

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
Washington, D.C.

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<b>In the Matter of:</b>	*	
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<b>The Whittaker Appraisal Group, Inc.</b>	*	<b>Docket No. 08-3556-DB</b>
<b>and</b>	*	<b>Docket No. 08-3557-DB</b>
<b>Robert G. Whittaker,</b>	*	
	*	
<b>Respondents.</b>	*	

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**DEBARRING OFFICIAL'S DETERMINATION**

INTRODUCTION

By separate Notices of Proposed Debarment dated August 11, 2008 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondents THE WHITTAKER APPRAISAL GROUP, INC. AND ROBERT G. WHITTAKER that HUD was proposing their debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a two-year period from the date of the final determination of this action. The Notice further advised Respondents that the proposal to debar them was in accordance with the procedures set forth in 2 CFR parts 180 and 2424. In addition, the Notice informed Respondent Whittaker that his proposed debarment was based upon his conviction in the State of New York in the Schenectady County Court and the Montgomery County Court of falsifying business records. The Whittaker Appraisal Group, Inc. was advised that its proposed debarment was based on information that it was an affiliate of Whittaker. Respondent Whittaker pleaded guilty to one count in each of the indictments in the respective county courts and was sentenced in both cases to a conditional discharge and ordered to make restitution of \$1,172.00 and \$7,022.50, respectively.

A telephonic hearing on Respondents' proposed debarment was held in Washington, D.C. on January 21, 2009, before the Debarring Official's Designee, Mortimer F. Coward. Respondents were represented by Daryl Cutler, Esq. Stanley Field, Esq. appeared on behalf of HUD.

Summary

I have decided, pursuant to 2 CFR part 180, to debar Respondents from future participation in procurement and nonprocurement transactions, as a participant, principal, or contractor with HUD and throughout the Executive Branch of the Federal Government,

for a period of one year from the date of this Determination. My decision is based on the administrative record in this matter, which includes the following information:

1. The Notices of Proposed Debarment dated August 8, 2008.
2. A letter dated September 9, 2008, from Respondents' attorney requesting a hearing in this matter.
3. A twenty-five count indictment filed June 8, 2005, in the Schenectady County Court charging Respondent Whittaker with various offenses.
4. A forty-one count indictment filed June 3, 2005, in the Montgomery County Court charging Respondent Whittaker with the commission of several offenses.
5. The Orders of Conditional Discharge entered in the Montgomery County Court and the Schenectady County Court March 6, 2006 and March 23, 2006, respectively, placing Respondent Whittaker on conditional discharge for a period not to exceed one year based on his conviction of falsifying business records.
6. Respondents' Counter Statement of Facts filed December 23, 2008 (including all exhibits thereto).
7. A letter from Respondents' attorney dated February 6, 2009, addressed to the Debarring Official's Designee, transmitting eight letters of commendation submitted by various parties on Respondent Whittaker's behalf.
8. The Department's Response to Respondent's Submission of Opinions of his Good Character filed February 17, 2009.
9. The Department's Pre-Hearing Brief in Support of a Two-Year Debarment of the Respondents filed November 14, 2008 (including all exhibits thereto).
10. The Department's Response to Respondent's Submission of Opinions of his Good Character filed February 17, 2009.

#### Government Counsel's Arguments

Government counsel notes that Respondent Whittaker was a HUD-approved real estate appraiser and CEO or Chairman of the Whittaker Appraisal Group, Inc. Respondent Whittaker pleaded guilty in January 2006 to one count of a twenty-six count indictment which charged him with making a false entry on or about August 22, 2002, in the ledger book of his employer in order to commit, aid, or conceal the commission of a crime. In a second proceeding, Respondent pleaded guilty on September 15, 2005, to count two of a forty-two count indictment, which similarly charged him with making, on or about June 9, 2000, a false entry in the business records of a company. Counsel further notes that, in settlement of a complaint filed by the New York Department of State, based on the afore-mentioned convictions, Respondent executed a Consent Order in May 2007, in which he agreed to the revocation of his real estate appraiser license.<sup>1</sup>

Counsel argues that Respondent, as a former HUD-approved appraiser, has been a principal or participant in a covered transaction. *See* 2 CFR 180.970 and 980. Further, because Respondent once again holds an appraiser's license he may seek reinstatement as a HUD-approved appraiser. Thus, because Respondent has been, or may reasonably be expected to be, a participant or principal in a covered transaction, he is subject to HUD's

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<sup>1</sup> On January 8, 2008, Respondent's license was restored by the State of New York. *See* Gov't Ex. 11.

debarment regulations. *See* 2 CFR 180.105. Counsel also argues that the Whitaker Appraisal Group, Inc. (WAG) is controlled by Respondent Whittaker as its CEO. WAG is, therefore, an affiliate of Whittaker's, thereby making WAG subject to the debarment regulations. *See* 2 CFR 180.625 and 905.

Counsel next argues that Respondent Whittaker's wrongful acts, which led to his conviction for a crime involving fraud, are cause for debarment under 2 CFR 180.800(a)(1). Counsel adds that the crime of falsification of records is specifically identified as grounds for debarment under 2 CFR 180.800(a)(3). Another cause for Respondent Whittaker's debarment also exists under 2 CFR 180.800(a)(4), counsel contends, in that Whittaker's conviction demonstrates a lack of business honesty and integrity that seriously and directly affects his present responsibility. Counsel makes reference to 2 CFR 180.850(b) with respect to HUD's burden of proving that a cause for debarment exists. Counsel notes that if, as here, "the proposed debarment is based upon a conviction . . . , the standard of proof is met."

Counsel contended, in opposition to Respondents' arguments at the hearing, that the passage of time since the commission of Respondent's crimes, by itself, is not significant in demonstrating present responsibility. Moreover, Respondent Whittaker had produced no evidence to show that he is presently responsible. Indeed, Counsel dismisses Respondent Whittaker's character evidence, arguing that none of the eight letters submitted address or make mention of Respondent's criminal convictions or his license revocation, and none claim to have dealt with him in his capacity as an appraiser.<sup>2</sup>

In arguing for Respondents' debarment, counsel states that, because of Respondent Whittaker's crimes, he "cannot be relied upon to act with the candor and probity necessary for HUD to effectively administer its programs."<sup>3</sup> Counsel concludes that Respondent should be debarred for two years along with his affiliate, The Whitaker Appraisal Group, Inc.<sup>4</sup>

### Respondents' Arguments

Counsel for the Respondents acknowledged that the Government had met its burden of showing that cause exists for Respondents' debarment. Counsel reviews the relevant dates and events surrounding Respondent Whittaker's criminal conviction and the revocation and reinstatement of his real estate appraisal license. Counsel then turns to an examination of some of the factors listed in 2 CFR 180.860 to determine whether it would be appropriate to debar Respondents. Counsel argues that "applying the factors to the Respondents' case supports the conclusion that debarment would be harsh and unnecessary."<sup>5</sup> First, there is a lapse of 2 ½ to three years between Respondent Whittaker's convictions and the issuance of the proposed debarment. Respondent has no prior criminal history, he has paid all liabilities, and by his guilty plea, counsel reasons, Respondent accepted responsibility for his wrongdoing. It is Respondents' counsel's

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<sup>2</sup> The eight letters were submitted after the close of the hearing.

<sup>3</sup> Gov't Brief at 10.

<sup>4</sup> *See* 2 CFR 180.625.

<sup>5</sup> Resp. Counterstatement at 4(unpaginated).

position that “[e]ntering into the consent order was the equivalent of being debarred as a New York State Appraiser for approximately 2 years.”<sup>6</sup>

Counsel further argues that during the period Respondent’s license was revoked (i.e., April 2006 to January 2008), Respondent was ineligible to perform HUD appraisals, and “HUD deemed him ineligible even after he was recertified as a New York State Appraiser.”<sup>7</sup> Counsel acknowledges that Respondent Whittaker was not suspended. However, counsel contends that during the time Respondent’s license was revoked followed by HUD’s March 14, 2008, denial of his application for reinstatement as a HUD appraiser, “HUD effectively informally debarred him.”<sup>8</sup> Counsel analogizes Respondent’s situation to that of a respondent who has been suspended and is later debarred. Counsel argues that, pursuant to 2 CFR 180.865(b), the Debarring Official must consider the period of suspension in determining the term of debarment. Counsel sums up by requesting the Debarring Official to “consider the period between April 10, 2006, to present as akin to an informal suspension or debarment.”<sup>9</sup> Counsel concludes that, based on the factors set forth in 2 CFR 180.860(c), (g), (h), and (s), Respondent is presently responsible.

#### Findings of Fact

1. Respondent Whittaker, at all relevant times, was a HUD-approved lender licensed in the State of New York.
2. Respondent was the Chairman or CEO of The Whittaker Appraisal Group, Inc.
3. Respondent Whittaker was accused of making false entries in the books of his employer with intent to defraud on various dates beginning in 2000 and ending in 2002.
4. Respondent was indicted in June 2005 in Montgomery County and Schenectady County in New York State on several counts, including falsification of business records.
5. Respondent Whittaker pleaded guilty and was convicted of one count of falsifying business records in each of the indictments and was sentenced on each count to one-year conditional discharge and ordered to pay restitution of \$7,022.52 and \$1,172.00, respectively.
6. Respondent’s criminal conduct, though it began earlier, last occurred almost seven years ago, as evidenced, for example, by his admission in his plea in the Schenectady County Court that he made false entries in the books of his employer on August 22, 2002. In his plea in the Montgomery County Court, Respondent admitted to a violation that occurred on June 9, 2000.
7. At about the same time the disposition of Respondent Whittaker’s criminal matters was being finalized, Respondent applied to the State of New York for renewal of his appraiser license. Respondent’s application was denied by the State of New York.

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

8. In May 2007, in response to a complaint issued by The Secretary of State of New York, Respondent executed a Consent Order admitting his convictions in the two afore-mentioned courts.
9. Effective January 8, 2008, Respondent Whittaker's license was restored, recertifying him as a real estate appraiser for two years.
10. In March 2008, Respondent Whittaker applied to HUD for placement on the FHA Appraiser Roster; HUD denied his application.
11. Respondent testified at the hearing that he accepts responsibility for his actions, doing so during the most difficult time of his life.

### Conclusions

Based on the above Findings of Fact, I have made the following conclusions:

1. Respondent Whittaker was a participant in a covered transaction as defined in 2 CFR part 180.
2. Respondent's criminal conviction serves as the basis for his debarment.
3. Pursuant to 2 CFR 180.800, a conviction for falsification of records, *inter alia*, is a cause for debarment.
4. The passage of time (almost seven years)<sup>10</sup> since Respondent Whittaker's commission of the crime for which he was convicted and the absence of evidence of any further wrongdoing by Respondent are mitigating factors that were considered favorably in determining Respondents' debarment.<sup>11</sup> *See* 2 CFR 180.860.
5. Although Respondents' counsel cited no authority for the proposition that the length of time Respondent was unable to practice his profession as a real estate appraiser amounted to an informal suspension, the Debarring Official gave some credit to the argument in arriving at a just period of debarment. In this regard, it is noted that imposing a debarment will effectively disqualify Respondent Whittaker from acting as a HUD-approved appraiser for the period of the debarment. This is the same disability he suffered from during the period from April 2006 to January 2008 when his license was restored by the New York State Secretary of State. His federal disability continues to the present, however – an almost three-year period of disqualification. *See, e.g.,* 2 CFR 180.860 (“The debarring official may consider other factors if appropriate in light of the circumstances of a particular case.”) *See also, Shane Meat Co. v. United States*, 800 F. 2d 334 (3<sup>rd</sup> Cir. 1986) (Debarring Official “fully credited [Respondents] with the time they had been suspended... as well as the time immediately preceding debarment.”)
6. The commendatory letters submitted on Respondent Whittaker's behalf strongly suggest that his professionalism and ethical standards are viewed favorably in his community.<sup>12</sup>

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<sup>10</sup> *See* Finding of Fact #6, *supra*.

<sup>11</sup> Although the passage of time since the commission of a crime is not, standing alone, dispositive of the issue in a debarment proceeding, it is a mitigating factor for consideration. *See, e.g., In the matter of Thomas T. Demery*, No. 96-0083-DB(October 11, 1996).

7. Respondent's acceptance of responsibility for his wrongdoing is a mitigating factor in determining the appropriate period of debarment to be imposed. *See* 2 CFR 180.860(g).
8. Respondent The Whittaker Appraisal Group, Inc. is an affiliate of Whittaker's and is subject to the same period of debarment as Respondent Whittaker. *See* 2 CFR 180.625 and 905.
9. The seriousness of Respondent's acts is an aggravating factor considered in imposing the period of debarment on him. *See* 2 CFR 180.865.
10. In weighing all the factors, mitigating and aggravating as set forth here, the Debarring Official is persuaded that a shorter period of debarment than in the usual case should be imposed. *See* 2 CFR 180.845 and 865.
11. The Government has met its burden of demonstrating that cause exists for Respondent's debarment. *See* 2 CFR 180.850 and 855.
12. Respondent's actions that led to his criminal conviction raise grave doubts with respect to his business integrity and personal honesty.
13. HUD has a responsibility to protect the public interest and take appropriate measures against participants whose actions may affect the integrity of its programs.
14. HUD cannot effectively discharge its responsibility and duty to the public if participants in its programs or programs that it funds fail to act with honesty and integrity.

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<sup>12</sup> Government counsel makes much of the absence of any reference in the letters to Respondent's criminal convictions or license revocation, thereby dismissing the letters as not trustworthy. Government counsel's hypertechnical criticisms of the letters are not to be ignored and, admittedly, the letters may not follow the punctilio of the usual character reference. The Debarring Official, however, does not consider the omissions noted by Government counsel fatal nor that the letters are untrustworthy. Some of the letters do, however, refer to Respondent's professionalism, high ethical standards, and his appraisal work. *See, e.g.*, letters from Walter Scram, Dayton King, Mary Beth Uebrick (undated), Jason Hart (undated), David P. Huckans, and Brian Howe (undated). Specifically, Peter Fiorello writes that Respondent "has an outstanding moral and ethical standard." Walter Scram states that Respondent's "overall professionalism [is] exceptional." Rev. Kliueg gives Respondent "the highest reference as a man of integrity, initiative, and ability." Dayton King comments on the "professionalism that [Respondent] has while representing his . . . Appraisal Company." Mary Beth Uebrick, in addition to her observations of Respondent's "overall professionalism [as] exceptional" would recommend him "for any task where a high level of commitment and trustworthiness is valued." Jason Hart writes that it would be difficult to find someone who "conducts his personal and business affairs with a higher level of ethical and moral integrity" than Respondent. David P. Huckans notes that in his sixteen years in the industry, and of all the appraisers with whom he has been associated, "Whittaker is the most professional and ethical."

DETERMINATION

Based on the foregoing, including the Findings of Fact, Conclusions, and the administrative record, I have determined, in accordance with 2 CFR 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondent for a one-year period from the date of this Determination. Respondent's "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 CFR chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: \_\_\_\_\_

4/3/09



Henry S. Czauski  
Debarring Official