

FCC Plans Major Overhaul of Suspension and Debarment Rules for its USF, TRS, and Other Funding Programs

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The FCC [proposed](#) sweeping reforms to its process for suspending and debarring entities from participating in its largest funding programs, including the four Universal Service Fund ("USF") programs, at its [meeting](#) on November 22, 2019. If adopted, the proposed rules would mark a sea change in FCC enforcement, allowing the FCC to [cut off funding](#) more quickly and for a wider range of alleged misconduct. The FCC also would expand the scope of these rules to cover its Telecommunications Relay Service ("TRS") program and National Deaf-Blind Equipment Distribution Program ("NDBEP"), in addition to the High-Cost, Lifeline, E-Rate, and Rural Health Care USF programs.

The proposed rules also would impose new disclosure obligations on support recipients and require them to verify that they do not work with suspended/debarred entities. In addition, the proposed rules would create a federal reciprocity system, in which entities suspended/debarred from participating in funding programs administered by other agencies similarly would be prevented from participating in the FCC's programs (and vice versa). The proposed rules would impact nearly every USF participant and warrant close attention. The FCC has not announced comment deadlines on its proposals, but they will likely occur in early 2020. While the FCC's proposals are just the first step towards actual rule changes, the agency has shown every indication that it will continue moving [full speed ahead](#) on USF reform in the coming year.

Expansion of the Suspension and Debarment Conditions

The FCC's current suspension/debarment rules only apply to its USF programs and only allow for suspension/debarment following a conviction or civil judgment involving fraud or certain criminal offenses. In the past, the FCC backed off on attempts to withhold USF funding while it conducted enforcement proceedings, in the face of claims that the only trigger in its rules involved convictions or civil judgments. Under the proposed rules – which follow [guidelines](#) adopted by other federal agencies – the FCC now would be empowered to suspend/debar entities without a conviction or final judgment and for a broader array of alleged bad behavior. In particular:

- Entities could be suspended/debarred for repeat violations of FCC rules (whether or not related to USF), submitting false documentation for support, failing to pay FCC regulatory fees, refusing to cooperate with FCC investigations, or any other conduct deemed by the agency to indicate "a lack of business integrity."
- Suspensions would require "adequate evidence," meaning the FCC has a "reasonable belief" that the alleged misconduct occurred, and would take effect immediately and prospectively. The proposed rulemaking suggests that allegations contained in a Notice of Apparent Liability

(“NAL”) may be enough to warrant a suspension, even though Section 504(c) of the Communications Act says that the FCC may not use the fact of an NAL to the party’s detriment.

- Debarments would require a “preponderance of evidence,” meaning the FCC finds that it is more likely than not that the alleged misconduct occurred.
- Entities would have 30 days to challenge a suspension/debarment and the FCC would be required to render a decision within 45 days of receiving such a challenge. In addition, the FCC seeks comment on establishing an expedited, “limited” debarment mechanism subject to its own challenge process that would allow it to prohibit an entity from participating in a particular USF, TRS, or NDBEP program for a limited time for an even broader list of issues, including concerns that the entity has “documented deficiencies” or “irregularities” in past program participation or that the entity’s future participation poses “an unsatisfactory risk.”

Policing and Disclosure Obligations on Program Participants

The proposed rules would impose new disclosure obligations on USF support recipients, requiring them to inform the FCC not only if they are suspended, debarred, or otherwise disqualified from federal funding programs, but also whether any of their contractors, subcontractors, suppliers, consultants, agents, or representatives are similarly banned. While use of personnel disqualified from a federal funding program would not automatically prevent an entity from participating in an FCC program, the FCC would take a closer look at all individuals playing a significant role relating to or affecting USF disbursement claims. The FCC further expects to adopt a reciprocity system that would exclude entities barred from participating in funding programs administered by other agencies from its funding programs (and vice versa), and seeks public input on how best to share suspension/debarment information with other federal regulators. Suspended or debarred entities also would be prohibited from serving on FCC advisory committees and task forces.

Open Questions

Although the proposed rulemaking provides some detail on how the new suspension/debarment process would work, it still leaves key questions unanswered. For example, the proposed rulemaking does not designate who would investigate and prosecute suspension/debarment cases and who would render decisions in such cases. Such duties currently reside within the FCC’s Enforcement Bureau, but the proposed rulemaking hints that the Office of Inspector General, Office of Managing Director, and/or the rulemaking bureaus could play significant, to-be-determined roles. It is undetermined how a beneficiary of a USF benefit through an entity that is suspended/debarred (*e.g.*, a school that receives E-Rate benefits) could continue to receive benefits if its service provider is suspended. Moreover, the proposed rulemaking indicates that the FCC may apply the new suspension/debarment rules retroactively to cover conduct occurring before their adoption, although prior settlements generally would be left undisturbed. This significant (and legally-suspect) proposed expansion of liability is sure to draw opposition. With their broad scope as well as complex procedures, the proposed suspension/debarment rules will generate significant comment and could ultimately transform how the FCC approaches enforcement involving its major funding programs.