 98% of cost claimed were unsupported or unsupportable, and that the "REA pursued over $5M in non-compensable costs," as a "result of fraud" or "inability to comprehend and adhere to applicable law." However, the decision dropped the allegation that the REA "constituted a false claim." SDO concluded that the Administrative Record contains "adequate evidence" to support the debarment.

b. The Challenges to the Debarment. Metcalf sought a TRO, Preliminary Injunction, a declaration that the debarment was unlawful and violated Metcalf's Due Process rights, and an order terminating the debarment ab initio. The specific issues raised were: a) The SDO failed to use the proper standard of proof for debarment; b) the Administrative Record failed to support the SDO's findings (e.g., 98% unsupported and unsupportable costs, $5M in non-compensable costs, as a result of fraud or failure to know or adhere to law); c) the SDO violated Metcalf's due process rights by not affording it a hearing and the right to confront witnesses.

c. Disposition by the Court. Metcalf's request for a TRO was heard by Judge Collyer on October 12, 2007. The SDO testified. Three days later, the Navy filed a Notice of Circumstances Rendering this Case Moot, based on a letter rescinding the debarment. On October 16, the court denied the motion for a TRO and a Preliminary Injunction as moot.

On October 24, Metcalf filed an Application for Fees and Other Expenses under the EAJA. On February 19, 2008, the parties filed a joint Stipulation of Dismissal and Settlement. The Stipulation noted the Navy's rescission of the Debarment Orders and settled the remaining issue of attorney's fees and costs and the entire case. The Stipulation required the Navy to pay Metcalf a lump sum of $50,000 in attorney's fees and expenses. On February 20, 2008, the stipulation was so ordered by Judge Collyer.

3. **International Relief and Development et al. v. United States Agency for International Development, D.D.C., No. 1:15-cv-00854-RCL.**

a. IRD's Challenge of the Suspension Decisions. IRD's lawsuit challenged USAID's Notice of Suspension dated January 26, 2015 and the Suspension Continuation dated April 13, 2015. The Complaint requested that "the Court declare the Suspension Decisions null, void and unenforceable, enjoin their enforcement, and grant further relief to assure that subsequent agency decisions concerning IRD…conform to requirements of law and regulation."

The Suspension Decisions, issued under the Non-Procurement Common Rule, 2 C.F.R. Part 180, asserted that there was "adequate evidence to suspect" a "cause of so serious or compelling a nature that it affects your present responsibility" – the so-called "catch-all" provision at 2 C.F.R. 10.800 (d). The Complaint noted that 2 CFR§180.700(c) required a finding that "immediate action is necessary to protect the public interest." IRD's complaint alleged the following:

- Prompted by a Washington Post article reporting excessive management compensation and other overhead expenses charged to the government and inadequate internal controls, USAID issued show cause letters to IRD in June and July of 2014, in response to which IRD enhanced its systems and internal controls, hired outside experts to audit, advise, and monitor, and made management changes, reporting these actions to USAID.
- Between June 2014 and Suspension Notice, USAID issued IRD eight new awards, contract extensions and/or modifications totaling over $450 million, indicating that IRD was presently responsible and posed no immediate threat.
- On January 16, 2015, the Chairman of the Senate Foreign Relations Committee issued a letter that criticized USAID and demanded that USAID report back by January 30 whether suspension proceedings were initiated against IRD.
- USAID then issued the January 26 notice without identifying any immediate harm to the Government; the only urgency facing USAID was Senator Corker's deadline; USAID had been aware for months of the grounds asserted, as well as the extensive efforts undertaken by IRD to address those concerns, and USAID gave no notice that there was a need for immediate action.
- The April 13, 2015 Suspension Continuation similarly did not demonstrate an immediate need for suspension or on-going threat to taxpayers. Nor did it make any independent analysis to evaluate whether IRD had sufficient financial systems in place or was presently responsible. Instead, going outside the administrative record, it referred to "an on-going OIG investigation," without asserting any "adequate evidence" which IRD could address.
- The Suspension Continuation relied on material facts that IRD disputed, without an independent fact-finding proceeding required by 2 C.F.R. §180.735(c).
- The Suspension Decisions were political, pressured by Senator Corker and agency management, not a reasoned decision by an independent SDO; and were issued by an SDO who had an organizational conflict of interest.

The "conflict of interest" alleged by IRD arose because the SDO simultaneously served as USAID's Director of the Office of Acquisition and Assistance, contrary to the National Defense

Authorization Act of 2013, 112 P.L. 238, 126 STA 1632 CT §861(a), which prohibited an SDO from acting under the direction or supervision of the agency's acquisition office.

b. USAID'S Motion to Dismiss as Moot. By letter dated June 22, 2015, USAID acknowledged the conflict of interest in violation of the 2013 NDAA, explaining that USAID's regulations had been changed on June 20, 2015 to separate the Acquisition and Assistance function from the SDO. Accordingly, USAID "lifted the suspension" and "will reevaluate the suspension decision." Based on this action, USAID filed a Motion to Dismiss as Moot and Opposition to Motion for Preliminary Injunction "in light of the decision…to lift the suspension" pending reconsideration "by a different decision maker."

IRD objected: "This court should not succumb to Defendant's sleight of hand and half-measures which are designed to avoid the court's judicial review of the illegal original IRD suspension." "In fact, a recent press release makes clear that Defendants' temporary lifting of the suspension was designed solely to avoid an injunction hearing before this court, not to afford real relief to IRD." The USAID's press release read: "USAID's decision to lift the suspension does not mean the Agency has found IRD to be presently responsible. A determination of whether the IRD is presently responsible or not will be made by the new SDO." IRD argued that "by issuing a tepid announcement that [it] was temporarily lifting" its suspension but continuing to pronounce that IRD is not necessarily presently responsible, USAID had not mooted the Complaint. IRD asked the Court "to end IRD's purgatory" by formally ending a suspension process that was invalid from the beginning and declaring the IRD suspension "void ab initio."

c. The Hearing Before Judge Lamberth. At the hearing on July 20, Judge Lamberth's skepticism that IRD's complaints had been mooted immediately became evident when he questioned whether the "lifting" had fully restored IRD to the status quo prior to the January 26 suspension. These exchanges are indicative:

> THE COURT: …why did the agency find it necessary to put in the press release that they're not making a determination that [IRD] are presently responsible?
> AUSA: I don't know.
> THE COURT: I don't know either. But that's the crux of the case, isn't it?
> AUSA: Well, no Your Honor. My understanding is that was intended to clarify that that was not an affirmative finding of present responsibility because the agency was still going to be reevaluating the IRD's present responsibility after, in light of the additional information that had been provided and with a new decision maker—
> THE COURT: Well, the regulations provide that. So is this just a wink from the agency head. Wink, wink, we haven't decided they're responsible…I don't understand how that's fair. How is that fair? I don't have any love lost for this contractor. But you have to treat them fairly.

Judge Lamberth also focused on "the wording about lift versus vacate"; "they didn't vacate, they lifted, whatever that means. And then they have their IG going out and tell all this stuff." The government position was undermined by evidence that subsequent to the lifting of the suspension, an IG had presented a compliance briefing to another contractor with a slide stating that IRD was suspended, accompanied by a suggestion of the potential for bankruptcy. The following exchange shows Judge Lamberth's reaction:

> THE COURT: Why didn't the government go back and tell these people that was a mistake to give them those slides.

Error! Unknown document property name.

AUSA: Yes, Your Honor. So that's one investigator, that is not the Office of Inspector General.
THE COURT: I understand. I understand. I understand it's a big government everybody doesn't always get the word, but he had the word and he put up those slides anyway. Why did he do that? He knew he was wrong and he put up those slides anyway.
AUSA: My understanding from the declaration is that this particular individual thought he would correct it orally. He had an outdated slide show with one slide that was outdated.
THE COURT: Isn't that a heck of a way to run the government: You don't have to comment on that.

d. The Court's Disposition. The court denied USAID's Motion to Dismiss as Moot from the bench at the hearing and took IRD's Motion for a Preliminary Injunction under advisement, requesting further information on the extent and nature of the injury to IRD. On August 3, 2015, the court granted the Preliminary Injunction, with this unusual order:

1. Defendants are enjoined to declare plaintiffs' suspension void ab initio within 1 (one) day of this order.
2. Defendants are enjoined restore plaintiffs' pre-suspension access to advance funding within 3 (three) days for all contracts, grants, and agreements under which plaintiffs would be qualified for advance funding but for their now-voided suspension.
3. To each contracting or agreement officer for the business opportunities identified in Exhibit A to plaintiffs' supplemental Filing (Dkt. 29), defendants are enjoined to issue an unqualified written statement within 3 (three) days that:
   i. They shall consider plaintiff's proposal in their determination about which bidder will be awarded the contract, grant, or an extension thereof, as if plaintiffs had never been suspended or declared ineligible for award…;
   ii They do not have discretion to disregard plaintiffs' proposal or exclude it from consideration based on a purported "period of ineligibility" attributable to the legally invalid and since-lifted suspension;
   iii They must consider plaintiffs' proposal in good faith and no differently than any other proposal, as if plaintiffs had not been suspended or declared ineligible for award in January and April 2015; and
   iv The contracting/agreement officer shall not take into consideration that defendants are "re-evaluating" whether plaintiffs are presently responsible in his or her own independent determination as to whether plaintiffs are presently responsible or are qualified to receive award of an assistance agreement under 2 C.F.R. §200.205, including under special conditions per 2 C.F.R. §200.207;
4. Defendants are enjoined from making contracting decisions regarding plaintiffs that rely on plaintiffs' now-voided suspension.

e. Subsequent Proceedings. On October 23, IRD filed a Motion for Judgment on the Pleadings, based on USAID's failure to deny the Complaint's allegations; instead calling them "immaterial and impertinent to this action and no response is required." USAID filed another Motion to Dismiss as Moot, based on the dispositive nature of the August 3 Order and USAID's decision not to suspend or debar, instead intending to enter into an administrative agreement. IRD contended that constituted "suspension-related purgatory": "Defendants are treating IRD as

if the voided, illegal suspension was justified, and the proposed agreement would impose terms of probation to avoid the defendants' reimposing the suspension." Oral argument was held on November 9, 2015.

4. AUI Management, LLC et al v. USDA et al, D.M.D. Tenn; No. 2 :11-cv-0121 (Motion to dismiss denied March 23, 2015)

a. The Complaint and Motion to Dismiss. AUI Management and Jeff Callahan sued the Department of Agriculture, the Farm Services Agency, and its SDO for a judgment declaring that the suspension of AUI and Callahan be set aside ab initio, that AUI and Callahan are not required to disclose the suspensions on any bid form, and that AUI and Callahan be removed from the list of contractors who have been suspended by the Government. The Defendants moved to dismiss for lack of jurisdiction and standing because the suspensions had expired.

b. The AbilityOne Program, ARC, and its Bankruptcy. The suspensions of AUI and Callahan derived from suspensions of Advocacy Resources Corporation (ARC), a non-profit entity that participated in a government program established by statute, 41 U.S.C. §46-48, to promote employment of disabled individuals in the provision of certain products to government agencies. The AbilityOne program was administered by the Committee for the Purchase From People Who Are Blind or Disabled (the Committee), which was to set fair purchase prices. ARC had a set-aside contract for the provision of vegetable oil fortified with Vitamin A. Unfortunately, the Committee set the prices below ARC's costs. As a result, USDA underpaid ARC by several million dollars, and by 2006 ARC was forced to file in bankruptcy. Under supervision of the Bankruptcy Judge to avoid liquidation of ARC, the trustee sought to obtain needed financing and to establish non-confiscatory prices.

c. Financing Arrangement with AUI and Callahan and ARC's Recovery. Thus, AUI and Callahan became involved at the behest of ARC's trustee in bankruptcy. Under a Management Agreement, AUI would obtain financing and manage the operations of ARC, in return for a fee. Callahan provided or personally guaranteed the funds for ARC and became CEO of ARC. The agreement contained a provision indemnifying and holding AUI harmless from any ARC negligence or willful misconduct. The Bankruptcy Judge approved the agreement on November 22, 2006.

The trustee also addressed the unfair pricing formula by filing in the District Court and, despite government opposition, was able to obtain a new pricing formula. The Committee adjusted the prices prospectively, but would not adjust prior payments. The trustee subsequently filed a contempt petition to enforce the court's decision, to the irritation of the USDA.

As a result of the AUI-Callahan capital infusion and implementation of the new interim pricing formula in 2010 ARC not only was able to restart, it flourished, employing approximately 100 disabled persons at the time of the suspensions in 2011.

d. USDA Discovery of Fraudulent Certificates and the Search and Seizure. However, in late Summer 2009, a USDA auditor contacted the USDA contracting officer with evidence that a number of Certificates of Analysis (COAs) done by an independent testing lab, when compared to the COA's submitted with ARC's invoices, showed that the percentage content of Vitamin A had been altered. The CO turned this information over to the USDA OIG. The decision was made not to advise ARC, AUI, or Callahan of the issue. On September 16,

2009, the government executed a search warrant on ARC's facilities, seizing records, samples, and other evidence.

e. The Response of ARC, AUI, and Callahan. Callahan immediately hired a reputable, experienced lawyer to investigate what had happened and to advise ARC. The lawyer conducted an investigation, to the extent possible given the Government's seizure of evidence. He interviewed the Quality Manager, who admitted that he had altered the COAs and implicated no one else. After a series of interviews, the lawyer was unable to identify others who were involved in or knew of the fraud.

The lawyer advised ARC not to take any action that might be misconstrued as interference with or obstruction of the on-going investigation. Thus he advised against contacts about the investigation with the testing laboratory or the contracting office. He said he would establish communications with the U.S. Attorney and that would be ARC's single channel of communication. The lawyer did contact the U.S. Attorney, reporting the results of his investigation that there had been a fraudulent alteration of the COAs in 2008 and 2009, including the extent of the alterations and that the Quality Manager was the lone culprit. Through its attorney, ARC cooperated with the investigation.

ARC, AUI, and Callahan also implemented measures to assure that there would be no reoccurrence of the fraudulent acts. The Quality Manager resigned after making his confession and was replaced by a "six sigma" quality expert. New procedures were implemented, including multiple person reviews of certificates and new technology to assure conforming products. From September of 2009 to 2011, ARC, under direction of AUI and Callahan, shipped to the government $80-90 million of fortified vegetable oil. These deliveries conformed to specification (as the CO confirmed).

f. The May 18, 2011 Initial Suspensions. On May 18, 2011, the FSA SDO suspended ARC, citing "adequate evidence" of four grounds: commission of fraud by ARC; falsification of COAs in invoice packages; knowing failure of ARC to disclose credible evidence of violation of the FCA; and conduct that "seriously and directly affects responsibility to perform as a Government contractor." AUI and Callahan were suspended as "affiliates" and because they "knew or should have known" of the fraud. The SDO stated that suspension protected the interests of the government, but cited no immediate or urgent need.

g. The Hearing on Disputed Facts. The July 7, 2011 evidentiary hearing held before a USDA employee designated by the FSA SDO was extremely contentious (as evidenced by the USDA cross-examination of the respondents' witnesses) and surfaced disagreements common in suspension proceedings:

- Whereas ARC's lawyer testified under oath about his investigation and conclusion that the lone individual was responsible and that others, including Callahan, did not know of the fraud, and no evidence was presented that indicated Callahan's knowledge, USDA was unwilling to accept this evidentiary record. When witnesses testified that Callahan's focus was on financing and he delegated operations to others, the USDA relied on his duty as ARC's CEO and the AUI Management Agreement, which stated that AUI was to provide management services for ARC's "day-to-day operations," including "compliance with contracts."

- With respect to the failure-to-disclose ground, ARC's witnesses, including its outside lawyer, testified, for example, that "USDA already had the information," by virtue of the

search and seizure. It then became clear, from the cross-examination, that ARC was expected to "disclose" to the CO the quantum of ARC's resulting liability and make an offer of restitution. ARC's witnesses responded that, based on the advice of outside counsel, ARC's communications were between him and the AUSA, and "we were allowing the situation to resolve itself through legal channels," not the suspension.

- The CO admitted that, at the time of the suspension, in May 2011 and "since September 2009," he had no evidence that ARC's product was non-conforming as to Vitamin A and no evidence that anyone on the ARC management team on the date of the suspension (or currently) committed any fraudulent conduct. When asked, "what was the threatened harm that necessitated immediate action," he replied that "we do not know what else might be discovered in the investigation."

h. The Continued Suspensions. On September 2, 2011, the FSA SDO continued the suspension of ARC. Subsequently, the FSA entered into an Administrative Agreement with ARC, with one of the conditions being that AUI and Jeff Callahan would be separated from ARC. On November 10 the FSA SDO continued the suspensions of AUI and Callahan, repeating the grounds stated in the initial suspension. The suspension of AUI was "based on the fact that AUI as an affiliate of ARC knew or had reason to know of these four enumerated grounds." The suspension of Callahan was "based on the fact that you knew or had reason to know of these four enumerated grounds." The suspensions of AUI and Callahan expired after twelve months on May 18, 2012 in accordance with FAR 9.407.4. The impacts of the suspensions were devastating. Callahan was forced to file a Chapter 11 bankruptcy petition. AUI's business operation shut down and all of its employees laid off. ARC, despite relief from the suspension under its settlement with the Government, was unable to find alternative financing and ceased it operations, including the employment of disabled persons under the AbilityOne program.

i. The Court's Ruling on the Motion to Dismiss. AUI and Callahan persisted in seeking judicial relief from their suspensions. On March 23, 2015, the District Court denied the Government's motion to dismiss as moot. The Court held that the suspensions of Callahan and AUI had a continuing effect and were only nominally temporary. Recognizing requirements for representations denying prior suspensions as conditions of eligibility to bid, as well as other impediments such as net worth requirements, the court found that

> …the suspensions while only temporary were "essentially a death blow" to their business. Although the suspension has been lifted, Plaintiffs are still listed on the public archives of the Government's Excluded Parties List System as having been previously suspended… Plaintiffs have sufficiently alleged their ability to bid on numerous government contracts in the future "will be impeded" by the suspensions… Furthermore, the judgment from this Court, that the suspension was void, ab initio, (which is the relief Plaintiff is seeking), would likely alleviate such inability and potential harm to Plaintiff's reputation.