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THE ENVIRONMENTAL PROTECTION AGENCY'S SUSPENSION AND DEBARMENT PROGRAM

By Joseph D. West, Raymond B. Ludwiszewski, Robert F. Meunier, and Carey A. Fenton

Seven years ago, BRIEFING PAPERS No. 06-9 provided a comprehensive overview of the policies, practices, and procedures followed by the Federal Government when exercising its right to suspend or debar contractors from obtaining new Government business.[1] Complementing that earlier PAPER, which remains current in all material respects, this BRIEFING PAPER focuses on the suspension and debarment practices of the Environmental Protection Agency (EPA) under its unique and far-reaching program. The importance of this single-agency case study is two-fold. First, the EPA's suspension and debarment program differs, structurally and procedurally, from that of almost any other agency.[2] Second, for the most part, the EPA's suspension and debarment reach extends much further than that of other agencies, at least in practice, and it can affect entities that have no current, past, or future business dealings with the EPA.

IN BRIEF

The EPA's suspension and debarment program is uniquely organized. The EPA extends the reach of its program to its 10 regions by maintaining close ties with its regional Criminal Investigations

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Division (CID) offices and the Office of the Inspector General (OIG).[3] It is in these local offices that the initial development of many potential suspension or debarment actions takes place; the EPA decided many years ago to separate investigatory actions from decisionmaking functions within the suspension and debarment process. In addition, the EPA has a designated Hearing Officer who may conduct factfinding proceedings and issue findings of fact to inform the final decision of the Suspension and Debarment Official (SDO). It is the SDO who has initial (and typically final) decisionmaking authority in all suspension and debarment cases. Finally, the EPA has a designated senior career official—the Director of the Office of Grants and Debarment (OGD)—to whom the SDO's decisions may be appealed and who has discretion over whether to hear such appeals.[4]

The EPA's substantial enforcement and regulatory presence within the individual states, coupled with its broad suspension and debarment powers, also means that it is uniquely reactive to criminal environmental law violations and may be more likely than other agencies to use its discretionary authority to debar criminal actors. Thus, for example, a manufacturer that has violated environmental permits could face companywide suspension and debarment under the EPA's discretionary debarment authority and could thereby be precluded from receiving Government-backed loans. And a nationwide drug store chain could be prohibited from filling Medicare prescriptions if it were suspended or debarred for some type of company-wide failure to comply with Clean Water Act (CWA)[5] or other environmental law requirements (e.g., by improperly disposing of certain types of products) that rose to the level of triggering action under the EPA's discretionary debarment authority. The EPA's presence at the state and local level and close integration with state and local government authorities makes it more likely than other agencies to become aware of such violations and respond to them.

Furthermore, because of the EPA's role in enforcing the statutory debarment provisions of both the Clean Air Act (CAA) and CWA,[6] the EPA's suspension and debarment reach can extend to entities that never before had their present responsibility assessed by that agency. This reach is limited by the statutory language to violating facilities as opposed to entire organizations, but debarment of such facilities is mandatory and can last many times longer than discretionary debarments because reinstatement is dependent upon the conditions giving rise to the violation having been corrected. And, if the EPA believes that it is warranted, the EPA can and will use its discretionary suspension and debarment powers to extend the limited statutory debarment to the entire company and its affiliates.

Finally, the EPA has shown that it is not intimidated by the size of a corporation when considering whether to exercise its suspension and debarment rights. In 2008, the EPA suspended IBM in connection with a direct procurement activity it was conducting,[7] and in 2012 it suspended BP P.L.C. and a number of its affiliates in connection with the Deepwater Horizon incident. At that time, BP had no contractual relations with the EP, but was the largest supplier of fuel contracts to the Department of Defense.[8]

EPA Suspension & Debarment Program Background

The EPA has maintained a large and influential suspension and debarment program for over three

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decades.[9] In 1982, in response to congressional oversight hearings highlighting Government-wide inadequacies in the management of federal contracts, the EPA began its official discretionary debarment program.[10] Significant waste, fraud, and abuse, identified in the hearings and in task force studies conducted by the Executive Council on Integrity and Efficiency,[11] led to the creation of a Government-wide suspension and debarment protocol for all federal contracts, as well as assistance, loans, grants, and benefits extended by Executive Branch agencies.[12] For application to federal procurement activity, this protocol was issued first by the Office of Federal Procurement Policy in Policy Letter 82-1 in 1982[13] and later adopted into Subpart 9.4 of the Federal Acquisition Regulation (FAR).[14]

In 1986, President Reagan mandated that all agencies adopt comprehensive regulations regarding suspension and debarment for nonprocurement matters, including Government assistance, loans, grants, and benefits.[15] The EPA had already adopted such a rule in 1982,[16] and it was adopted by 27 other agencies in 1988.[17] This regulation, known as the "Nonprocurement Common Rule" (NCR), became the standard for discretionary, nonprocurement suspensions and debarments. The NCR is codified today in the *Code of Federal Regulations* at 2 C.F.R. Part 180,[18] and—like the FAR—it provides for the reciprocal treatment of all procurement and nonprocurement suspensions and debarments by any agency, Government-wide.[19]

In addition to the NCR, the EPA also has statutory mandates to debar parties who violate certain criminal provisions of the CWA or the CAA.[20] The EPA thus processes suspensions and debarments under three separate authorities: the FAR, the NCR, and the statutory provisions of the CWA and CAA.

Historically, these three different debarment processes were handled by separate offices of the EPA. In 1982, all EPA discretionary procurement debarments were handled by the Procurement and Contracts Management Division; all assistance debarments were administered by the Grants Administration Division of the EPA; and all statutory debarments were delegated to the Office of Enforcement.[21] Subsequently, the administration of all EPA discretionary procurement and assistance debarments was consolidated into the Grants Administration Division.[22] Today, all EPA debarment authority is delegated to the Assistant Administrator for the Office of Administration and Resource Management (OARM), and it is implemented by the SDO, who resides within the OGD.[23] In 2011, Richard A. Pelletier, SDO for the EPA, stated before Congress that the EPA almost exclusively uses the NCR in its discretionary suspension and debarment actions, whether they originate in procurement or nonprocurement activities.[24] However, in recent years, the EPA has begun citing the FAR, as well as the NCR, in some of its notices.

The EPA's model is, in some ways, unique among agencies. Unlike all but two other executive agencies—the Air Force and the Navy—the EPA maintains a full-time SDO with independent decisionmaking power.[25] In addition to the SDO, who has final decisionmaking authority over all suspension and debarment actions before the agency (unless overturned on discretionary appeal), the EPA also has a Suspension and Debarment Division (SDD), which has primary responsibility for case development.[26] Once a case has been developed by the SDD in consultation with the EPA OIG and CID, as well as any other stakeholders like the Department of Justice (DOJ) and other federal or state agencies, it is forwarded to the SDO for action and resolution.[27]

Purpose Of Suspension & Debarment

Administrative suspension and debarment, under both the FAR and the NCR, is not driven by punitive goals, but rather is designed for use "in the public interest for the Government's protection."[28] The intent under both the FAR and the NCR is to ensure that the Government deals only with presently "responsible" entities, and not with any entities or persons who engage in dishonest or illegal conduct to the detriment of the United States.[29]

Congress has also sought to protect the Government and enforce compliance with the laws by creating statutory mechanisms for suspension and debarment. The first such statute was the Buy American Act of 1933, which promotes the use of American-produced materials and mandates

the debarment of any contractor that violates its provisions.[30] Since then, labor laws such as the Davis-Bacon Act and Walsh-Healey Act,[31] drug-enforcement laws such as the Drug-Free Workplace Act and Anti-Drug Abuse Act,[32] and environmental laws such as the CAA and CWA,[33] promote their various goals by barring noncompliant Government contractors and program participants. The CAA and CWA in particular prohibit the Government from entering into "any contract with any person who has been convicted" of either of the Acts' criminal offenses.[34] As with the NCR and FAR, however, the best interests of the United States govern any decision to suspend or debar. Although both the CAA and the CWA *mandate* suspension or debarment in the event of a qualifying conviction, they also provide for exemptions from debarment upon a written determination by the President or the head of any federal department or agency that an exemption is "in the paramount interest of the United States."[35]

Congress has also used its power of the purse to require that agencies affirmatively consider suspension and debarment before entering into contracts or other nonprocurement agreements in particular instances. The Consolidated Appropriations Act, 2012, for example, provides that no portion of the funds it authorizes for the DOD may be used for specified procurement or nonprocurement transactions in which the contracting agency knows that a "corporation" has been convicted of a felony crime under federal law within the preceding 24 months, unless that agency has considered suspension or debarment and made a determination that such action is "not necessary to protect the interests of the Government."[36] The Act similarly provides that such funds cannot knowingly be used for specific procurement or nonprocurement transactions with corporations that have unpaid federal tax liability (assessed, and for which no judicial or administrative appeal options remain), unless the contracting agency has considered suspension or debarment and made a determination that such action is "not necessary to protect the interests of the Government."[37] Both of these provisions continue in effect under the Consolidated and Further Continuing Appropriations Act, 2013,[38] and both Acts contain similar provisions that apply to different agencies.[39]

The Government has also recently shown an increased willingness to use exclusion as a means to promote statutory goals outside of Government procurement. For example, the Social Security Act requires exclusion of providers found guilty of health care fraud or abuse from Medicare and Medicaid programs.[40] Similarly, the Generic Drug Enforcement Act prohibits persons who have committed certain drug-related violations from submitting or assisting in the submission of a drug application.[41]

EPA's Debarment Program Organization

As noted above, the overall responsibility for implementing suspension and debarment responsibilities for procurement, assistance, and environmental compliance activities has, over time, been consolidated into a single program at the EPA.[42] The management of statutory and discretionary power to prevent presently nonresponsible contractors, subcontractors, recipients, and participants (including individuals) from accessing federal funds is placed under the authority of the Assistant Administrator for the OARM.[43] The OARM has further delegated all policy and operational responsibilities for debarment or suspension under the FAR, the NCR, and § 306 of the CAA[44] and § 508 of the CWA[45] (the Acts' mandatory debarment provisions) to the EPA SDO in the OGD.[46] Accordingly, unlike some agencies in which suspension and debarment power is exercised by a political appointee, the EPA has placed that function under the day-to-day authority of the career civil service. The decision to consolidate power in one career civil service entity was initiated in 1983 for procurement and assistance activities and culminated with the final consolidation of environmental compliance-based debarment activities under the CAA and CWA in 1995.[47]

Although when dealing with some agencies it may be useful to directly address senior political leadership regarding suspension and debarment concerns, at the EPA that approach is not likely to be successful. The EPA intentionally housed its suspension and debarment authority in the career civil service. One is likely to encounter serious resistance from both the political and

career service ends of the agency if one tries to do an end run around the SDO. Another aspect of the EPA Debarment Program worth noting is that power over the process is not only delegated out of the political arena, but it is further divided within the career service to ensure that adequate separation exists between those who perform investigative and prosecution type functions from those who serve in a decisionmaking capacity. This is one of the more attractive and important features in the EPA model because it gives greater credibility to a process that has been subject to some criticism for the commingling of these functions in other agencies. At the EPA, the separation of functions concept has been formally translated into its policy directives and captured in its organizational structure.

■ Director, Office Of Grants & Debarment (OGD)

The OGD Director has two primary functions in the EPA Suspension and Debarment Program. First, the OGD Director is the highest career civil servant supervisor of the EPA debarment program, responsible for reviewing the job performance of those officials who carry out the major functions of the program. Second, the OGD Director is the official to whom a respondent may administratively appeal decisions rendered by the SDO.[48] The EPA is one of only a few agencies that offer an internal appeal option, which is not provided for in the primary text of the FAR or the NCR. The EPA administrative appeal was created by the EPA in the EPA's implementing supplement to the NCR.[49]

■ EPA Suspension & Debarment Official (SDO)

The SDO reports directly to the OGD Director. The SDO is the only official at the EPA who may suspend, propose debarment, debar, or give effect to an administrative agreement to resolve a suspension and debarment matter. The SDO also provides policy guidance and procedures that direct or guide the manner in which the suspension and debarment program operates. The SDO's policy function does not preclude him or her from personally initiating an action, but it does relegate his or her primary function to one of providing guidance to the program components to preserve the SDO's capacity to fairly consider and decide specific cases. The SDO is assisted in carrying out his or her functions by an analyst and a Hearing Officer who report directly to the SDO.

■ EPA Hearing Officer

The EPA Suspension and Debarment Hearing Officer, as the title implies, is the official to whom the SDO may submit material facts in dispute for hearing and determination. When a dispute is referred, the Hearing Officer conducts a factfinding proceeding and prepares written findings for the SDO to include in the administrative record. The Hearing Officer also has broader, non-factfinding roles. For example, if a contractor or program participant wishes to contest a notice of proposed debarment or a suspension order, the Hearing Officer schedules matters in opposition as the initial step in contesting exclusionary action. The Hearing Officer is also the official who coordinates receipt of matters in opposition, including establishing due dates for written material and scheduling time for in-person meetings with the SDO. In some cases, the Hearing Officer will preside over the oral presentation of factual matters in opposition. Finally, the Hearing Officer is ordinarily the first level of review for the SDO of matters officially referred for action. In that capacity, the Hearing Officer may prepare action notices for the SDO's signature, assist the SDO in preparation of a final decision, review proposed administrative agreements, and otherwise interact with other participants in the process on behalf of the SDO. The Hearing Officer at the EPA is essentially the SDO's "gatekeeper."

■ Suspension & Debarment Division (SDD)

Separate from the SDO staff in the immediate office of the OGD Director, and collateral to the SDO, is the SDD. The SDD Director also reports to the OGD Director, but is primarily responsible for "presenting" matters to the SDO for action. The SDD functions in a manner similar to that of the U.S. Attorney's Office within the justice system. The SDD is staffed with investigators, auditors, program, grants or procurement analysts, and attorneys. Attorneys within the SDD are primarily tasked with handling presentations

to the SDO. In building a case for suspension or debarment, SDD attorneys coordinate with officials who administer EPA procurement and assistance programs; federal agents and auditors of the OIG, which has jurisdiction over matters of fraud, waste, and abuse in procurement and assistance programs; agents of the CID within the Office of Enforcement and Compliance Assurance, which has jurisdiction over matters related to enforcement of various environmental statues; and other agencies with interests in the matter. SDD attorneys then package this information for the SDO and advocate in favor of suspension or debarment. SDD attorneys also coordinate regional actions with state regulatory and permit authorities and have positions out-posted from headquarters to various locations throughout the country.

The SDD plays a very important and prominent role in both negotiating and overseeing administrative agreements. As discussed below, administrative agreements are a form of negotiated settlement between the EPA and entities proposed for suspension or debarment that allow those entities to remain eligible to participate in federal programs. Most administrative agreements at the EPA result from joint filings by the respondents and the SDD to the SDO recommending resolution of the suspension or debarment actions under terms that are essentially conditional and probationary in nature. The SDD will ultimately be consulted by the SDO before an administrative agreement is offered or accepted, and thus consultation with the SDD is an important first step in negotiating an administrative agreement. Upon signing, the SDO sends the administrative agreement back to the SDD for supervising compliance with its terms.

In sum, the EPA has centralized and consolidated its suspension and debarment authority under a single program, but administers the program in a manner that incorporates a sharing of power between the SDO and the SDD to achieve a unique system that promotes efficiency and uniformity without compromising fairness and objectivity. Handling a debarment or suspension matter before the EPA involves interaction with several components that share power in different spheres of responsibility. Being mindful of these entities' varying functions and respectful of the protocols that flow from them can have a beneficial impact on the outcome of any exclusionary action.

Grounds For Discretionary Suspension & Debarment

No agency may suspend or debar a contractor to punish a contractor or program participant.[50] Where proper grounds for discretionary debarment exist, an agency is permitted but not mandated to suspend or debar. Discretionary suspension and debarment protects the Government and the public by ensuring that the Government financially transacts only with *presently* responsible entities. If a contractor or program participant is *presently* responsible, an agency, such as the EPA, should not use suspension or debarment as a means to exclude them from transactions with the Government.[51] Under the FAR, an agency looks to the seriousness of a contractor's acts or omissions and any remedial measures or mitigating factors counseling against exclusion to determine whether a contractor is presently responsible.[52]

The FAR provides the grounds and procedural process for suspensions and debarments that originate in procurement activities, and the NCR provides the grounds and procedural process for suspension and debarments that relate to nonprocurement activities.[53] Although, as noted above, the EPA SDO has stated that the EPA almost exclusively uses the NCR in its discretionary suspension and debarment actions whether they originate in procurement or nonprocurement activities, the EPA has the authority to suspend and debar under either the FAR or the NCR.[54] As such, this PAPER will address the grounds, process, mitigating factors, and resolutions available under both the FAR and the NCR.

■ Grounds For Debarment

Debarment disqualifies an entity from contracting with the Government or participating in Government nonprocurement transactions for a specific period of time (usually limited to a maximum of three years).[55] The FAR enumerates several grounds for administrative debarment in procurement matters. Generally, a contractor or participant in a Government program may be debarred for (1) a

conviction or civil judgment for fraud or the commission of a criminal offense, (2) a serious violation of the terms of a Government contract, subcontract, or transaction (established by a preponderance of the evidence), or (3) any other cause so serious or compelling in nature that it affects an entity's "present responsibility."[56]

Specifically, procurement debarment under the FAR can occur for criminal convictions or civil judgment for (a) fraud or a criminal offense in connection with a public contract or subcontract, (b) violation of federal or state antitrust laws, (c) embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property, (d) intentionally affixing a "Made in America" label to foreign goods, or (e) any other offense indicating a lack of business integrity or business honesty.[57] Debarment under the FAR may also be based on evidence of a serious violation of the terms of a Government contract or subcontract.[58] Such violations include a willful failure to perform, a history of failure to perform, and unsatisfactory performance on one or more contracts and must be proven by a preponderance of the evidence.[59] Further grounds for debarment include a preponderance of the evidence indicating (1) a violation of the Drug-Free Workplace Act, (2) intentional affixation of a "Made in America" label on foreign goods, (3) unfair trade practices, (4) delinquent federal taxes, (5) knowing failure by a principal to disclose to the Government credible evidence of the violation of various criminal laws found in Title 18 of the U.S. Code, the civil False Claims Act, or significant overpayment on the contract, (6) noncompliance with the Immigration and Nationality Act's employment provisions, or (7) "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor."[60] Number (5) above is often referred to as the mandatory disclosure requirement. Not only is the underlying act a potential cause for debarment, but the failure to timely report any credible evidence that a principal, employee, agent, or subcontractor has (A) committed a violation of federal criminal laws involving fraud, conflict of interest, bribery, or gratuity, (B) violated the False Claims Act, or (C) received a significant overpayment on the contract, up to *three years after* the final payment on a covered contract, is independent grounds for debarment.[61]

The grounds for nonprocurement debarment under the NCR are similar in most respects to the FAR. Unlike the FAR, the NCR does not specifically provide for debarment for falsely affixing a "Made in America" label to foreign-made products or noncompliance with the employment provisions of the Immigration and Nationality Act.[62] The NCR does, however, provide five additional, unique grounds for nonprocurement debarment. First, the NCR specifically provides for debarment for a conviction or civil judgment for making false claims or obstruction of justice.[63] Second, in what is a significant expansion over the FAR, the NCR provides for debarment of an entity for "[k]nowingly doing business with an ineligible person."[64] Third, a participant may be debarred for failing to pay debts to "any Federal agency or instrumentality" (except for debts arising under the Internal Revenue Code).[65] Fourth, in addition to two examples given in the FAR of violations of public agreements serious enough to merit debarment, the NCR provides for debarment for a "willful violation of a statutory or regulatory provision…applicable to a public agreement."[66] Finally, the NCR expressly provides for debarment upon violation of a material provision of a voluntary exclusion agreement or any suspension or debarment settlement agreement.[67]

Where one or more of the above grounds for debarment exists, debarment will be imposed where it is "in the Government's interest."[68] It is extremely important to recognize that debarment is often a likely collateral consequence of a criminal conviction or civil judgment. Moreover, it is important to bear in mind that a grant of immunity from prosecution is no guarantee against suspension or debarment.[69]

Finally, because the Government has the ability to debar for "any…cause affect[ing] the present responsibility of a contractor or subcontractor,"[70] it is vitally important that targeted entities engage with their SDOs early and often when faced with allegations relating to fraud, ethics violations or other serious noncompliance. Early engagement with an SDO signals a willingness to be candid about potential grounds for debarment and may

engender trust in the SDO. Early engagement also allows a contractor to learn about the SDO's concerns in an informal context rather than in a formal notice, to address those concerns, and to build a case for the contractor's present responsibility. Although early engagement with the SDO is not a guarantee against suspension or debarment, it is one of the most effective methods of prevention that a contractor has.

■ Grounds For Suspension

Suspension, which takes effect immediately, temporarily disqualifies an entity from contracting with the Government or from participating in Government programs.[71] The grounds for suspension and debarment are substantially similar; however, the evidentiary threshold necessary to suspend is lower than it is to debar.[72] Practically speaking, suspension is a temporary debarment that lasts until an investigation, litigation, or agency determination has settled the facts relevant to the grounds for debarment.[73] Accordingly, although a suspension is "temporary," in instances where an investigation or litigation lasts more than three years, the term of a suspension may actually exceed the typical maximum term of a debarment.[74]

Under both the FAR and the NCR, suspension is a "serious action" that should only be imposed where "immediate action" is necessary to protect the Government's and public's interests. Further, a suspension should only be imposed on the basis of an indictment or other "adequate evidence" of the existence of grounds for debarment.[75] "Adequate evidence" is defined as "information sufficient to support the reasonable belief that a particular act or omission has occurred."[76] To determine whether adequate evidence for suspension exists, the FAR and the NCR state that a suspending official "should" consider how much information is available, the credibility of the available information, whether important allegations are corroborated, and what inferences can be reasonably drawn from the available evidence.[77] Under the FAR, a suspending official "should" examine basic documents such as contracts, inspection reports, and correspondence.[78] The official also "should" consider the seriousness of the contractor's acts or omissions and "may, but is not required to," consider remedial measures or mitigating factors.[79] The NCR, in contrast, states only that the official "may" examine basic documents and does not expressly provide for consideration of the seriousness of a participant's actions or mitigating factors.[80] Under both the FAR and the NCR, however, the adequate evidence requirement for suspension is an easier standard for a suspending official to meet than the preponderance of the evidence standard required for debarment.

Another difference between the FAR and NCR regards the action required in response to a serious violation of the terms of a Government contract or agreement. Under the FAR, a serious violation supported by the preponderance of the evidence is grounds for debarment, but—unlike the other grounds for debarment—there is no corresponding provision in the FAR for suspension based on adequate evidence of such a violation.[81] In contrast, because the NCR provides for suspension upon adequate evidence of the existence of *any* cause of debarment, the NCR does specifically provide for suspension based on adequate evidence of a serious violation of a public agreement or transaction.[82]

As described above, the NCR, which is the EPA's preferred suspension and debarment vehicle, provides broader suspension and debarment grounds than the FAR. Furthermore, because the FAR compels review of mitigating factors and the NCR merely allows it, the NCR arguably provides less focus on mitigating factors than does the FAR.

Procedural Process For Discretionary Suspension & Debarment

The procedural process applicable to discretionary (also referred to as administrative) debarments and suspensions is found in the FAR for procurement-related actions and the NCR for nonprocurement-related actions. The procedural processes outlined in the FAR and the NCR are substantially similar; the differences are highlighted below.

To have an effective suspension and debarment program, an agency, such as the EPA, must have

a means of becoming aware of the existence of possible grounds for taking such action. The FAR mandates that agencies establish procedures for prompt reporting, investigation, and referral to the applicable debarring official of any "matters appropriate for that official's consideration."[83] Indictments, convictions, and civil judgments are the types of "matters" most commonly referred to debarring officials. However, while less common, a suspension may be initiated by an agency that has developed the facts independent of or even in the absence of a parallel judicial proceeding.[84] Since, as described above, the EPA has the SDD—an entire division that handles suspension and debarment and that includes its own investigators, auditors, and analysts—the EPA is uniquely equipped to detect, investigate, and refer suspension and debarment cases to the SDO.

If an agency makes the decision to formally consider an entity for debarment or to suspend an entity, the agency is required by the FAR and NCR to issue either a notice of suspension[85] or notice of proposed debarment.[86] While the regulations require that notice be given *before* debarment (hence the notice of *proposed* debarment),[87] a notice of suspension can be (and usually is) provided with the suspension effective immediately.[88] The notice must include the following information: that the entity has either been suspended or is being considered for debarment, the basis for the agency's action, and the Government-wide effect of the suspension or proposal to debar.[89] In the case of a suspension, the notice also notes that the suspension is for a temporary period pending completion of an investigation or resulting proceedings.[90] Although the agency must state the basis for the suspension or proposed debarment "in terms sufficient to put you on notice," in the case of a suspension, which often occurs concurrent with some Government investigation or prosecution, the agency is permitted to limit the notice so as not to disclose the Government's evidence.[91]

One crucial difference between the FAR and the NCR is that, while a notice of proposed debarment under the FAR immediately excludes a contractor from procuring additional Government contracts, a notice of proposed debarment under the NCR does not.[92] Under the NCR, an entity must actually be suspended or debarred before exclusion begins. However, an entity that is proposed for debarment under the FAR is immediately excluded from participation in nonprocurement programs governed by the NCR[93] as a consequence of § 2455 of the Federal Acquisition Streamlining Act of 1994, which conferred reciprocity between the FAR and NCR exclusions.[94] Under both the FAR and the NCR, notice that an agency is considering suspension or proposing to suspend an entity is not sufficient to exclude the entity. Both the FAR and the NCR require that a notice of suspension sufficient to exclude an entity must notify an entity that "you *have been* suspended."[95]

Receipt of a notice of suspension under the FAR or the NCR or a notice of proposal to debar under the FAR has an immediate and devastating effect on a Government contractor. Upon receipt, the entity is excluded from obtaining any further contracts or Government programs. In part because of this draconian effect, agencies, including the EPA, sometimes issue "show cause" letters, which inform entities that they are being considered for suspension or proposed debarment, but do not have the effect of immediate exclusion. The EPA reports having issued six show cause letters in 2009, four in 2010, and ten in 2011.[96]

Typically, show cause letters offer an opportunity to respond within a set time period to allegations of misconduct that have been brought to the attention of the debarring official. Neither the FAR nor the NCR require an agency to issue a show cause letter or to provide any notice before the notice of suspension or proposed debarment. Therefore, the issuance of a show cause letter continues to be completely at the discretion of the EPA and other individual agencies. Whether, however, an entity receives a show cause letter, or simply knows by other means that an agency is considering suspension or proposed debarment, that entity is well advised to begin a dialogue with the agency early in the process so as to avoid, if possible, the issuance of an immediately effective exclusionary notice. Agency debarring officials are normally receptive to such approaches. At the EPA, such an approach can be particularly sensitive because it must involve

both the assigned SDD attorney and the SDO, who may have differing levels of receptivity to presuspension negotiation. The importance of advice from experienced counsel as early as possible in this process cannot be overstated.

After receipt of a notice of suspension, a suspended entity has 30 days to submit information and argument in opposition to the suspension. The response submission should include specific facts that contradict statements contained in the notice.[97] Similarly, an entity can contest a proposed debarment within 30 days by providing specific facts contradicting the basis for the debarment.[98] The NCR requires that, in addition to providing specific information contradicting the basis for the suspension or proposed debarment, an entity contesting suspension or debarment must also inform the agency of all prior exclusions imposed by federal, state, or local agencies, any additional relevant criminal or civil proceedings not included in the notice, and all of the entity's affiliates.[99]

Where (1) material facts are in dispute, (2) the suspension or proposed debarment was not based on an indictment, conviction, or civil judgment, and (3) substantial interests of the Government in pending or contemplated legal proceedings will not be prejudiced by a hearing, the SDO will refer the issue to a factfinder (the Hearing Officer) who will conduct an independent proceeding.[100] Unless the Hearing Officer's determination is found by the SDO to be arbitrary and capricious or clearly erroneous, the written determination of fact is binding.[101]

Once the administrative record is complete, the SDO must make a debarment decision on entities that were proposed for debarment within 30 days under the FAR and 45 days under the NCR, subject to extension for good cause.[102] The administrative record is complete once the entity has had an opportunity to submit its response and all necessary factfinding decisions have been made.[103] The debarring official must provide a written notice of the decision to the contractor and any involved affiliates. A notice stating that debarment has been imposed must also include the reasons for debarment and the period of debarment and explain that the debarment is effective Government-wide.[104]

Mitigating Factors In Discretionary Debarment Actions

The decision to debar under either the NCR or the FAR is a discretionary one and debarring officials are encouraged by both regimes to consider both mitigating and aggravating factors in coming to a final decision. None of these factors is decisive or mandatory, but they may be outcome-determinative on the balance. As noted in the FAR, "[t]he existence of a cause for debarment… does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision."[105]

The FAR provides that a debarring official "should" consider several factors, including—but not limited to—the following: (1) whether the contractor had effective standards of conduct and internal control systems in place when the misconduct occurred or prior to any Government investigation; (2) whether the contractor alerted the appropriate Government agency to the misconduct in a timely manner; (3) whether the contractor has fully investigated the circumstances surrounding the cause for debarment and shared the results of that investigation with the agency; (4) whether the contractor cooperated fully; (5) whether the contractor has agreed to pay fines, restitution, and reimbursement of the Government's investigation and administrative costs; (6) whether the contractor has taken disciplinary action against the individuals responsible for the misconduct; (7) whether the contractor has agreed to implement remedial measures; (8) whether the contractor has agreed to institute review and control procedures and ethics training programs; (9) whether the contractor has had adequate time to eliminate internal circumstances that led to the cause for debarment; and (10) whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.[106]

The NCR provides a longer list of mitigating and aggravating factors that a debarring official "may" consider. In addition to those contained in the FAR and listed above, the NCR indicates

that a debarring official may consider the following: (a) any actual or potential harm or impact that results or may result from the wrongdoing; (b) the frequency of incidents or duration of wrongdoing; (c) whether there is a pattern or prior history of wrongdoing; (d) whether the contractor or program participant has previously been excluded or disqualified by a federal, state, or local agency on the basis of similar conduct; (e) whether the entity has entered into an administrative agreement on the basis of similar conduct; (f) whether, and to what extent, the entity planned, initiated, or carried out the wrongdoing; (g) whether the wrongdoing was pervasive within the organization; (h) the kinds of positions held by those involved in the misconduct; (i) whether the principals in the organization tolerated the offense; and (j) other factors appropriate to the circumstances of the particular case.[107]

The Government has the initial burden to show cause for debarment.[108] If a cause for debarment exists under either the NCR or the FAR, the burden is on the contractor or program participant to show that it is presently responsible and should not be debarred because of these, and any other, mitigating factors.[109] Furthermore, it is vitally important that the targeted entity seek to bring mitigating factors to the attention of the SDO in advance of any suspension or debarment decision. Although failure to consider mitigating factors may be grounds to appeal a decision as arbitrary, the standard of review is so deferential to the agency's discretion that an entity's best chance of proving present responsibility is before official action.[110]

Recognizing the value in encouraging self-policing, the EPA initiated a Voluntary Disclosure Program in 1995.[111] This program provides incentives to entities to voluntarily discover, report, and correct wrongdoing.[112] Specifically, the EPA pledges not to assess gravity-based penalties—those portions of penalties over and above the portions representing the entities' economic gains from noncompliance—against entities that meet specified self-policing and self-reporting criteria and to reduce gravity-based penalties by 75% against those entities that comply but do not have systematic discovery mechanisms in place.[113] Further, the EPA generally will not recommend criminal prosecution of entities—by the DOJ or any other prosecuting authority—that dutifully and in good faith abide by the program's requirements.[114] Although the Voluntary Disclosure Program does not expressly guarantee that compliance will prevent suspension or debarment, the EPA's general practice has been not to suspend or debar compliant organizations.

Resolution Of Discretionary Suspension & Debarment Actions

The impacts of suspension or debarment on a Government contractor or program participant can be devastating. Given their far-reaching and often prolonged impacts, suspension or debarment can mean the financial ruin of an excluded entity. As discussed herein, suspension or debarment not only affects a contractor or program participant's ability to do business with the excluding agency, it also includes potential reciprocal debarment by other federal, state, and local agencies. It is essential, therefore, that an entity facing potential debarment be cognizant of all potential impacts as it navigates the process.

■ Effect & Duration Of Suspension & Debarment

The immediate impact of suspension or debarment, under either the NCR or the FAR, is Government-wide exclusion from all new procurement or nonprocurement activity.[115] As discussed elsewhere, the provisions of both the NCR and the FAR provide for reciprocal treatment of suspensions and debarments. Thus, when an entity is suspended or debarred under the FAR, it cannot engage in new nonprocurement transactions with the Government; similarly, it cannot pick up new contracts from the Government if suspended or debarred under the NCR.[116]

The length of time of exclusion varies according to whether an entity has been suspended or debarred and under what regime. A suspension is technically a "temporary" exclusion, so the Government is obligated to initiate legal proceedings within 12 months of a suspension notice, or within 18 months if the Assistant Attorney General requests an extension of time.[117] Even so, because suspension is pending a decision to debar, it persists for the duration of any legal

proceedings and may therefore last far longer than a standard debarment.[118] Under the EPA Supplement to the NCR, if a suspended entity presents information in opposition to the suspension, and the SDO decides, despite the submission, to continue the suspension, the suspended entity has two ways to seek review of the decision.[119] Both requests for review must be in writing, state the specific findings that one believes are in error, and include the reasons for one's beliefs.[120] First, the suspended entity can ask the SDO to review his decision for material errors of fact or law.[121] Second, within 30 days of receipt of the SDO's decision, a suspended entity can seek review of that decision by the OGD Director.[122] Review by the Director is within the sole discretion of the Director, who also has authority to stay the suspension pending the review.[123] However, the Director can reverse the suspension decision only where the Director finds that the decision is based on a clear error of material fact or law, or where the SDO's decision was arbitrary, capricious, or an abuse of discretion.[124]

A discretionary debarment, by way of contrast, is always for a fixed period of time—generally not to exceed three years[125]—and debarring officials must consider the length of any suspension when setting the period of debarment.[126] The EPA has, however, debarred contractors upon a showing of good cause for 15–20 years as recently as 2009 and 2010.[127]

Debarment decisions are also appealable; a debarred entity can request that the debarring official reconsider the debarment or reduce the period of debarment.[128] Such requests must be in writing and supported by documentation of the reasons for reconsideration.[129] Reasons sufficient to support reconsideration might include (1) newly discovered material evidence; (2) reversal of a conviction or judgment that served as the basis of debarment; (3) bona fide change in control of the debarred organization; (4) elimination of other causes for which debarment was initially imposed; or (5) other reasons that the debarring official finds appropriate.[130] Under the EPA Supplement to the NCR, in addition to seeking reconsideration of the SDO's debarment decision by the SDO, one can also seek review by the OGD Director of the SDO's decision within 30 days.[131] Like the request to the SDO for review, the request to the Director must be in writing, state the specific findings that one believes are in error, and include the reasons for one's beliefs.[132] Review by the Director is within the sole discretion of the Director, who also has authority to stay the debarment pending the outcome of the review.[133] Importantly, the Director can reverse the debarment decision only where the Director finds that the decision is based on a clear error of material fact or law, or where the SDO's decision was arbitrary, capricious, or an abuse of discretion.[134] In practice, if the Director has some concerns with a decision, he may "remand" the case rather than reverse it. These informal remands can result in an administrative agreement rather than a suspension or debarment.

If a debarring official wishes to extend the period of an existing debarment, the official may do so but must first show that extension is necessary to protect the public interest.[135] The official must also cite facts and circumstances beyond those that supported the initial debarment.[136] Further, to meet the due process demands of the Fifth Amendment, the Government must use effectively the same procedures to extend a debarment as it would use to impose one.[137] In practice, debarment periods are rarely extended once imposed.

■ System For Award Management

When a party is suspended, debarred, or proposed for debarment under the FAR, agencies must inform the General Services Administration (GSA) of that action so that the party may be listed on the Government's central System for Award Management (SAM).[138] SAM is the primary mechanism by which the Government achieves Government-wide exclusion for debarred and suspended parties.[139] It was launched in 2012 as part of an effort to streamline and consolidate several online "legacy systems" that the Government has historically used to manage procurement and nonprocurement transactions.[140] The Government's goal is ultimately to "phase in" approximately 10 such systems over time, but the version as implemented in 2012 merged only the Central Contractor Registration (CCR)/ Federal Agency Registration (FedRe), the Online Representations

and Certifications Application (ORCA), and the Excluded Parties List System (EPLS).[141] The last of these, EPLS, was formerly the GSA's database of excluded entities. Thus, SAM now serves—among other things—as a central collection point for the names of debarred and suspended entities in both procurement and nonprocurement actions.[142] Also listed on SAM are those entities that have entered into voluntary exclusion agreements with the EPA and other agencies to terminate or avoid suspension or debarment.[143]

Under both the FAR and NCR, whenever the EPA takes exclusionary action toward an entity it must report that action to the GSA—within three working days under the FAR and within five working days under the NCR.[144] This notice to GSA must include the name and address of the excluded party; contact information for the EPA; the cause for the action; the termination date of the action; and a DUNS Number, Social Security Number, Employer Identification Number, or other Taxpayer Identification Number, where available.[145] Both the FAR and the NCR also provide that modification or rescission of an exclusionary action must be entered in SAM within five working days.[146]

Once an entity is listed on SAM, its exclusion from engaging in contracts, subcontracts, and nonprocurement transactions takes Government-wide effect.[147] The FAR prohibits agencies from soliciting offers from, awarding contracts to, or allowing prime contractors to subcontract with, entities listed on SAM.[148] To avoid any erroneous awards, the FAR requires that all Contracting Officers consult SAM both immediately upon opening bids or receiving proposals and again immediately before contract award.[149] Furthermore, listed contractors are barred from representing other contractors or serving as their agents in contracting with the Federal Government.[150] The NCR contains similar provisions barring all federal agencies from entering into covered transactions with parties listed on SAM.[151]

Whether the origin of listing lies in a procurement or nonprocurement action, federal agencies are prohibited from engaging with parties listed on SAM unless the agency's head grants an exception, in writing, identifying the "compelling reasons" for the exception.[152] These exceptions are rare, and they are generally limited to either very large contractors that the Government cannot quickly replace, or contractors that provide highly specialized goods or services.[153] The EPA SDO is the person within the EPA who has been delegated the authority to grant an exception allowing an excluded person to participate in a covered transaction.[154] An exception is granted in writing and must state the reasons for the deviation.[155]

The Government deals strictly with excluded parties who are inadvertently engaged as contractors. Under the FAR, when an excluded contractor is awarded a contract, that agreement is voidable at the option of the Government. Contractors that have already incurred expenses in part performance of such voidable contracts also are not entitled to reimbursement.[156] Finally, as discussed below, the False Claims Act could impose civil or criminal liability on any contractor that falsely certifies that they are not presently excluded or disqualified.[157]

■ Existing Contracts

Suspensions and debarments are prospective and thus generally do not affect contracts existing at the time that the contractor is suspended, proposed for debarment, or debarred, unless the agency head directs otherwise.[158] The EPA and other agencies can therefore terminate existing contracts in their discretion, but only after contracting and technical personnel have reviewed such contracts to "ensure the propriety of the proposed action."[159] Furthermore, without a written determination by the agency head citing the "compelling reasons for doing so," the EPA and other agencies cannot (1) place orders exceeding the guaranteed minimum under indefinite-quantity contracts, (2) place new orders under optional use contracts, blanket purchase agreements, or basic ordering agreements, or (3) add new work, exercise options, or otherwise extend the duration of current contracts or orders.[160]

■ Certification

As alluded to earlier, the FAR provides certification requirements for entities that seek to

enter into procurement transactions with the Government to ensure that the Government does not contract or subcontract with excluded parties.[161] Specifically, the FAR requires that the contractor provide a certification for all contracts at or above the simplified acquisition threshold (currently at $150,000).[162] This certification states whether the contractor or any "principals" of the contractor[163] (1) is currently debarred, suspended, proposed for debarment, or otherwise ineligible for federal contracts; (2) has received a criminal conviction or civil judgment in the past three years for fraud or a similar offense in connection with a public contract or subcontract, for a violation of federal or state antitrust statutes relating to offers, or for commission of theft, embezzlement, forgery, bribery, or similar crimes;[164] (3) is currently criminally indicted or civilly charged for any of the above offenses; (4) has been notified within the past three years of delinquent taxes in an amount exceeding $3,000 for which liability remains unsatisfied; or (5) has had any Government contracts terminated for default in the past three years.[165] First-tier subcontractors on subcontracts above $30,000 also must certify their eligibility.[166]

Like the FAR, the NCR imposes an affirmative disclosure requirement on direct program participants who learn that they or their principals[167] (a) are presently excluded or disqualified; (b) have in the past three years been convicted or had a civil judgment rendered against them of the type that could form the basis for suspension or debarment; (c) are presently indicted or civilly charged with such an offense; or (d) have had any federal, state, or local government transactions terminated for default within the past three years.[168] The EPA Supplement to the NCR expands the definition of principal to include (1) principal investigators, (2) technical or management consultants, (3) individuals performing chemical or scientific analysis or oversight, (4) professional service providers such as doctors, lawyers, accountants, and engineers, (5) individuals responsible for the inspection, sale, removal, transportation, storage or disposal of solid or hazardous waste or materials, (6) individuals whose duties require special licenses, (7) individuals that certify, authenticate, or authorize billings, and (8) individuals that serve in positions of public trust.[169] Furthermore, although the NCR alone does not require certification from the direct participant regarding lower-tier transactions, the EPA has elected to require certification by subcontractors in most nonprocurement transactions and in procurement transactions valued at over $25,000, and the NCR also places an affirmative duty on participants to verify that lower-tier entities are not excluded.[170]

Methods For Resolving Suspension & Debarment Actions

Applicable regulations state that an excluded entity is entitled to a written determination.[171] This written resolution may take one of several forms: (1) in the case of uncontested suspension or debarment actions, the EPA may enter a default order; (2) it may enter into a negotiated administrative agreement with the targeted entity to avoid formal debarment; or (3) it may issue a written resolution detailing the SDO's rationale for either action or non-action.[172] For actions brought under the CAA's or CWA's mandatory debarment provisions,[173] the latter may take the form of a petition for reinstatement determination.

■ Default Orders

The regulations require that notice be given *before* debarment occurs, and thus the EPA will typically issue either a notice of suspension (pending debarment determination)[174] or a notice of proposed debarment[175] to commence a debarment action. When parties fail to exercise their right to respond to such notices and thereby to contest debarment, the EPA may issue a default order of debarment.[176] The EPA does not maintain a collection of such default determinations.[177]

■ Administrative Agreements

When parties do contest debarment, the EPA typically either enters into a negotiated administrative agreement with that party or ultimately issues a written resolution explaining its decision to debar or declining to debar. An administrative agreement is a common solution when, for example, grounds for suspension or debarment have been established but the debarring official has determined that the entity is nonetheless

presently responsible. The EPA has significant discretion regarding whether to consider an administrative agreement settlement and how to structure it; the FAR provides expressly for administrative agreements as a mechanism for resolving debarment or suspension actions, and the NCR states that settlement is permissible and may include a voluntary exclusion.[178]

Administrative agreements vary from settlement to settlement. Generally speaking, however, they tend to be for a fixed period of time (often three years) and often require entities to take remedial or mitigating actions to compensate for their improper acts. Such remedial actions might include implementing or maintaining compliance, monitoring, or ethics programs; excluding certain individuals from involvement with the agency or from the business altogether; and self-regulation and reporting requirements. Agreements may also provide for voluntary exclusion for a period of time and generally also include a term stating that material breach of the agreement will result in immediate debarment.[179] Administrative agreements are posted for public viewing within three working days on the Federal Awardee Performance and Integrity Information System (FAPIIS), which is one of the "legacy sites" that will ultimately be rolled into SAM.[180]

Notably, the EPA rarely renders findings of present responsibility in the face of a criminal conviction for misconduct. In cases of criminal conviction, any reinstatement of eligibility will likely be subject to conditions contained in an administrative agreement to be overseen by the EPA's SDD.

■ Contested Case Determinations

When grounds for debarment exist and affect a contractor or program participant's present responsibility, the EPA will prepare a written decision to debar.[181] Similarly, if the EPA declines prosecution of a proposed debarment, it will issue a written determination to that effect.[182] Such declinations are relatively rare, however; in 2009, the EPA's SDO received 196 debarment referrals and declined to prosecute only one such pending referral; in 2010, it received 159 and declined to prosecute only five pending referrals.[183] The EPA's compiled contested case determinations going back to 1982 are accessible through the commercial electronic database maintained by Westlaw at *http://www.westlaw.com.*

Statutory Debarment

In addition to being authorized to issue discretionary suspensions and debarments, the EPA administers mandatory statutory debarments under the CAA and CWA. Although the debarments, themselves, are mandated by statute, the EPA has significant discretion in determining the scope, duration, and ultimate resolution of the statutory debarments. The statutory debarment scheme is laid out in Executive Order 11738,[184] § 306 of the CAA,[185] and § 508 of the CWA.[186] The relevant provisions are explained in detail below.

■ Executive Order 11738

In 1973, President Nixon signed Executive Order 11738 which states that "it is the policy of the Federal Government to improve and enhance environmental quality."[187] To further that policy, "each Federal agency empowered to extend Federal assistance by way of grant, loan, or contract shall undertake such procurement and assistance activities in a manner that will result in effective enforcement of the [CAA] and the [CWA]."[188] The Order makes the Administrator of the EPA responsible for attaining the objectives of the Order and mandates that the EPA Administrator designate facilities that have been convicted of violating certain sections of the CAA or CWA.[189] Under the Order, federal agencies are barred from entering into any contract for the procurement of goods, materials or services that is to be performed in whole or in part in any facility that has been designated by the EPA Administrator as in violation of the relevant sections of either the CAA or CWA.[190] Further, the Order bars federal agencies from extending loan, grant, or contract assistance where the assistance is to be used to support any activity or program involving the use of a facility that has been designated as a violating facility by the EPA Administrator.[191] As discussed in detail below, the Order allows exemptions where a "paramount interest" of the United States requires it.[192] Finally, the Order specifies that

it does not apply to contracts, grants, or loans involving the use of facilities located outside the United States.[193]

■ Statutory Provisions

Section 306 of the CAA (42 U.S.C.A. § 7606) bars federal agencies from entering into any contract for the procurement of goods, materials, and services with any person who is convicted of any offence under the CAA provisions codified at 42 U.S.C.A. § 7413(c), where both (1) the contract is to be performed at the violating facility, and (2) such facility is owned, leased, or supervised by the convicted person.[194] Similarly, § 508 of the CWA (33 U.S.C.A. § 1368) mandates that "[no] Federal agency may enter into any contract with any person, who has been convicted of any offense under [the CWA provisions codified at 33 U.S.C.A. §] 1319(c), for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person."[195] The EPA Administrator is responsible for notifying all federal agencies of the list of violating facilities and convicted persons.[196] A person is defined as "an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body."[197] A violating facility is "any building, plant, installation, structure, mine, vessel, floating craft, location or site of operations that gives rise to a CAA or CWA conviction."[198] If a site of operations includes more than one building, plant, installation, structure, mine, vessel, floating craft, or other operational element, the entire location is considered the violating facility unless the EPA specifically limits the scope of the debarment.[199] The EPA accomplishes the required notification of all federal agencies by entering the name of the convicted person and the address of the violating facility into SAM as soon as possible after the EPA learns of the conviction.[200] As described earlier in this PAPER, federal agencies must verify that an entity is not listed in SAM before entering into a contract or granting a nonprocurement award.[201]

Both the CAA and the CWA state that the debarment shall continue until the Administrator certifies that the condition giving rise to such conviction has been corrected.[202] The CAA specifically states that the EPA Administrator may extend the debarment to other facilities owned or operated by the convicted person.[203] Although, the CWA is silent on the issue of extending the debarment to other facilities, the EPA has the authority to take discretionary suspension and debarment actions on the basis of the misconduct that lead to a CWA or CAA conviction.[204] The EPA will use its discretionary authority when it determines that the "risk presented to Federal procurement and nonprocurement activities on the basis of the misconduct which gives rise to a person's CAA or CWA conviction exceeds the coverage afforded by mandatory disqualification."[205]

■ Exemptions

Under both the CAA and CWA, the President has the authority to exempt any contract, loan, or grant from the mandatory debarment scheme where he determines such exemption is necessary in the "paramount interest of the United States."[206] The President must notify Congress of the granted exemptions. The necessity for each exception must be reviewed annually.[207]

Further, after consulting with the EPA SDO, the head of any federal department or agency may exempt any particular award or class of awards from CAA or CWA disqualification.[208] Any class or classes of contracts, grants, or loans may be exempted if they (1) involve less than a specified dollar amount, (2) have minimal potential impact on the environment, or (3) involve persons who are not prime contractors or direct recipients of federal assistance by way of contracts grants or loans.[209]

Where an exemption is granted, the exemption must be in writing and explain why the exemption is in the paramount interests of the United States. The exempting agency must send a written copy of the exemption to the EPA SDO for inclusion in the official record of exemptions.[210]

■ Scope Of Debarment

A statutory debarment under the CAA or CWA disqualifies the convicted person from receiving any contract, subcontract, assistance, sub-assistance,

loan or other nonprocurement benefit if (1) the convicted person will perform any part of the transaction or award at the violating facility and (2) the convicted person owns, leases, or supervises the violating facility.[211] Further, the scope can be expanded to additional facilities, the convicted person, and potentially to the convicted person's parent company.[212] Unless the EPA SDO chooses to expand the statutory scope of the debarment, a statutory debarment typically has a more narrow scope than a discretionary debarment (i.e., one facility rather than an entire company). However, in contrast to a discretionary debarment, which typically lasts for a set duration, under CAA and CWA debarment, the debarment remains in effect until the SDO "certifies that the condition giving rise to the conviction has been corrected."[213] As reinstatement is dependent on corrective actions being taken by the convicted person and the violating facility, a CAA or CWA debarment could be significantly shorter or longer than a discretionary debarment.

Another difference between discretionary debarment and statutory debarment is that in the case of statutory debarment the convicted person's name and the violating facility's name are often listed in SAM before the convicted person has received a confirmation notice of the listing or had an opportunity to discuss the scope of the debarment with, or seek reinstatement from, the EPA.[214] This happens because a criminal conviction under the CAA or CWA legally puts a person on notice that he is debarred.[215] As a courtesy, however, the SDO also will send a notice of debarment to the convicted person and the violating facility.[216] The notice includes the procedures for seeking reinstatement and the name of a person to contact regarding reinstatement.[217]

■ Reinstatement

Although there is a formal written process for requesting reinstatement (discussed in detail below), as a practical matter, one's likelihood of success in achieving reinstatement is significantly increased by initially pursuing informal discussions with the EPA representative named in the notification of debarment.[218] During the informal discussions, a convicted person should seek guidance from the EPA on which concerns need to be addressed to achieve reinstatement. Seeking guidance in advance reduces the chance of submitting an insufficient application for reinstatement. In addition, it may be possible to resolve the debarment through reaching an administrative agreement with the SDO.

The formal process for reinstatement begins when the person seeking reinstatement submits a written request for reinstatement to the SDO.[219] When making a reinstatement decision, the SDO considers all material in the administrative record, including materials in support of and in opposition to the reinstatement request.[220] The SDO also considers any mitigating or aggravating factors that relate to the CAA or CWA conviction, including the same mitigating and aggravating factors (discussed above) that are evaluated in conjunction with a discretionary debarment.[221] Further, if the convicted entity is a business, the SDO will evaluate its corporate culture, including business policies, attitudes, and procedures. Particular attention will be paid to the policies, procedures, and attitudes that contributed to the conviction and whether those policies, procedures, and attitudes have been changed since the incident that led to the conviction.[222]

The written reinstatement request must state the conditions that led to the conviction and enumerate how each condition has been corrected, relieved, or addressed.[223] Further, the submission must include documentation sufficient to support each material assertion.[224] The SDO will evaluate the submission to determine whether each technical and nontechnical cause of the conviction has been sufficiently addressed to allow the Government to comfortably contract with the debarred person.[225] In evaluating the reinstatement request, the SDO can seek review and comment from any party who may have information about, or an official interest in, the matter.[226] Other interested parties can submit relevant information to the SDO and that information becomes part of the administrative record.[227] The SDO will give the debarred person an opportunity to address material information and allegations that are included in the administrative record before making a decision on the reinstatement request.[228]

As information is added to the administrative record by other interested parties, it is possible

that the debarred person will disagree with some of the provided information. If the reinstatement request is based on factual information (for example, scientific testing data) that is different from the information in the administrative record, the SDO will decide whether the facts are genuinely in dispute and whether they are material to the reinstatement decision. If there is a genuine dispute and the determination of the dispute is material, a factfinding proceeding will be conducted.[229] The SDO will consider the outcome of the factfinding proceeding when deciding whether to grant reinstatement.[230] If the basis of the disagreement with the information contained in the administrative record is not related to a disputed material fact, a factfinding proceeding will not be held. However, the SDO will allow the debarred party "ample opportunity" to present its position for the record.[231] As a practical matter, any oral presentations made to the SDO should be reduced to writing so that they can be included in the administrative record.[232] Once the administrative record is closed, the SDO typically sends a written reinstatement decision within 45 days.[233]

Rather than pursuing the formal reinstatement process, a debarred party can pursue an administrative agreement to resolve the party's CAA or CWA debarment. The SDO has the authority to enter into an administrative agreement at any time.[234] However, to enter into the administrative agreement, the SDO must have enough information to certify that the condition that gave rise to the conviction has been rectified.[235] Notably, a party can pursue a statutory debarment administrative agreement as part of a comprehensive criminal plea or civil settlement.[236] It is in the debarred party's best interest to start a dialogue with the SDD early in the criminal proceeding, particularly if the party is negotiating a plea agreement.

Any affirmative reinstatement decision, whether achieved through a formal reinstatement request or through an administrative agreement, is conditioned upon the accuracy of the information in the administrative record.[237] If the SDO determines that the decision to reinstate was based on intentionally inaccurate or misleading information, the SDO can, and likely will, suspend or debar the entity that provided the misinformation.[238] Further, if the reinstated party violates a term of an administrative agreement, the SDO has the authority to suspend or debar the violating party.[239] Finally, "if anyone provides false, inaccurate, incomplete or misleading information to the EPA in an attempt to obtain reinstatement," the matter will be evaluated for potential criminal or civil liability by the EPA Office of Inspector General.[240]

If the SDO denies the request for reinstatement, the denied party has two options to pursue with regard to reconsideration. First, the denied party can ask the SDO to reconsider whether his decision contains material errors of fact or law.[241] Second, within 30 days of receipt of the decision denying reinstatement, the denied party can send a written request to the Director of the OGD asking the Director to review the SDO's decision.[242] The written request must state the specific findings that the denied party believes are in error and must include the reasoning and legal basis for the denied party's beliefs.[243] It is within the Director's sole discretion whether he reviews the SDO's decision.[244] Further, the Director can only overturn the SDO's decision where there is a clear error of material fact or law or where the SDO's decision was arbitrary, capricious, or an abuse of discretion.[245] The Director will send written notice of his decision.[246]

Judicial Review Of Suspension & Debarment Actions

Federal agency suspension and debarment actions are subject to judicial review under the Administrative Procedure Act (APA).[247] The APA provides for review by a federal district court upon the exhaustion of all available administrative remedies.[248] This requirement, grounded in deference to an agency's expertise and discretion,[249] is strictly enforced and may be waived in "only the most exceptional circumstances."[250] Generally, this means that unless a claimant can show that further agency process would be clearly futile (as in the case of prolonged agency inaction, for example), the claimant will not be permitted to bypass the exhaustion requirement.[251] Thus, for example, where a claimant fails to submit an opposition to suspension within 30 days of receiving

notice, that claimant will be found to have failed to meet the exhaustion requirement under the NCR.[252] Notably, however, the requirement that a claimant exhaust all administrative remedies does *not* mean that they must exhaust all administrative appeal processes, unless the governing statute or regulations expressly require administrative appeal exhaustion.[253] Furthermore, unless either (1) a statute mandates higher level administrative appeals, or (2) an agency rule does so while also staying suspension or debarment pending the outcome of such appeals, the APA provides that an excluded party can seek immediate injunctive relief from the courts.[254]

Once all administrative remedies have been exhausted and a claim is brought before a district court for consideration, the court will apply a very deferential standard of review. Under the APA, courts must not set aside agency determinations unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[255] In reviewing agency action, courts will look to the administrative record and inquire whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for the action including a rational connection between the facts found and the choice made."[256] The scope of a contractor's or program participant's remedy is also limited by sovereign immunity; because the appellee in any contested suspension or debarment case is the Federal Government, an excluded entity's sole remedy is an injunction against that suspension or debarment.[257]

When a claimant seeks a preliminary injunction, i.e., an order not to exclude the claimant pending resolution of suit, courts apply another fairly stringent test. This test varies according to the circuit in which suit is brought, but it generally includes the following four factors: (1) whether the claimant has a substantial likelihood of success on the merits; (2) whether the claimant would suffer an irreparable harm without the injunction; (3) whether the claimant's need for an injunction outweighs any harm that would result; and (4) whether the preliminary relief would serve the public interest.[258]

Finally, to the extent that an agency follows the procedural requirements set forth in the FAR or NCR in making a suspension or debarment decision, challengers on the grounds of constitutional due process are unlikely to meet with much success. The procedures encoded in the FAR and NCR were developed in response to early court decisions that found due process violations in suspension and debarment proceedings. As a result, the law is fairly settled, and modern procedures are consistently upheld by courts as adequately satisfying constitutional due process.[259]

Contractors and program participants who contest proposed suspensions or debarments at the agency level should proceed with an eye toward potential future judicial proceedings. Because judicial review is always a possibility, it is impossible to overstate the importance of ensuring that the administrative record, which will serve as the basis for a court's decision, reflects favorably upon the contractor's present responsibility. As such, a contractor or program participant is advised to fully inform the agency about the policies, procedures, and training that it has implemented to assist it in being presently responsible.

Parallel Proceedings & Coordinated Settlement

Suspension and debarment are also often collateral considerations to concurrent civil or criminal proceedings. When civil or criminal cases run parallel to suspension or debarment proceedings, it is crucial for the affected contractor or program participant to be aware that settlement of an active case will not necessarily guarantee immunity from suspension or debarment.[260] Courts are also very hesitant to stay parallel proceedings or to force them into sequential order.[261] Even when they do so, debarment can be imposed in sequence with civil or criminal penalties arising from the same conduct without triggering jeopardy concerns.[262]

To avoid potential issues with concurrent processes, executive agencies have made a concerted effort in recent years to promote early interagency cooperation and coordination of parallel proceedings. The Interagency Suspension and Debarment Committee (ISDC), for example, which is tasked with overseeing all executive agencies' implementation of suspension and debarment regulations,[263] has worked with

several federal inspectors general to devise best practices for early coordination.[264] Similarly, the Attorney General issued a memorandum in early 2012 directing all U.S. Attorney's Offices and litigating components of the DOJ to coordinate with the Government's relevant criminal, civil, regulatory, and administrative attorneys when initiating suit or investigation.[265] The DOJ memorandum stresses the importance of "[e]ffective and timely communication with representatives of the agency…including suspension and debarment authorities," to ensure that appropriate remedies are pursued at the correct time.[266]

Given the difficulties inherent in juggling multiple proceedings—both judicial and administrative—it is often wise to attempt to reach a "coordinated settlement" with the Government. Many agencies will not consider final settlement of a suspension or debarment matter until the underlying civil or criminal case has been resolved. Over the last 10 years, however, more agencies have been willing to at least enter into interim administrative agreements that have included the use of monitors during active investigation. In many cases, this is the only realistic option available to both the Government and the entity to protect the important interests of each until the facts and circumstances are fully understood.

Comprehensive settlement is also complicated by the fact that the DOJ, not the suspending agency, controls the underlying civil or criminal case. As a result, it is imperative that affected contractors take an active role in coordinating among agency debarring officials and the DOJ to facilitate resolution of as many parallel proceedings as possible. Such coordination, in addition to the DOJ's and other agencies' directives to communicate with one another, may be the most expeditious way for a contractor to maintain or regain eligibility or a finding of present responsibility.

Even where an agency is unwilling to discuss comprehensive settlement, contractors should consider whether thoughtful settlement of civil or criminal proceedings could influence settlement of suspension and debarment issues. In particular, although settlement of a civil or criminal suit will not guarantee settlement of suspension and debarment proceedings, a settlement statement from the prosecutor or adverse party that bears positively on an affected contractor's present responsibility might help. For example, a statement by the DOJ that its investigation has not revealed evidence suggesting a *current* lack of integrity or business honesty on the part of the company, its managers, and its employees, could be favorably received by any agency decisionmaker weighing the potential suspension or debarment of that contractor.

The EPA has self-reported engaging in administrative agreements and voluntary exclusion agreements in recent years, which suggests a willingness to settle potential suspension and debarment claims. Voluntary exclusion is a tool available under the NCR, whereby parties agree to voluntarily exclude themselves from eligibility to receive Government contracts or subcontracts, and from participation in nonprocurement transactions.[267] Administrative agreements are formal agreements in lieu of debarment that are viewed as creating an incentive for companies to improve their ethical cultures and business practices in exchange for avoiding debarment.[268] In Fiscal Years 2009 and 2010, the EPA engaged in 14 administrative agreements; in Fiscal Year 2011, it engaged in three. It also agreed to fewer than five voluntary exclusions in Fiscal Years 2009–2010.[269]

EPA Debarment & Suspension Actions Based On State Violations

In its role as an enforcement agency, the EPA devotes significant resources to many aspects of environmental protection including assisting state and local Governments with addressing environmental issues. To implement its nationwide mission, the EPA's 10 regional offices coordinate actions of the Federal Government with state enforcement partners. Decentralization allows the EPA to work organically with state agencies to address state and local-level environmental non-compliance. Further, under numerous federal environmental statutes, many states are authorized by the EPA to implement federal regulations. Therefore, the states have primacy in enforcing those federal environmental requirements. This level of integration between the EPA and state and local authorities increases the likelihood that the EPA will be aware of state and local environmental

infractions. Likewise, it increases the likelihood that the EPA will choose to exercise its suspension and debarment authority in response to them.

There is less of a true separation in environmental criminal matters between the states and the Federal Government than there is in other contract- and fraud-based crimes. Whether a state acts under a federal or state statute, if the SDD learns of a criminal action against an entity that performs environmental or other services, it is likely to submit an Action Referral Memorandum to the SDO seeking a suspension and/or debarment. The SDO may pursue action, regardless of whether the underlying violation was brought to its attention by the state or the DOJ. Of course, convictions under the provisions of the CAA or CWA that trigger a § 306 CAA or § 508 CWA statutory debarment will likely be referred by CID to the SDD.

Accordingly, the EPA initiates suspension and debarment actions against contractors, subcontractors, assistance recipients, program participants, and individuals alike, for matters of environmental noncompliance arising at every level of Government.

GUIDELINES

These *Guidelines* are intended to assist you in understanding the EPA's suspension and debarment program. Many of these *Guidelines* are specific to the EPA suspension and debarment process and presume a basic understanding of the significant role that suspension and debarment play in the business decisions made by those who do business, directly or indirectly, with the Federal Government. They are not, however, a substitute for professional representation in any specific situation.

1. Make certain that you understand the differences between the FAR and the NCR, especially if you are a Government contractor or a recipient of, or participant in, "nonprocurement" spending such as grants, loans, and numerous other forms of Government assistance. Note that the NCR provides four additional grounds for debarment: (1) for "knowingly doing business with an ineligible person," (2) for failing to pay debts to "any Federal agency or instrumentality" (except for debts arising under the Internal Revenue Code), (3) for "willful violation of a statutory or regulatory provision… applicable to a public agreement," and (4) upon violation of a material provision of a voluntary exclusion agreement or any suspension or debarment settlement agreement.

2. Realize that even when the EPA is able to use a FAR-based process to evaluate whether to suspend or debar an entity, the EPA will often—as is its right—use the NCR process instead. As most other agencies primarily use the FAR-based process, even seasoned practitioners are less familiar with the NCR process and need to take care to identify the nuances in the NCR.

3. Because convictions for certain criminal offenses under the CAA and the CWA trigger a mandatory statutory debarment under those Acts, make certain that when addressing any potential violations of either statute you fully consider the suspension and debarment risks attendant to any potential resolution of the problems.

4. If you are doing business with the EPA, make certain to "get out in front" of any suspension and debarment issues whenever an event occurs that could bring into question your environmental compliance record or your integrity, business ethics, or "present responsibility." It is commonly known that entities that bring their problems to the debarring officials fare better in the end than those whom the debarring official has to summon under a "show cause" or other type of procedure.

5. Should your situation come to the point where you have the opportunity to make or supplement the administrative record before the debarring official, take every opportunity to include documents that will prove, demonstrate, or support your present responsibility. If the EPA suspends or debars you, and the matter goes to court, the court will examine the propriety of the EPA's decision against what is in the administrative record. If the EPA's decision is not supported by that record, then it will be overturned by the court.

★ REFERENCES ★

1/ West, Hatch, Brennan & VanDyke, "Suspension & Debarment," Briefing Papers No. 06-9 (Aug. 2006).

2/ Several agencies have adopted many of EPA's program features in recent years. The Department of the Interior, for example, now has a suspension and debarment program that closely models EPA's. See 2 C.F.R. pt. 1400.

3/ At one time, EPA actually had attorneys on the ground in all 10 regions, but this is no longer the case as a result of budget and personnel changes in the past decade.

4/ See 2 C.F.R. §§ 1532.765, 1532.890.

5/ See 33 U.S.C.A.§ 1368.

6/ 42 U.S.C.A. § 7606; 33 U.S.C.A.§ 1368.

7/ See 50 GC ¶ 131(a); 50 GC ¶ 118(a).

8/ See EPA News Release, BP Temporarily Suspended From New Contracts With the Federal Government (Nov. 28, 2012); see also 54 GC ¶ 371(b); 55 GC ¶ 263(c).

9/ Testimony of Richard A. Pelletier, Suspension and Debarment Official for the Environmental Protection Agency, Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform, 112th Cong. 1 (Oct. 6, 2011).

10/ EPA, Brief History of EPA's Debarment Program, http://www.epa.gov/ogd/sdd/history.htm.

11/ The Inspector General for EPA, like all other civilian agency Inspectors General, was appointed to this council by Exec. Order No. 12301, 46 Fed. Reg. 19,211 (Mar. 26, 1981).

12/ EPA, Brief History of EPA's Debarment Program, http://www.epa.gov/ogd/sdd/history.htm; FAR subpt. 9.4 (procurement); 2 C.F.R. pt. 180.

13/ 47 Fed. Reg. 28,854 (July 1, 1982).

14/ 54 Fed. Reg. 19,814 (May 8, 1989).

15/ Exec. Order No. 12549, 51 Fed. Reg. 6370 (Feb. 21, 1986).

16/ 47 Fed. Reg. 35,940 (Aug. 17, 1982) (adding 40 C.F.R. pt. 32).

17/ 53 Fed. Reg. 19,160 (May 26, 1988); 2 C.F.R. pt. 180.

18/ See 70 Fed. Reg. 51,863 (Aug. 31, 2005); 68 Fed. Reg. 66,534 (Nov. 26, 2003).

19/ 2 C.F.R. §§ 180.140, 180.145; FAR 9.401. This reciprocity was mandated by the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2455(a), 108 Stat. 3243 (1994).

20/ 33 U.S.C.A. § 1368; 42 U.S.C.A. § 7606; 2 C.F.R. §§ 1532.1100–1532.1600.

21/ EPA, Brief History of EPA's Debarment Program, http://www.epa.gov/ogd/sdd/history.htm.

22/ EPA, Brief History of EPA's Debarment Program, http://www.epa.gov/ogd/sdd/history.htm.

23/ Proposed Rule, 60 Fed. Reg. 47,135 (Sept. 11, 1995); Final Rule, 61 Fed. Reg. 28,755 (June 6, 1996); Interagency Suspension and Debarment Comm., Fiscal Year 2011 Report, app. 1, at 17–18 (2012).

24/ Testimony of Richard A. Pelletier, Suspension and Debarment Official for the Environmental Protection Agency, Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform, 112th Cong. 2 (Oct. 6, 2011).

25/ Testimony of Richard A. Pelletier, Suspension and Debarment Official for the Environmental Protection Agency, Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform, 112th Cong. 1 (Oct. 6, 2011) (discussing the role of the EPA SDO and noting that there are only two other agencies with full-time SDOs); Statement of Steven A. Shaw, Deputy General Counsel for Contractor Responsibility, Dep't of the Air Force, Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform, 112th Cong. (Oct. 6, 2011) (discussing the Air Force's dedicated SDO position); Statement of Richard T. Ginman, Director, Defense Procurement and Acquisition Policy, Before the Contracting Oversight Subcomm. of the S. Comm. on Homeland Sec. & Governmental Affairs, 112th Cong. (Apr. 17, 2012) (noting that Air Force and Navy have dedicated SDOs).

26/ Testimony of Richard A. Pelletier, Suspension and Debarment Official for the Environmental Protection Agency, Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform, 112th Cong. 2 (Oct. 6, 2011).

27/ Testimony of Richard A. Pelletier, Suspension and Debarment Official for the Environmental Protection Agency, Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform, 112th Cong. 2 (Oct. 6, 2011).

28/ FAR 9.402(b); see 2 C.F.R. § 180.125.

29/ FAR 9.402(a), 2 C.F.R. § 180.125.

30/ 41 U.S.C.A. § 10b. See generally Chierichella, Aronie & Skowronek, "Domestic & Foreign Product Preferences," Briefing Papers No. 00-13 (Dec. 2000).

31/ 40 U.S.C.A. § 3144; 41 U.S.C.A. § 6504. See generally Greenberg, Abrahams & Katz, "Complying With the Davis-Bacon Act," Briefing Papers No. 03-11 (Oct. 2003).

32/ 41 U.S.C.A. § 8102; 21 U.S.C.A. § 862.

33/ 42 U.S.C.A. § 7606; 33 U.S.C.A. § 1368.

34/ 42 U.S.C.A. §§ 7606(a), 7413(c); 33 U.S.C.A. §§ 1368(a), 1319(c).

35/ 42 U.S.C.A. § 7606(d); 33 U.S.C.A. § 1368(d); 2 C.F.R. § 1532.1140.

36/ Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. A., § 8125, 125 Stat. 786, 837 (2011).

37/ Pub. L. No. 112-74, div. A, § 8124.

38/ Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, div. C, §§ 8112–8113, 127 Stat. 198, 325–326 (2013).

39/ Pub. L. No. 112-74, div. B, §§ 504–505; div. C, §§ 630–631; div. E, §§ 433–434; div. H, § 514; Pub. L. No. 113-6, div. A, §§ 732–733; div. B, §§ 540–541; div. E, § 514–515.

40/ 42 U.S.C.A. § 1320a-7.

41/ 21 U.S.C.A. § 335a.

42/ Proposed Rule, 60 Fed. Reg. 47,135 (Sept. 11, 1995); Final Rule, 61 Fed. Reg. 28,755 (June 6, 1996).

43/ Memorandum of Understanding Between the Procurement and Contracts Management Division (P&CMD) and the Grants Administration Division (GAD) (Sept. 29, 1983).

44/ 42 U.S.C.A. § 7606.

45/ 33 U.S.C.A. § 1368.

46/ EPA Delegations Manual, Delegation 1-13 (Rev. Dec. 26, 1996).

47/ See EPA, Brief History of EPA's Debarment Program, http://www.epa.gov/ogd/sdd/history.htm.

48/ EPA Delegations Manual, Delegation 1-13 (Rev. Dec. 26, 1996).

49/ 2 C.F.R. §§ 1532.765, 1532.890.

50/ 2 C.F.R. § 180.125; FAR 9.402(b).

51/ 2 C.F.R. § 180.125; FAR 9.406-1(a), 9.407-1(b).

52/ FAR 9.406-1(a), 9.407-1(b).

53/ FAR subpt 9.4; 2 C.F.R. pt. 180.

54/ Testimony of Richard A. Pelletier, Suspension and Debarment Official for the Environmental Protection Agency, Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform, 112th Cong. 2 (Oct. 6, 2011).

55/ FAR 2.101, 9.406-4; 2 C.F.R. §§ 180.865, 180.925.

56/ FAR 9.406-2; see 2 C.F.R. § 180.800.

57/ FAR 9.406-2(a).

58/ FAR 9.406-2(b)(1)(i).

59/ FAR 9.406-2(b)(1)(i).

60/ FAR 9.406-2(b), (c).

61/ FAR 9.406-2(b)(1)(vi); see also West, Richard, Manos, Brennan, Barsalona, Koos & Meene, "Contractor Business Ethics Compliance Program & Disclosure Requirements," Briefing Papers No. 09-5, at 6–7 (Apr. 2009). Contractors subject to the "Contractor Code of Business Ethics and Conduct" clause, FAR 52.203-13, are further bound by these mandatory disclosure requirements as a contract term.

62/ See 2 C.F.R. § 180.800.

63/ 2 C.F.R. § 180.800(a)(3).

64/ 2 C.F.R. § 180.800(c)(2).

65/ 2 C.F.R. § 180.800(c)(3).

66/ 2 C.F.R. § 180.800(b)(3).

67/ 2 C.F.R. § 180.800(c)(4).

68/ FAR 9.406-1(a); cf. 2 C.F.R. 180.845.

69/ American Floor Consultants & Installations, Inc. v. United States, 70 Fed. Cl. 235 (2006) (permitting debarment notwithstanding an agreement immunizing the contractor from criminal prosecution).

70/ See FAR 9.406-2(c).

71/ FAR 2.101; 2 C.F.R. § 180.1015.

72/ FAR 9.407-2(a); FAR 9.406-2(a), (b)(1), 2 C.F.R. §§ 180.700, 180.800.

73/ FAR 9.407-1(b)(1), 9.407-4(a); 2 C.F.R. §§ 180.700, 180.760.

74/ See, e.g., Frequency Elecs., Inc. v. U.S. Dep't of the Air Force, 151 F.3d 1029 (4th Cir. 1998) (upholding a "temporary" suspension of almost five years).

75/ FAR 9.407-1(b)(1); 2 C.F.R. § 180.700.

76/ 2 C.F.R. § 180.900; FAR 2.101. Both the FAR and the NCR state that an indictment constitutes adequate evidence for suspension actions. FAR 9.407-2(b); 2 C.F.R. § 180.705(b).

77/ FAR 9.407-1(b)(1); 2 C.F.R. § 180.705.

78/ FAR 9.407-1(b)(1).

79/ FAR 9.407-1(b)(2).

80/ 2 C.F.R. § 180.705.

81/ Compare FAR 9.406-2(b)(1) with FAR 9.407-2.

82/ 2 C.F.R. § 180.700(b).

83/ FAR 9.406-3(a); see also FAR 9.407-3(a); 2 C.F.R. § 180.600.

84/ See, e.g., Electro-Methods, Inc. v. United States, 728 F.2d 1471 (Fed. Cir. 1984) (upholding a suspension based on the Air Force's independent finding of "adequate evidence" of wrongdoing after the issuance of search warrants but before indictment).

85/ FAR 9.407-3(c); 2 C.F.R. § 180.715.

86/ FAR 9.406-3(c); 2 C.F.R. § 180.805.

87/ FAR 9.406-3(c)(1); 2 C.F.R. § 180.805(a).

88/ FAR 9.407-3(c)(1); 2 C.F.R. § 180.715(a).

89/ FAR 9.406-3(c), 9.407-3(c); 2 C.F.R. §§ 180.715, 180.805.

90/ FAR 9.407-3(c)(2); 2 C.F.R. § 180.715(e).

91/ 2 C.F.R. § 180.805(b); 2 C.F.R. § 180.715(c); FAR 9.406-3(c)(2), 9.407-3(c)(1)(ii); see also Electro-Methods, Inc. v. United States, 728 F.2d 1471 (Fed. Cir. 1984).

92/ Compare FAR 9.405(a) with 2 C.F.R. § 180.810.

93/ 2 C.F.R. § 180.940(a).

94/ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2455(a), 108 Stat. 3243 (1994).

95/ See 2 C.F.R. § 180.715(a) (emphasis added); FAR 9.407-3(c)(1).

96/ Interagency Suspension and Debarment Comm., Fiscal Year 2009–2010 Report 5 (2011); Interagency Suspension and Debarment Comm., Fiscal Year 2011 Report 9 (2012).

97/ FAR 9.407-3(c)(5); 2 C.F.R. §§ 180.725, 180.730.

98/ FAR 9.406-3(c)(4); 2 C.F.R. §§ 180.820, 180.825.

99/ 2 C.F.R. §§ 180.825, 180.730.

100/ FAR 9.407-3(b)(2), 9.406-3(b)(2), 9.407-3(d)(2)(ii), 9.406-3(d)(2)(ii); 2 C.F.R. §§ 180.735, 180.830.

101/ FAR 9.407-3(d)(2)(ii), 9.406-3(d)(2)(ii); 2 C.F.R. §§ 180.750, 180.845.

102/ FAR 9.406-3(d); 2 C.F.R. § 180.870(a).

103/ See FAR 9.406-3(d); 2 C.F.R. § 180.870(a).

104/ FAR 9.406-3(e); 2 C.F.R. § 180.870(b).

105/ FAR § 9.406-1(a); cf. FAR 9.407-1(b)(2) (stating that the suspending official "should consider the seriousness of the contractor's acts or omissions and may, but is not required to, consider remedial measures or mitigating factors such as those set forth in [FAR] 9.406-1(a)").

106/ FAR § 9.406-1(a).

107/ 2 C.F.R. § 180.860.

108/ FAR § 9.406-1(a); 2 C.F.R. § 180.855.

109/ FAR § 9.406-1(a); 2 C.F.R. § 180.855. For a more extensive discussion of the role of remedial measures and mitigating factors in avoiding suspension and debarment, see American Bar Ass'n, The Practitioner's Guide to Suspension and Debarment ch. IV (3d ed. 2002).

110/ Compare Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 849–50 (S.D. Cal. 1993), 35 GC ¶ 385 (finding an agency debarment decision arbitrary, capricious, and an abuse of discretion because it did not focus on mitigating factors surrounding the plaintiff's guilty plea) with Kirkpatrick v. White, 351 F. Supp. 2d 1261, 1285 (N.D. Ala. 2004) (noting that a key factor in the Silverman decision was the six-year period between the misconduct and debarment).

111/ See 65 Fed. Reg. 19,618 (Apr. 11, 2000) (replacing policy statement issued at 60 Fed. Reg. 66706 (Dec. 22, 1995)).

112/ See 65 Fed. Reg. 19,618 (Apr. 11, 2000).

113/ See 65 Fed. Reg. 19,618–19 (Apr. 11, 2000).

114/ See 65 Fed. Reg. 19,619 (Apr. 11, 2000).

115/ 2 C.F.R. §§ 180.140, 180.145; see also 2 C.F.R. §§ 180.710, 180.810; FAR 9.405.

116/ 2 C.F.R. §§ 180.140, 180.145; FAR 9.401.

117/ FAR 9.407-4; 2 C.F.R. § 180.760.

118/ See FAR 9.407-4(a); 2 C.F.R. § 180.760.

119/ 2 C.F.R. § 1532.765.

120/ 2 C.F.R. § 1532.765(b).

121/ 2 C.F.R. § 1532.765(a)(1).

122/ 2 C.F.R. § 1532.765(a)(2).

123/ 2 C.F.R. § 1532.765(a)(2), (c).

124/ 2 C.F.R. § 1532.765(a)(2).

125/ FAR 9.406-4(a); 2 C.F.R. § 180.865.

126/ FAR 9.406-4(a)(2); 2 C.F.R. § 180.865(b).

127/ Interagency Suspension and Debarment Comm., Fiscal Year 2009–2010 Report 4 (2011).

128/ FAR 9.406-4(c); 2 C.F.R. §§ 180.875, 180.880, 1532.890.

129/ FAR 9.406-4(c); 2 C.F.R. §§ 180.875, 180.880.

130/ FAR 9.406-4(c); 2 C.F.R. § 180.880.

131/ 2 C.F.R. § 1532.890(a).

132/ 2 C.F.R. § 1532.890(b).

133/ 2 C.F.R. § 1532.890(a)(2), (c).

134/ 2 C.F.R. § 1532.890(a)(2).

135/ FAR 9.406-4(b); 2 C.F.R. § 180.885.

136/ FAR 9.406-4(b); 2 C.F.R. § 180.885.

137/ FAR 9.406-4(b); 2 C.F.R. § 180.885(c).

138/ FAR 9.404; see also 2 C.F.R. § 180.155 (referring to SAM by its archaic term, EPLS, as of Oct. 21, 2013). The web-based SAM is at https://www.sam.gov/portal/public/SAM/.

139/ FAR 9.404; 2 C.F.R. § 180.155.

140/ Richard, Whiteman & Gleich, "Contractor Reporting Requirements in the Wake of Implementation of the System for Award Management," Briefing Papers No. 13-6, at 2 (May 2013).

141/ The full list of systems to be consolidated into SAM includes the CCR, ORCA, EPLS, Federal Business Opportunities (FedBizOpps), Federal Procurement Data System-Next Generation (FPDS-NG), Wage Determinations Online (WDOL), the Electronic Subcontracting Reporting System (eSRS), and the Past Performance Information Retrieval System (PPIRS), the last of which includes both the Contractor Performance Assessment Reporting System (CPARS) and the Federal Awardee Performance and Integrity Information System (FAPIIS). Richard, Whiteman & Gleich, "Contractor Reporting Requirements in the Wake of Implementation of the System for Award Management," Briefing Papers No. 13-6, at 2 (May 2013).

142/ FAR 9.404; see also 2 C.F.R. § 180.155 (referring to SAM by its archaic term, EPLS, as of Oct. 21, 2013).

143/ 2 C.F.R. § 180.645(a).

144/ FAR 9.404(b), (c)(3); 2 C.F.R. §§ 180.515, 180.520.

145/ FAR 9.404(b); 2 C.F.R. §§ 180.515, 180.520.

146/ FAR 9.404(c)(5); 2 C.F.R. § 180.520.

147/ 2 C.F.R. §§ 180.140, 180.145; see also 2 C.F.R. §§ 180.710, 180.810; FAR 9.405.

148/ FAR 9.405(a).

149/ FAR 9.405(d).

150/ FAR 9.405(a).

151/ 2 C.F.R. §§ 180.400(a), 180.430(a).

152/ FAR 9.405(a); 2 C.F.R. § 180.135.

153/ See Kramer, "Awarding Contracts to Suspended and Debarred Firms: Are Stricter Rules Necessary?," 34 Pub. Cont. L.J. 539 (2005) (noting that Boeing and MCI WorldCom continued to receive significant Government business even after being excluded).

154/ 2 C.F.R. § 1532.137.

155/ 2 C.F.R. § 1532.137.

156/ See American Heritage Bancorp v. United States, 61 Fed. Cl. 376, 387 (2004) (collecting cases).

157/ See 2 C.F.R. §§ 180.335; 180.345.

158/ FAR 9.405-1; 2 C.F.R. § 180.415.

159/ FAR 9.405-1(a); 2 C.F.R. § 180.415(a).

160/ FAR 9.405-1(b); see also 2 C.F.R. § 180.415(b).

161/ FAR 9.104-7(a), 52.209-5.

162/ FAR 9.104-7(a) (imposing the certification requirement); FAR 52.209-5 (certification language); 41 U.S.C.A. § 134 (statutorily defining the "simplified acquisition threshold"); FAR 2.101 (setting the current simplified acquisition threshold as applied under the FAR).

163/ See FAR 52.209-5(a)(2) (defining "principal" as "an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions").

164/ 2. C.F.R. § 180.800.

165/ FAR 52.209-5(a)(1).

166/ FAR 9.409, 52.209-6.

167/ See 2 C.F.R. § 180.995 (defining "principal").

168/ 2 C.F.R. § 180.335.

169/ 2 C.F.R. § 1532.995.

170/ 2 C.F.R. §§ 180.200–189.225; 180.300, 1532.220.

171/ FAR 9.406-1(b), 9.407-3(d)(4); 2 C.F.R. § 180.615.

172/ EPA Debarment and Suspension Contested Case Determinations, http://www.epa.gov/ogd/sdd/decision.htm.

173/ 42 U.S.C.A. § 7606; 33 U.S.C.A. § 1368.

174/ FAR 9.407-3(c); 2 C.F.R. § 180.715.

175/ FAR 9.406-3(c); 2 C.F.R. § 180.805.

176/ EPA Debarment and Suspension Contested Case Determinations, http://www.epa.gov/ogd/sdd/decision.htm.

177/ EPA Debarment and Suspension Contested Case Determinations, http://www.epa.gov/ogd/sdd/decision.htm.

178/ FAR 9.406-3(f), 9.407-3(e); 2 C.F.R. §§ 180.635, 180.640.

179/ 2 C.F.R. § 180.640.

180/ FAR § 9.406-3(f)(1), 9.407-3(e)(1).

181/ EPA Debarment and Suspension Contested Case Determinations, http://www.epa.gov/ogd/sdd/decision.htm.

182/ EPA Debarment and Suspension Contested Case Determinations, http://www.epa.gov/ogd/sdd/decision.htm.

183/ Interagency Suspension and Debarment Comm., Fiscal Year 2009–2010 Report 10-11 (2011).

184/ Exec. Order No. 11738, 40 Fed. Reg. 30,410 (July 1, 1977).

185/ 42 U.S.C.A. § 7606.

186/ 33 U.S.CA. § 1368.

187/ Exec. Order No. 11738, 40 Fed. Reg. 30,410 (July 1, 1977).

188/ Exec. Order No. 11738, § 1.

189/ Exec. Order No. 11738, § 2.

190/ Exec. Order No. 11738, § 3(a).

191/ Exec. Order No. 11738, § 3(b).

192/ Exec. Order No. 11738, § 8.

193/ Exec. Order No. 11738, § 10.

194/ 42 U.S.C.A. 7606(a).

195/ 33 U.S.C.A. 1368(a).

196/ 33 U.S.C.A. § 1368(b); 42 U.S.C.A. § 7606(b).

197/ 2 C.F.R. § 1532.1600; see also 33 U.S.C.A. § 1362 (5); 42 U.S.C.A. § 7602(e).

198/ 2 C.F.R. § 1532.1600.

199/ 2 C.F.R. § 1532.1600.

200/ 2 C.F.R. § 1532.1125.

201/ FAR 9.405(d); 2 C.F.R. §§ 180.400(a), 180.430(a).

202/ 33 U.S.C.A. § 1368(a); 42 U.S.C.A. § 7606(a).

203/ 42 U.S.C.A. § 7606(a).

204/ 33 U.S.C.A. § 1368; 2 C.F.R. § 1532.1115; see also 2 C.F.R. pt. 180; FAR subpt. 9.4.

205/ 2 C.F.R. § 1532.1130(b).

206/ 42 U.S.C.A. § 7606 (d); 33 U.S.C.A. § 1368(d).

207/ Exec. Order No. 11738, § 8(a)(1).

208/ 2 C.F.R. § 1532.1140.

209/ Exec. Order No. 11738, § 8(a)(2).

210/ 2 C.F.R. § 1532.1140.

211/ 2 C.F.R. § 1532.1110.

212/ 2 C.F.R. § 1532.1115.

213/ 33 U.S.C.A. § 1368(a); 42 U.S.C.A. § 7606(a).

214/ 2 C.F.R. § 1532.1130.

215/ 2 C.F.R. § 1532.1200.

216/ 2 C.F.R. § 1532.1200.

217/ 2 C.F.R. § 1532.1200.

218/ 2 C.F.R. § 1532.1205(b).

219/ 2 C.F.R. § 1532.1205(a).

220/ 2 C.F.R. § 1532.1220(a).

221/ 2 C.F.R. § 1532.1220(b); see also 2 C.F.R. § 180.860.

222/ 2 C.F.R. § 1532.1220(c).

223/ 2 C.F.R. § 1532.1205(a).

224/ 2 C.F.R. § 1532.1205(a).

225/ 2 C.F.R. § 1532.1205(a).

226/ 2 C.F.R. § 1532.1210.

227/ 2 C.F.R. § 1532.1210.

228/ 2 C.F.R. § 1532.1210.

229/ 2 C.F.R. § 1532.1215(a); see also 2 C.F.R. §§ 180.830–180.840.

230/ 2 C.F.R. § 1532.1215(a).

231/ 2 C.F.R. § 1532.1215(b).

232/ 2 C.F.R. § 1532.1215(b).

233/ 2 C.F.R. §§ 1532.1225, 1532.1230.

234/ 2 C.F.R. § 1532.1300(a).

235/ 2 C.F.R. § 1532.1300(b).

236/ 2 C.F.R. § 1532.1300(c).

237/ 2 C.F.R. § 1532.1305(a).

238/ 2 C.F.R. § 1532.1305(b).

239/ 2 C.F.R. § 1532.1305(b).

240/ 2 C.F.R. § 1532.1305(b).

241/ 2 C.F.R. § 1532.1400(a)(1).

242/ 2 C.F.R. § 1532.1400(a)(2).

243/ 2 C.F.R. § 1532.1400(b).

244/ 2 C.F.R. § 1532.1400(c).

245/ 2 C.F.R. § 1532.1400(a)(2).

246/ 2 C.F.R. § 1532.1400(d).

247/ 5 U.S.C.A. § 704; see, e.g., Darby v. Cisneros, 509 U.S. 137 (1993).

248/ E.g., Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163, 167 (D.C. Cir. 1983).

249/ 714 F.2d at 168 (citing McKart v. United States, 395 U.S. 185, 194 (1969).

250/ 714 F.2d at 168–69.

251/ Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 105–06 (D.C. Cir. 1986).

252/ 2 C.F.R. §§ 180.720, 180.725.

253/ Darby v. Cisneros, 509 U.S. 137 (1993), 35 GC ¶ 426; Gleichman v. U.S. Dep't of Agric., 896 F. Supp. 42, 44 (D. Me. 1995).

254/ Darby v. Cisneros, 509 U.S. at 154 ("[W]here the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review.").

255/ 5 U.S.C.A. § 706(2)(A); IMCO, Inc. v. United States, 97 F.3d 1422, 1425 (Fed. Cir. 1996), 38 GC ¶ 521.

256/ Franklin v. Massachusetts, 505 U.S. 788, 822 (1992) (internal alterations, quotation marks, and citations omitted).

257/ IMCO, 97 F.3d at 1424–25; Am. Floor Consultants & Installations, Inc. v. U.S., 70 Fed. Cl. 235, 237 (Fed. Cl. 2006); 5 U.S.C.A. § 706.

258/ See, e.g., Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (citing Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (1958)).

259/ See Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (holding that debarment must, at a minimum, be preceded by notice of the grounds for debarment, an opportunity to rebut those grounds, and an administrative record consisting of the agency's findings and conclusions); Horne Bros., Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972) (holding that a suspension should not "exceed one month" without providing the suspended party an opportunity to rebut the basis for the suspension); Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 955–56 (D.C. Cir. 1980) (holding that, if the Government has not gone through the procedures necessary to overtly debar or suspend a contractor, but nonetheless "effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity," then "due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse action is taken").

260/ See, e.g., Am. Floor Consultants & Installations, Inc. v. United States, 70 Fed. Cl. 235 (Fed. Cl. 2006) (dismissing a contractor's challenge to a debarment where the contractor had entered into a no-prosecution agreement).

261/ See, e.g., United States v. Kordel, 397 U.S. 1, 11 (1970) ("It would stultify enforcement of federal law to require a governmental agency…invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial."); United States v. Stringer, 535 F.3d 929, 933 (9th Cir. 2008), vacating in part, United States v. Stringer, 408 F. Supp. 2d 1083 (D. Or. 2006) (holding that "[t]here is nothing improper about the government undertaking simultaneous criminal and civil investigations," provided that they are used in appropriate ways); Securities & Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980) ("The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence."); Arthurs v. Stern, 560 F.2d 477 (1st Cir. 1977) (refusing to stay civil proceedings until the termination of concurrent criminal proceedings).

262/ See United States v. Glymph, 96 F.3d 722, 724–25 (4th Cir. 1996) (upholding contractor's fraud conviction because prior debarment on the same facts was remedial and not punitive).

263/ Exec. Order No. 12549, 51 Fed. Reg. 6370 (Feb. 21, 1986).

264/ Interagency Suspension and Debarment Comm., Fiscal Year 2009–2010 Report 4 (2011).

265/ Attorney General, Memorandum for All U.S. Attorneys, Director of the Federal Bureau of Investigation, All Assistant U.S. Attorneys, All Litig. Divs., and All Trial Attorneys, Coordination of Parallel Criminal, Civil, Regulatory, and Admin. Proceedings (Jan. 30, 2012), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj00027.htm.

266/ Attorney General, Memorandum for All U.S. Attorneys, Director of the Federal Bureau of Investigation, All Assistant U.S. Attorneys, All Litig. Divs., and All Trial Attorneys, Coordination of Parallel Criminal, Civil, Regulatory, and Admin. Proceedings (Jan. 30, 2012), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/doj00027.htm.

267/ Interagency Suspension and Debarment Comm., Fiscal Year 2009–2010 Report 4 (2011); 2 C.F.R. § 180.635–180.645.

268/ Interagency Suspension and Debarment Comm., Fiscal Year 2011 Report 6 (2012).

269/ Interagency Suspension and Debarment Comm., Fiscal Year 2009–2010 Report 4 (2011).