

United States Senate

WASHINGTON, DC 20510

August 11, 2022

The Honorable Merrick Garland
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Lisa O. Monaco
Deputy Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland and Deputy Attorney General Monaco,

We write regarding our ongoing concern that the federal government is failing to use key tools in its arsenal against corporate criminals, allowing them to slide by with penalties and settlements that do not fit the gravity of their crimes and that encourage lawbreaking and recidivism by big business.

We are particularly concerned about the Department of Justice's (Department) inability or unwillingness to use its authority to suspend or debar corporate criminals from the government contracting process. The federal government spends over \$600 billion annually on contracted goods and services—meaning that the ability to revoke a company's privilege of doing business with the government is a potent tool in an agency's arsenal for protecting the government and the public from harm.¹ The Department, however, rarely exercises this authority. In FY20, the Department issued only three suspensions and eight debarment actions.² Under current Department practices, even companies that engage in massive, years-long schemes to defraud the public are allowed to continue to do business with the government. We urge the Department to pursue more robust use of its suspension and debarment authority to protect the government from waste, fraud, and abuse and to protect the public from health, safety, and environmental harms.

Agencies possess broad authority to suspend and debar individuals and entities that engage in criminal conduct or pose a risk to the public interest. The Federal Acquisition Regulation (FAR) permits an agency to debar an entity if it is convicted of or receives a civil judgment for "any...offense indicating a lack of business integrity or business honesty."³ An agency can also debar an entity based on just a "preponderance of the evidence" for "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor."⁴ Before or while a debarment is being

¹ Government Accountability Office, "A Snapshot of Government-Wide Contracting For FY 2020," June 22, 2021, <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic>.

² Interagency Suspension & Debarment Committee, "Section 873 Report to Congress (FY 2020)," 2022, [https://www.acquisition.gov/sites/default/files/page_file_uploads/ISDC_FY_2020_Section_873_Report_\(use_for_web_upload\).pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/ISDC_FY_2020_Section_873_Report_(use_for_web_upload).pdf).

³ 48 C.F.R. 9.406-2(a)

⁴ 48 C.F.R. 9.406-2(b)

considered, agencies can suspend a contractor if there is “adequate evidence” that suspension is necessary to protect the government’s interests.⁵ Agencies also have a wide latitude to link contracting companies to the misconduct of any of their employees—including top company executives—as long as the misconduct “occurred in connection with the individual’s performance of duties for or on behalf of the contractor, or with the contractor’s knowledge, approval, or acquiescence.”⁶

The Department has broad authority to debar any government contractor that has committed a covered violation as long as the Department follows proper referral and debarment procedures. Notably, the Department can debar even companies that it does not directly do business with, and a contractor can be debarred even for conduct that does not relate to any of its government contracts.⁷ The Department has suggested it views debarment as a “non-criminal *alternative* to prosecution”⁸ (emphasis added), but the FAR makes clear that the prior imposition of “criminal, civil, and administrative liability” does not preclude debarment.⁹

Despite this broad authority, the Department has historically failed to deploy its suspension and debarment power. This reluctance has undermined the goals of debarment regulations and allowed unscrupulous contractors to continue ripping off the government. High-profile corporate fraud cases where the Department failed to pursue debarment—and where consequently those companies continued to receive government contracts—include:

- **Balfour Beatty.** Balfour Beatty, a notorious corporate bad actor that specializes in providing substandard, unsafe housing to military families,¹⁰ recently agreed to pay \$65 million in fines and restitution after defrauding the government of millions of dollars using falsified maintenance logs.¹¹ Despite its appalling conduct, Balfour Beatty continues to rake in huge government contracts¹² and has not been debarred—by the Department of Justice, the Department of Defense, or the General Services Administration.¹³ The Department of the Air Force reviewed Balfour Beatty for possible suspension and debarment in 2019 but elected not to take those actions.¹⁴

⁵ 48 C.F.R. 9.407-1(b)(1)

⁶ 48 C.F.R. 9.406-5(1)

⁷ Examples include unfair trade practices and improperly affixing a “Made in America” label to products; 48 C.F.R. 9.406-2(b)(1)

⁸ Department of Justice, “Justice Manual,” <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.250>.

⁹ 48 C.F.R. 9.406-1(a)

¹⁰ Sen. Elizabeth Warren, “Warren Demands Answers Following Reports that Military Housing Contractor Balfour Beatty Falsified Maintenance Logs to Boost Income,” June 27, 2019, <https://www.warren.senate.gov/oversight/letters/warren-demands-answers-following-reports-that-military-housing-contractor-balfour-beatty-falsified-maintenance-logs-to-boost-income>.

¹¹ Department of Justice, “Justice Department Announces Global Resolution of Criminal and Civil Investigations with Privatized Military Housing Contractor for Defrauding U.S. Military,” December 22, 2021, <https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-privatized>.

¹² USA Spending, Contract Award, https://www.usaspending.gov/award/CONT_AWD_N6247322F4241_9700_N6247321D1202_9700.

¹³ Email from the General Services Administration’s Office of Congressional and Intergovernmental Affairs to the Office of Senator Elizabeth Warren in response to an information request, August 8, 2022.

¹⁴ *Id.*

Earlier this year, the company received a \$580,000 award from the Department of the Defense,¹⁵ and tens of millions in existing contracts are still in place.¹⁶ An investigation this year by the Senate Permanent Subcommittee on Investigations found that—unsurprisingly—Balfour Beatty “has continued to mistreat military families and to record inaccurate and incomplete work order data.”¹⁷

- **Schneider Electric.** Through a large kickback and overcharge scheme, Schneider Electric stole millions of dollars from the government.¹⁸ In 2020, the Department secured an \$11 million resolution but pursued no other action.¹⁹ The Department of the Navy reviewed Schneider Electric for possible suspension and debarment in 2018 but declined to pursue those actions.²⁰ The Navy reached an administrative agreement with the company in November 2021, but that agreement explicitly permits the Navy to pursue debarment if it deems such an action appropriate.²¹ As a result, Schneider Electric and the companies it controls have received at least \$23 million in contract awards from over a dozen agencies since the fraud resolution was announced, giving the company an ongoing opportunity to continue its illegal behavior.²²
- **Avanos Medical.** In the midst of the 2014 Ebola outbreak, Avanos Medical intentionally mislabeled surgical gowns, claiming they provided protection from fluids and viruses that they did not actually provide.²³ The Department secured a \$22 million fraud resolution but did not put in place a compliance monitor²⁴ and did not pursue suspension or debarment.²⁵ Now, the same company that put countless lives at risk to pad its own profits continues to receive government contracts.²⁶

¹⁵ USA Spending, Contract Award,

https://www.usaspending.gov/award/CONT_AWD_N6247322F4241_9700_N6247321D1202_9700.

¹⁶ USA Spending, Contract Award, https://www.usaspending.gov/award/CONT_AWD_N4008021C0055_9700_-NONE_-NONE-.

¹⁷ Letter from Senate Committee on Homeland Security & Governmental Affairs, Permanent Subcommittee on Investigations to Secretary Lloyd J. Austin III, May 20, 2022, <https://www.hsgac.senate.gov/imo/media/doc/2022-05-20%20Ossoff%20and%20Johnson%20Letter%20to%20DOD%20Re%20Balfour%20Military%20Housing.pdf>.

¹⁸ Department of Justice, “Government Contractor Admits Scheme to Inflate Costs on Federal Projects and Pays \$11 Million to Resolve Criminal and Civil Probes,” December 21, 2020, <https://www.justice.gov/opa/pr/government-contractor-admits-scheme-inflate-costs-federal-projects-and-pays-11-million>.

¹⁹ *Id.*

²⁰ Email from the General Services Administration’s Office of Congressional and Intergovernmental Affairs to the Office of Senator Elizabeth Warren in response to an information request, August 8, 2022.

²¹ Department of the Navy, “AGREEMENT BETWEEN SCHNEIDER BUILDINGS AMERICA, INC. AND THE DEPARTMENT OF THE NAVY,” November 23, 2021, accessible at <https://www.fapiis.gov/fapiis/#/report>.

²² USA Spending, Contract Awards, <https://www.usaspending.gov/recipient/2d7b1eb3-63d8-a322-54b1-612d5264a2a4-C>.

²³ Department of Justice, “Avanos Medical Inc. to Pay \$22 Million to Resolve Criminal Charge Related to the Fraudulent Misbranding of Its MicroCool Surgical Gowns,” July 8, 2021, <https://www.justice.gov/opa/pr/avano-medical-inc-pay-22-million-resolve-criminal-charge-related-fraudulent-misbranding-its>.

²⁴ *Id.*

²⁵ Email from the General Services Administration’s Office of Congressional and Intergovernmental Affairs to the Office of Senator Elizabeth Warren in response to an information request, August 8, 2022.

²⁶ USA Spending, Contract Awards, <https://www.usaspending.gov/recipient/363668c9-e17e-b06e-b470-4afd26ff6845-C>.

The Department’s historically lethargic use of its debarment authority sends a clear message: Corporate criminals can engage in any kind of wrongdoing, and—after receiving an occasional fine or slap on the wrist—can return to business as usual, receiving millions (and in some cases, billions) in taxpayer-funded government contracts. Corporate criminals and their top executives can rest easy knowing that no matter how egregious, how extensive, or how long-lasting their misconduct, the government will welcome them back to the contracting table with open arms.

It is time for this lax approach to change. The Department’s prosecutors and procurement staff should use all the tools at their disposal, including suspension and debarment, to deter corporate criminals. We urge the Department to expand its use of debarment in four primary ways:

- **Use debarment authority for corporate entities, not just individuals.** Historically, the Department has pursued debarment almost exclusively against individuals and not firms. Many of these individual debarments are statutory debarments required by law under, for example, the *Drug-Free Workplace Act*.²⁷ The Department should also aggressively use its authority to pursue debarment against companies. In many cases, corporate misconduct is the product of extensive schemes, systematic lack of oversight, or corporate negligence. In these cases, the company as a whole rather than a specific employee poses a risk to the government’s business interests, and the corporate entity itself should be considered for suspension and debarment. According to Department estimates, 10-20% of all major corporate criminal resolutions involve companies that have already entered into resolutions for previous misconduct.²⁸ These corporate recidivists have clearly exhibited “a lack of business integrity or business honesty”²⁹ and should be automatically referred to debarring officials.
- **Use debarment government-wide.** The Department has the authority to suspend and debar entities that contract with any federal agency—not just its own contractors. The Department has historically viewed debarment as the responsibility of the contracting agency, to be used only in cases where the debarring agency was itself the victim of the corporate misbehavior. For example, in *Foreign Corrupt Practices Act* cases, the Department’s policy is that debarment actions should be taken by the “independent debarment authorities within each agency, such as the Department of Defense or the General Services Administration” rather than the Department of Justice itself.³⁰ But as the case examples highlighted above show, contracting agencies are extremely reticent to pursue suspension and debarment even in cases of outrageous misconduct. Instead, the Department should adopt policies that call for Department prosecutors and staff to systematically refer corporate misconduct to the Department’s debarring officials for review in all appropriate cases. Contractors should know that their misconduct will open them up not just to criminal and civil punishment but also debarment—regardless of which agency was most directly harmed.

²⁷ 41 U.S.C. 8102

²⁸ “Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA’s 36th National Institute on White Collar Crime,” October 28, 2021, <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

²⁹ 48 C.F.R. 9.406-2(a)(5)

³⁰ Department of Justice and Securities and Exchange Commission, “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” July 2020, <https://www.justice.gov/criminal-fraud/file/1292051/download>.

- **Consider debarment for all corporate misconduct.** Companies that defraud the government are prime candidates for suspension and debarment, but the full breadth of corporate misconduct should subject a company to potential debarment. Tax evasion, bribery, unsatisfactory performance, and other harmful conduct—particularly health, safety, and environmental misconduct—should also give rise to debarment proceedings. Nor should the Department be limited to pursuing suspension or debarment actions only against companies that have committed wrongdoing in their dealings with the government. Corporate misconduct in any context—whether the government was harmed or not—should inform whether the company has the business integrity the government expects of its contractors and subcontractors.
- **Use suspension authority.** While they are often considered together, suspension and debarment are distinct tools at the Department’s disposal. In many cases, suspension may be appropriate while an investigation is pending even when a final debarment action may not yet be justified. Suspension can be levied on the basis of “adequate evidence” even as a fuller investigation or legal proceeding is still underway.³¹ Agencies, contrary to the intent of suspension regulations, have typically engaged in extensive reviews of a company’s misconduct to determine whether debarment is appropriate—all without placing any restrictions on that company’s activities. The Air Force reviewed Balfour Beatty for possible debarment and the Navy reviewed Schneider Electric, but neither department used its suspension authority while those reviews were underway.³² In these cases, the Department must step in to protect taxpayers. Suspension is a critical action to provide immediate protection to the government’s interests and one that should be used whenever appropriate.

The Department has both the authority and the resources to change its suspension and debarment policies. As the government’s chief law enforcement authority, the Department regularly uncovers evidence of contractor misconduct that meets the standards for suspension or debarment, and Department personnel should be empowered to use this knowledge to inform procurement and debarment decisions.

The FAR requires that suspension and debarment be imposed “in the public interest for the Government’s protection and not for purposes of punishment.”³³ While the Department may have historically viewed debarment as an alternative³⁴ to prosecution, a stronger debarment regime would deter bad actors from engaging in unethical *future* conduct. Indeed, precisely because debarment is meant to be protective and not punitive, debarment and prosecution should be complementary efforts. The Department has a duty to go beyond just its prosecutorial activities to protect the government and its citizens from bad actors with a history of misconduct. Debarment is a powerful and underutilized tool to do so.

We were encouraged by Deputy Attorney General Monaco’s comments last October outlining how the Department will step up its corporate crime enforcement measures.³⁵ These important steps are necessary in order to change corporate criminals’ “cost of doing business” mindset. In particular, we

³¹ 48 C.F.R. 9.407-1(b)(1)

³² Email from the General Services Administration’s Office of Congressional and Intergovernmental Affairs to the Office of Senator Elizabeth Warren in response to an information request, August 8, 2022.

³³ 48 C.F.R. 9.407-2

³⁴ Department of Justice, “Justice Manual,” <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.250>.

appreciate her commitment to ensuring that a company’s “full criminal, civil and regulatory record” is considered when prosecutors are deciding appropriate resolutions.³⁶ We believe that the same record of misconduct should also be considered when the government makes procurement decisions.³⁷ Balfour Beatty’s continued misconduct is strong evidence of the failure of traditional contracting tools to prevent harm. Greater use of suspension and debarment is necessary to truly change these companies’ decision-making calculus.

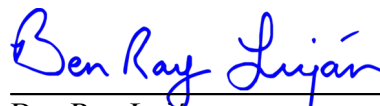
When companies repeatedly or brazenly commit misconduct, the Department has a duty to itself, other agencies, and the public to ensure the privilege of doing business with the government is not being abused. The stakes go beyond costing the government money. As the Avanos Medical case demonstrates, when corporate bad actors are permitted to contract with the government, people’s health and safety can be put at risk, as well. While we commend the Department for taking important steps to prioritize corporate crime, we urge the Department to use all the tools at its disposal and expand its use of the suspension and debarment authority.

Thank you both for your ongoing efforts to step up corporate criminal enforcement at the Department and for your attention to this matter.

Sincerely,



Elizabeth Warren
United States Senator



Ben Ray Lujan
United States Senator

³⁵ “Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA’s 36th National Institute on White Collar Crime,” October 28, 2021, <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute>.

³⁶ *Id.*

³⁷ Debarment would also have reciprocal effect on nonprocurement transactions (e.g., receiving grant funding, loan guarantees).