6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 16

[GN Docket No. 19-309; FCC 19-120]

Modernizing Suspension and Debarment

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (the FCC or Commission) proposes to adopt new rules consistent with Office of Management and Budget Guidelines to Agencies on Government Debarment and Suspension (Nonprocurement)(the Guidelines). The Commission proposes that such new rules be applied to transactions under the Universal Service Fund (USF) and Telecommunications Relay Services (TRS) programs and the National Deaf-Blind Equipment Distribution Program (NDBEDP). The Commission also proposes certain modifications to the Guidelines, including as appropriate transitional mechanisms for situations in which the suspended or debarred entity may be the sole source for the service involved. The Commission proposes that any new rules for suspension and debarment be put into a new Part 16 in title 47 of the Code of Federal Regulations.

DATES: Comments Due: **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** Reply Comments Due: **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**

ADDRESSES: Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: https://www.fcc.gov/ecfs/. Paper Filers: All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. Commercial overnight mail (other than U.S. Postal

Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

FOR FURTHER INFORMATION CONTACT: Paula Silberthau, Attorney-Advisor, Administrative Law Division, Office of General Counsel, (202) 418-1874 or Paula.Silberthau@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking, FCC 19-102, adopted on November 22, 2019 and released on November 25, 2019. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY-A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to FCC504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). The complete text of the order also is available on the Commission's website at https://www.fcc.gov.

SYNOPSIS

I. INTRODUCTION

1. The Commission oversees a number of critical support programs, including the Universal Service Fund (USF) programs, the Telecommunications Relay Services (TRS) programs, and the National Deaf-Blind Equipment Distribution Program (NDBEDP). Part of the Commission's role in overseeing these programs is protecting them from fraud, waste, and abuse. One important way the Commission does this is by identifying and barring from participation those who have abused or are likely to abuse these programs. This is why the Commission has, for its USF programs, implemented rules that suspend or debar those convicted of or found civilly liable for certain misconduct related to these programs.

2. While these rules have positive effects, this proceeding explores whether there is

more that the Commission can do. Specifically, we propose to adopt new rules consistent with the Office of Management and Budget Guidelines to Agencies on Government Debarment and Suspension (Nonprocurement) (the Guidelines). The Guidelines provide additional tools—adopted by a number of other federal agencies across the government—that could enhance the Commission's ability to root out bad actors from participation in its support programs. If adopted, these measures could not only help the Commission to fulfill its responsibility of ensuring that the USF and TRS funds are well managed, efficient, and fiscally responsible, but may also assist us in bridging the digital divide by ensuring that fund expenditures, including support for expanded broadband deployment, are directed in the first instance to good actors who will use them only for their intended purpose. For these reasons, this document proposes to adopt new rules consistent with the Guidelines in lieu of the Commission's current rules, and to apply these new rules to the four USF programs, as well as to the Commission's TRS programs[1] and to the NDBEDP.[2]

II. BACKGROUND

3. Most federal agencies have implemented the Guidelines—either wholesale or with modifications. The Commission stands apart from these agencies with its own rules for reasons that are largely historical. In 2003, when the Commission adopted its own suspension and debarment rules for certain USF programs, independent regulatory agencies like the Commission were expressly excluded from coverage under the Guidelines for Nonprocurement Debarment

[1] For purposes of this document, the term "TRS programs" means all programs described in Chapter 64, subpt. F, of the Commission's rules, including without limitation telecommunications relay services, speech-to-speech relay services, and video relay services. TRS enables an individual who is deaf, hard of hearing, deaf-blind, or who has a speech disability to communicate by telephone or other device through the telephone system. TRS is provided in a variety of ways. Currently, interstate TRS calls and all Internet Protocol (IP) based TRS calls, both intrastate and interstate, are supported by the Fund.

[2] The NDBEDP provides equipment needed to make telecommunications, advanced communications, and the Internet accessible to low-income individuals who are deaf-blind. For purposes of this document, we refer to the TRS program and the NDBEDP separately because they are certified and operated in different ways.

and Suspension that preceded the current Guidelines.[3] But when OMB adopted in 2005 the interim final changes to what have become known as the Guidelines, OMB modified this long-standing definition to remove the exclusion for independent agencies. As a result, independent regulatory agencies such as the Commission may participate in the government-wide suspension and debarment system by adopting the Guidelines. With that history in mind, we here briefly summarize these two debarment mechanisms and explain some of the key differences between them.

A. The Commission's Current Suspension and Debarment Rules

4. The Commission's current rules addressing suspension and debarment apply only to the USF programs.[4] In general, these rules cover a relatively narrow range of conduct and are clear-cut, mandatory, and virtually self-executing. The rules are non-discretionary and *require* the Commission to suspend or disbar any "person"[5] convicted (by plea or judgment) of, or found civilly liable for, the "attempt or commission of criminal fraud, theft, embezzlement, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice and other fraud or criminal offense arising out of activities associated with or related to the schools and libraries support mechanism, the high-cost support mechanism, the rural health care support mechanism, and the low-income support mechanism." A suspension or debarment of an entity applies to all organizational units of the entity unless the order specifies otherwise. A suspension immediately excludes a person from

[3] These earlier guidelines, typically referred to as the "Common Rules," were implemented through rules promulgated by executive agencies other than independent agencies. The Commission's exclusion was echoed in the subsequent OMB Notice of Proposed Rulemaking proposing revisions to those earlier guidelines.

[4] We note that a few Commission rules also mention "disqualification" from program participation as a possible remedy for unlawful conduct. The TRS program and NDBEDP provide for "suspension" or "revocation" of certification under sections 64.606(e) and 64.6207(h) of the Commission's rules. However, section 54.8 of the Commission's rules is the only provision that expressly provides for "suspension" and "debarment."

[5] Under section 54.8, a "person" is "[a]ny individual, group of individuals, corporation, partnership, association, unit of government or legal entity, however organized."

activities related to the USF programs, but only for a temporary period pending completion of the debarment proceedings. The debarment runs for the period specified by Commission order, generally three years.

5. Proceedings begin with a notice of suspension and proposed debarment issued by the Commission. The person subject to the suspension and proposed debarment has 30 days from the earlier of receipt of notice or publication in the *Federal Register* to challenge the Commission's action. The Commission must make a final ruling, overturning the original decision only in light of "extraordinary circumstances," no later than 90 days after receipt of a petitioner's arguments. While a suspension or debarment is in effect, the Commission may, on motion by the affected party or *sua sponte*, reverse such a finding or limit its effect in light of extraordinary evidence. The default period for debarment is three years, though the Commission may, if it serves the public interest, set a longer period at the beginning or extend the period during which it is in effect.

B. The OMB Guidelines

6. The Guidelines establish the framework for a government-wide debarment and suspension system for nonprocurement programs.[6] The Guidelines generally provide for suspension or debarment based on a range of misconduct. This range includes not only convictions of or civil judgments for fraud or certain criminal offenses, but also violations of the requirements of public transactions "so serious as to affect the integrity of an agency program" (including willful or repeated violations).[7] In addition, the Guidelines provide that suspension or

[6] Section 180.970 of the Guidelines defines "non-procurement transaction" as "any transaction, regardless of type (except procurement contracts)," including but not limited to grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurances, payments for specified uses, and donation agreements." Suspension and debarment rules for federal procurement contracts are contained in part 9 of the Federal Acquisition Regulation (FAR).

[7] The Guidelines also provide that the suspending officer may impose suspension only when immediate action is necessary to protect the public interest, and that official determines either that (1) the participant has been indicted for, or there is adequate evidence to suspect, an offense listed in section 180.800(a) of the

debarment could be warranted for "[f]ailure to pay a single substantial debt, or a number of outstanding debts . . . owed to any Federal agency. . . ." Finally, the Guidelines provide the discretion to suspend or debar for "[a]ny other cause of so serious or compelling a nature that it affects [the party's] present responsibility."

7. Suspensions under the Guidelines have prospective but immediate effect, and debarments are effective following a 30-day opportunity for a party to respond to a debarment notice. Once effective, an action to suspend or debar serves to automatically exclude the suspended or debarred party from new covered transactions government-wide, whether in procurement or nonprocurement programs or activities. For ongoing activities, "a participant may continue to use the services of an excluded person as a principal" if the participant was "using the services of that person in the transaction before the person was excluded." The participant also has the option of discontinuing the excluded person's services and finding an alternative provider.

C. Differences Between the Guidelines and the Commission's Rules

8. The Commission's rules differ from the Guidelines in several key respects. The Commission's rules are clear-cut and mandatory, with little room for discretion and a targeted focus on a narrow set of misconduct; the Guidelines, by contrast, address a broader range of misconduct and provide federal agencies with substantial discretion to suspend and debar entities based on consideration of numerous factors. Here, we briefly review some of the key differences between these two debarment mechanisms.

9. *First*, the rules differ in scope and reach. While the Commission's rules apply only to its four USF programs, the Guidelines broadly cover all nonprocurement transactions (unless otherwise modified by agency-specific rules) including subsidies, grants, loans, or other

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Guidelines; or (2) there is adequate evidence to suspect the existence of any other cause for debarment listed in sections 180.800(b)-(d)) of the Guidelines.

"payments for specified uses." The Guidelines also reach further down the supply chain, requiring that, before a primary tier participant enters into a covered transaction with another person at the next lower tier—for example, a subcontractor—the participant must verify that the person with whom it intends to do business is not excluded or disqualified.[8]

10. *Second*, the Guidelines provide greater discretion to agencies in determining which entity to debar and for what misconduct. As described above, the Guidelines consider a broader range of misconduct than the Commission's rules. They also do not require a prior court judgment or conviction. Thus, in contrast to the FCC's current rules, suspension or debarment actions under the Guidelines do not have to await completion of criminal or civil proceedings.[9] The Guidelines also allow an agency to impute conduct from an individual to an organization; from an organization to an individual or between individuals; or from one organization to another. Thus, action could be taken against an organization, not just a principal, or the reverse, in appropriate circumstances.

11. *Third*, the Guidelines provide greater flexibility in fashioning the terms of a suspension or debarment. The Guidelines afford a federal agency substantial discretion to

[8] "Exclusion" generally refers to being suspended or debarred, as discussed in this Notice. "Disqualification" means that a person is prohibited from participating in specified Federal procurement or nonprocurement transactions as required under a statute, Executive order (other than Executive Orders 12549 and 12689) or other authority. The Guidelines allow for the inclusion of disqualified persons in the System for Award Management Exclusions and state the responsibilities of federal agencies and participants to check for disqualified persons before entering into covered transactions. The Guidelines do not, however, specify the transactions for which a disqualified person is ineligible, the entities to which a disqualification applies, or the process that a federal agency uses to disqualify a person, as those factors are dependent on the underlying statute, Executive order or regulation that caused the disqualification.

[9] Under the Guidelines the suspending official must (1) have adequate evidence that there may be a cause for debarment of a person and (2) conclude that immediate action is necessary to protect the federal interest. The Guidelines also provide that "[i]n deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion." If legal or debarment proceedings are initiated at the time of, or during suspension, the suspension may continue until the conclusion of those proceedings. Otherwise, a suspension may not exceed 12 months. The Guidelines define "legal proceedings" to mean "any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act, to which the Federal Government or a State or local government or quasigovernmental authority is a party. The term also includes appeals from those proceedings." In addition, if the legal standard is satisfied, the agency may suspend a party during an investigation.

suspend, based on adequate evidence, or debar, based on a preponderance of evidence, as determined in the discretion of the designated suspending or debarring official. The Guidelines also give a suspending official "wide discretion" to determine whether *immediate action* is necessary to protect the public interest." As a result, an agency may immediately prevent the suspended party from entering into *additional* transactions under its programs. The Guidelines also allow an agency head to grant an "exception" to allow an excluded person to participate in a particular transaction.

12. *Fourth*, the Guidelines establish a government-wide debarment system. While determinations under the Commission's rules apply only to the Commission, the Guidelines provide for a government-wide system with reciprocity among federal agencies that adopt rules consistent with the Guidelines. This means that a party that has been suspended or debarred by *another* agency and placed on the government-wide System for Award Management Exclusions (commonly known as the "SAM Exclusions") maintained by the General Services Administration (GSA)[10] would be barred from participation in covered transactions unless an exception were granted for good cause by the agency head.[11] To effect this reciprocity, the Guidelines impose affirmative disclosure requirements on "participants" in government programs or other covered transactions.[12] Before entering into a covered transaction, participants must notify the agency if they are presently excluded or disqualified. Those who are excluded from government programs will be listed on the System for Award Management Exclusions. In addition, primary tier

[10] The System for Award Management records for an entity, including its exclusion status, can be searched at https://www.sam.gov/SAM/pages/public/searchRecords/search.jsf.

[11] As proposed in this Notice, covered transactions would be those under the USF or TRS programs or the NDBEDP.

[12] A participant is broadly defined as "any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant." The Guidelines refer to two categories of "covered transactions"—those which are in the "primary tier, between a Federal agency and a person" and those in a "lower tier, between a participant in a covered transaction and another person." Obligations under the Guidelines may vary depending upon whether a party is a primary tier participant or lower tier participant. Therefore, we propose below clarifications for several Commission programs to identify which persons would be considered "primary tier" participants within the meaning of any new rules.

participants (i.e., generally those participants who transact business directly with a federal agency) must advise the agency whether they have been convicted of certain offenses within three years, indicted, or terminated from public transactions. Further, under the Guidelines, a federal agency must check to see whether a person is excluded or disqualified before entering directly into a covered transaction or approving a principal in that transaction, and before approving any lower tier participant or principal thereof (if agency approval is required).

13. This is not an exhaustive list of the differences between the Guidelines and the Commission's rules. We strongly encourage interested parties to review the OMB Guidelines, which can be found at 2 CFR part 180, in addition to this document.

III. DISCUSSION

14. We propose to adopt new rules consistent with the Guidelines. Doing so would impose the following new mechanisms and obligations, among others: (1) new procedural requirements that would allow the agency to respond quickly to evidence of misconduct through a suspension mechanism prior to any debarment, while providing for a later evidentiary proceeding that will permit the Commission to consider a broader range of wrongful conduct than is now considered; (2) requirements that program participants confirm that those with whom they do business are not already excluded or disqualified from government activities; and (3) reciprocity within the Government-wide system preventing a party that is suspended or debarred by *another* agency from participation in covered Commission transactions unless the Commission grants an exception for good cause. We seek comment on this proposal.

15. We propose to adopt new debarment and suspension rules for several reasons. *First*, adopting the Guidelines would allow the Commission to take remedial action before the issuance of a judgment or conviction, based on a broader range of factors. As explained above, under our current rules suspension and debarment are triggered only by a final conviction or civil judgment showing malfeasance arising from or related to USF programs. The Commission's current rules allow an entity to be subject to a Notice of Apparent Liability (NAL) supported by substantial

evidence, or to enter into an executed Consent Decree with an admission of liability. However, even undisputed evidence supporting an NAL or Consent Decree, no matter how egregious, would not constitute sufficient grounds for a suspension or debarment under our rules, which require a judgment or conviction related to USF programs. In addition, many False Claims Act lawsuits arising from alleged wrongdoing in USF programs settle before final judgment, removing those cases from the reach of the Commission's suspension and debarment rules. Even if a conviction or civil judgment is pursued for malfeasance in a USF program, the litigation typically takes many years, and our current rules preclude a suspension or debarment while litigation is pending. Thus, while the Commission anticipated that the mandatory nature of the current debarment rules would be a strong tool to prevent fraud in the USF programs, the narrow trigger for suspension and debarment appears to be a significant constraint on the Commission's authority to protect the USF through those rules, in contrast to the more flexible approach under the Guidelines.[13] Finally, as noted above, malfeasance in other government programs or even criminal convictions outside the realm of the USF are not factors that the Commission may consider under the current rules. These and other limitations on our suspension and debarment procedures would be eliminated by adopting new rules consistent with the Guidelines.

16. *Second*, the Guidelines require that persons make advance disclosures regarding their exclusion or disqualification status prior to entering into covered transactions with federal agencies and participants in federal programs. More specifically, a person who enters into a covered transaction with a federal agency must disclose: whether they are presently excluded or disqualified; recent convictions, civil judgments, indictments, or civil charges; and recent defaults

[13] After the adoption of our current suspension and debarment rules in 2003, the Commission to date has debarred 49 persons or entities, with only one remaining currently debarred. Of those debarred, 46 have been debarred for activities pertaining to the E-rate program and 3 for activities under the Lifeline program. Despite numerous active investigations of wrongdoing in Commission programs, including several cases implicating the False Claims Act, there have been no debarments since 2015, in large measure due to the constraints imposed by our current rules requiring a judgment or conviction as a prerequisite to a Commission suspension or debarment.

on public transactions. Lower tier transactions (e.g., between a program participant and a consultant) require only a disclosure of exclusion or disqualification status. These disclosures afford participants in transactions more information by which to evaluate whether it is appropriate or prudent to do business with the person making the unfavorable disclosures.

17. *Third*, under the Guidelines, the Commission would have authority, like other government agencies, to evaluate the wrongful or fraudulent conduct of companies or individuals in *other* dealings with the government, and to use the possibility of government-wide, rather than program-specific, suspension or debarment as a deterrent to bad actors. In contrast, under the Commission's current rules, even a company or individual debarred *government-wide* for criminal or other unlawful conduct currently could not be barred from participation in the Commission's USF programs without a prior judgment or conviction related to a USF program. Furthermore, a party suspended or debarred from the USF programs under our current rules could still participate in other Commission programs such as TRS or NDBEDP; bid for procurement contracts with the Commission; and participate in both procurement and nonprocurement programs with other government agencies.

18. We seek comment on the analysis above. Would adopting suspension and debarment rules consistent with the Guidelines offer the benefits described? Are there costs associated with adopting such rules—for example, that broader rules allowing for more agency greater discretion might be create regulatory uncertainty or be more difficult to administer—that might outweigh these benefits? Would adopting these rules result in unintended consequences not discussed here? We seek comment on these questions, as well as our proposal to adopt suspension and debarment rules consistent with the Guidelines.

19. Following the practice of other agencies, we propose to adopt rules consistent with the Guidelines by reference to the codified Guidelines, and to supplement the Guidelines through FCC-specific regulations, including rules addressing those matters for which the Guidelines give each agency discretion. We note that other federal agencies have adopted the bulk of the

Guidelines with limited changes, and we propose to do the same here. In the remainder of this document, we propose supplemental rules and seek comment on how to implement the Guidelines in a manner that accommodates concerns that may be unique to the Commission's programs.

A. Overview of Supplemental Rules

20. Our supplemental proposals fall into three areas. *First*, we propose to apply the suspension and debarment rules to a broader category of entities than are now covered, by defining "covered transactions" as including conduct taken by participants in the USF and TRS programs and the NDBEDP, and by including as covered transactions additional tiers of contracts involving contractors, subcontractors, suppliers, consultants, or their agents or representatives that are participating in these programs. For the reasons discussed below, we propose that all other agency programs or transactions be exempted from the rules at this time.

21. *Second*, we propose to adopt requirements that program participants confirm that those with whom they do business are not already excluded or disqualified from government activities. We note that such confirmation is consistent with the Guidelines and many entities who participate in federal grant programs or seek federal contracts should already be familiar with the process. We also seek comment on possible exceptions and how to implement the principle of reciprocity, which would prevent a party that is suspended or debarred by *another* agency from participation in covered Commission transactions.

22. *Third*, again consistent with the Guidelines, we propose new procedural requirements that would allow the agency to respond quickly to evidence of misconduct through a suspension mechanism, while providing for an evidentiary proceeding, evaluating a broader range of wrongful conduct than is now considered,[14] prior to any disbarment.

[14] The Guidelines provide federal agencies with substantial discretion to suspend and debar participants based on consideration of numerous factors. Moreover, through imputation rules, action could be taken

23. We seek comment on these supplemental proposals. We also seek comment generally on any policies or procedures that we should adopt if we were to implement the Guidelines, and in particular what procedures would be "consistent with the [OMB] guidance." We seek comments about any other changes to our rules that might be appropriate should we choose to adopt rules consistent with the Guidelines, including our proposed supplemental rules, particularly any conforming changes that may be necessary, including modifications of forms for Commission programs, inclusion of additional certifications, and such other changes that may be necessary or helpful in implementing any new suspension and debarment rules. In particular, we seek comment on any changes required with respect to our rules for the contents of applications to participate in competitive bidding to receive auctioned support through covered transactions.

24. We also invite comment on the experiences of other agencies responsible for overseeing large programs that have applied the Guidelines. Have other agencies adopted the Guidelines largely intact, or are modifications commonly adopted so that suspension and debarment processes reflect the unique nature of the programs and missions the agencies oversee? Are there lessons learned by other agencies that could inform the Commission's adoption of expanded suspension and debarment rules consistent with the Guidelines?

25. While this document focuses on areas where we propose to supplement or deviate from the Guidelines, interested parties who believe the Commission should consider other changes to the Guidelines in its supplemental regulations should set forth their proposals, and the rationales supporting the proposed change, with specificity.

B. Covered Transactions and Disclosure Requirements

26. *Generally.* The Guidelines define "non-procurement transactions" as "any transaction, regardless of type (except procurement contracts)," including but not limited to grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan

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against an organization, not just a principal, or the reverse, in appropriate circumstances. The imputation rules too would plug a gap in the Commission's current suspension and debarment mechanism.

guarantees, subsidies, insurances, payments for specified uses, and donation agreements. Notwithstanding this definition, the Guidelines provide flexibility to agencies to determine which non-procurement transactions should be covered by their suspension and debarment rules. For example, the Guidelines specifically exclude from their scope any non-procurement transaction that is exempted by a federal agency's regulation. The Guidelines also exclude by default any "permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment," unless a federal agency specifically designates it to be a covered transaction.

27. If the Commission implements the Guidelines, should all transactions covered by the OMB definitions be included within the suspension and debarment regime? Are there additional types of transactions that should be included in addition to the examples provided in the Guidelines? Are there additional program-specific clarifications that should be made—for example, should the Commission clarify that Lifeline enrollment representatives who enroll individuals in the Lifeline program are executing covered transactions because enrollment is required before the service provider can claim a subsidy, or is that sufficiently clear from the Guidelines? Conversely, are there specific Commission nonprocurement transactions or programs that should be exempted from coverage?[15] For example, are there some programs or activities that should be exempted because remedies other than suspension or debarment (e.g., license revocation) may be more appropriate? Commenters should identify specific transactions that should be included as covered transactions or exempted from the proposed suspension and debarment rules and provide the rationale for that recommendation.

28. *USF, TRS, and NBDEDP as covered transactions.* The Commission's primary

[15] We note that procurement contracts awarded directly by a federal agency would not be considered "covered transactions" under the nonprocurement government-wide guidance for suspension and debarment. However, where non-federal participants in nonprocurement transactions award contracts for goods or services, such contracts would be deemed to be covered transactions if the amount of the contract equals or exceeds $25,000.

permanent nonprocurement programs are the USF and TRS programs. In 2018, disbursements totaled $8.33 billion for USF programs and $1.4 billion[16] for TRS. We propose that all transactions under the USF and TRS programs be considered covered transactions under any new rules, as well as transactions under the NDBEDP, and that all other Commission transactions be exempt from those rules.[17] We tentatively conclude that application of the suspension and debarment rules to these programs will improve the sustainability of their funding for the benefit of those whom the programs serve. We seek comment on this proposal, as well as this tentative conclusion. More specifically, under the TRS programs and NDBEDP, the Commission grants TRS and NDBEDP participants authorization to provide services and equipment pursuant to certifications and reimburses TRS providers and NDBEDP certified programs for services and equipment provided to beneficiaries. We invite comment on the benefits of applying the suspension and debarment rules to the TRS programs and to the NDBEDP.

29. *General exemption for all other transactions, including authorizations and licenses.* The Guidelines primarily, but not exclusively, focus on transactions that involve a transfer of Federal funds to a non-Federal entity.[18] The Guidelines also exclude by default from the definition of "covered transaction" any "permit, license, certificate, or similar instrument issued as a means to regulate public health, safety, or the environment," unless a federal agency

[16] Total disbursements for the NDBEDP, which come from the interstate TRS Fund, are limited to $10 million annually.

[17] In its most recent audit of the Commission's compliance with the Improper Payments Elimination and Recovery Improvement Act, the FCC's Inspector General listed nine programs that make disbursements under the direction of the Commission and its administrators: the four USF programs; the administrative costs of the Universal Service Administrative Company (USAC), the USF administrator; TRS; the North American Numbering Plan; payments related to the broadcast incentive auction (the TV Broadcaster Relocation Fund); and FCC operating expenses generally. In the report, OIG noted that the Commission had identified three of the USF programs and the TRS program as being susceptible to the risk of significant improper payments.

[18] The guidelines define "nonprocurement transaction" to include, among other things, grants, loans, loan guarantees, and subsidies. However, it is not necessary that a nonprocurement transaction include a transfer of Federal funds.

specifically designates it to be a covered transaction. Consistent with the framework in the Guidelines, we propose to exclude all transactions other than those involving the USF, TRS, and NDBEDP from the scope of our proposed rules, such as applications for section 214 authorizations, equipment authorizations, and broadcast and spectrum licenses issued by the Commission. The Communications Act of 1934, as amended (Communications Act) and the Commission's implementing regulations govern the qualifications of applicants for such licenses and authorizations and the standards for revocation of the same. Similarly, we propose to exclude all transactions to or from licensees and those with spectrum usage rights (excluding, of course, those USF, TRS, and NDBEDP transactions where such an entity happens to be a participant), such as incentive auction payments or repacking payments.[19] Such payments should not be "covered transactions" that might be stopped by suspension or debarment rules as the public interest is best served by facilitating spectrum usage right relinquishments or repacking in such circumstances—and the statutes and rules regarding the collection of any outstanding debts still apply and provide more appropriate remedies to protect these payments.[20] We seek comment on this proposal.

30. The Guidelines, unless otherwise expanded by agency rule, apply to two categories of transactions: a "primary tier between a federal agency and a person"; and a "lower tier, between a participant in a covered transaction and another person." Both primary tier and lower tier participants must disclose whether they, or any of their principals, are excluded or disqualified. Primary tier participants, however, must also disclose to the federal agency certain convictions, civil judgments, indictments, other criminal or civil charges, or defaults on public transactions of the participant or any of their principals.

[19] As noted, this exclusion, of course, would not apply to those USF, TRS, and NDBEDP transactions where such an entity is a participant.

[20] Thus, other provisions protect against payments to parties with existing debts to the Commission and other federal government entities.

31. Agencies have some discretion within the parameters of the Guidelines to designate primary versus lower tier participants, and to expand the tiers that would be considered to be "lower tier."[21] In this section, we propose to designate certain actors in the USF and TRS programs and the NDBEDP as primary tier participants, and others as lower tier participants. We also propose, consistent with the Guidelines, to designate certain entities who do not directly contract with the primary tier participant (for example, subcontractors) as lower tier participants if they meet certain criteria.[22] Before we do so, however, we set forth our proposals on what would constitute a "principal."

32. *Definition of "*principal*."* The Guidelines define "principal" to mean (a) an "officer, director, owner, partner, principal, investigator, or other person . . . with management or supervisory responsibilities" or (b) a "consultant or other person, whether or not employed by the participant or paid with Federal funds, who (1) [i]s in a position to handle Federal funds; (2) [i]s in a position to influence or control the use of those funds; or (3) [o]ccupies a technical or professional position capable of substantially influence the development or outcome of an activity [in a transaction]." The Guidelines further state that an agency may "[i]dentify specific examples of types of individuals who would be 'principals' under the Federal agency's nonprocurement programs and transactions, in addition to the types of individuals specifically identified above."

33. We propose that in addition to those persons defined as principals under the Guidelines, the term "principal" shall also mean "any person who has a critical influence on, or substantive control over, a covered transaction, whether or not employed by the participant."

[21] More specifically, the Guidelines also include as "covered transactions" any contract for goods and services awarded by a participant in a nonprocurement transaction covered under § 180.210 that is expected to equal or exceed $25,000, or any contract requiring the consent of an official of a federal agency.

[22] Sections 180.25(b)(2) and 180.220(c) of the Guidelines provide agencies with the option to include as "covered transactions an additional tier of contracts awarded under covered nonprocurement transactions." The Guidelines also contain an Appendix–Covered Transactions, with diagrams illustrating tiers of covered transactions.

Persons who may have a critical influence on, or substantive control over, a covered transaction could include without limitation: management and marketing agents, accountants, consultants, investment bankers, engineers, attorneys, and other professionals who are in a business relationship with participants in connection with a covered transaction under an FCC program.[23] We propose this expansion of the definition to ensure that all persons who have substantial influence on or control over a covered transaction may be considered "principals" even if they do not satisfy any of the three prongs in the Guidelines. For example, a person that causes violations of rules applicable to a party's competitive bidding evaluation might not be "influenc[ing] the development or outcome of *an activity* required to *perform* the covered transaction", yet that person could merit a debarment. This broadened definition of "principal" would afford the Commission the authority to consider such conduct. Commenters should identify any other categories of persons who should be considered "principals" in addition to those discussed above.

34. *Primary and lower tier participants for the USF and TRS programs and the NDBEDP – summary*. Our proposed designations for the programs are summarized in the chart below.

	Primary Tier Participants	**Lower Tier Participants**
High-Cost	Carriers	Contractors, subcontractors,[24] suppliers, consultants or their agents or representatives for High-Cost-supported transactions, if: (1) such person has a material role relating to, or significantly affecting, claims for disbursements related to the program; (2) such party is considered a "principal"; or (3) the amount of the transaction is expected to be at least $25,000.

[23] This expanded definition of the term "Principal" draws upon a supplement to the government-wide definition adopted by the Department of Housing and Urban Development (HUD).

[24] Under the Guidelines, subcontractors include suppliers of goods and services.

	Primary Tier Participants	Lower Tier Participants
Lifeline	Carriers	Any participant in the Lifeline program (except for the primary tier carrier), regardless of tier or dollar value, that is reimbursed based on the number of Lifeline subscribers enrolled, commissions, or any combination thereof. Contractors, subcontractors, suppliers, consultants, or their agents or representatives and third-party marketing organizations for Lifeline-supported transactions, if (1) such person has a material role relating to, or significantly affecting, claims for disbursements related to the program; (2) such party is considered a "principal"; or (3) the amount of the transaction is expected to be at least $25,000.
E-Rate	Schools and Libraries Form 471 Service Providers	Contractors, subcontractors, suppliers, consultants, or their agents or representatives for E-Rate-supported transactions, if (1) such person has a material role relating to, or significantly affecting, claims for disbursements related to the program; (2) such person is considered a "principal"; or (3) the amount of the transaction is expected to be at least $25,000.
RHC	Health Care Providers Form 462/466 Service Providers	Contractors, subcontractors, suppliers, consultants, or their agents or representatives for RHC-supported transactions, if (1) such person has a material role relating to, or significantly affecting, claims for disbursements related to the program; (2) if such party is considered a "principal"; or (3) the amount of the transaction is expected to be at least $25,000.
TRS NDBEDP	Service Providers	Contractors, subcontractors, suppliers, consultants, or their agents or representatives for TRS- or NDBEDP-supported transactions, if: (1) such person has a material role relating to, or significantly affecting, claims for disbursements related to the program; (2) such person is considered a "principal"; or (3) the amount of the transaction is expected to be at least $25,000.

35. *Primary and lower tiers – High-Cost Programs.* For the High-Cost programs, we propose that the primary tier participant will be the carrier receiving support. We propose that lower tier participants include contractors, subcontractors, suppliers, consultants, or their agents or representatives for High-Cost-supported transactions, regardless of the dollar value of the

contract or agreement, if (1) such person has a material role relating to, or significantly affecting, claims for disbursements related to the High-Cost program, or (2) such person is considered a "principal."[25] We also propose that contractors, subcontractors, suppliers, consultants, or their agents or representatives be treated as lower tier participants for all USF-supported transactions, including High-Cost-supported transactions, if the amount of the transaction is expected to be at least $25,000.

36. *Primary* and *lower tiers – Lifeline Program.* Under the Lifeline program, carriers can submit consumer Lifeline applications to the National Verifier and are in the best position to have up-to-date information on customer activation and use of their Lifeline service. In addition, the carrier submits requests for payment to the USF Administrator and is in the best position to carry out the obligations of primary tier participants under the Guidelines. In contrast, the direct interaction of low-income consumers with the Commission or the USF Administrator is incidental. We propose that these beneficiaries not be considered primary or lower tier participants. Therefore, in the Lifeline program, we propose that the primary tier participant will be the carrier receiving support.

37. We propose three categories of lower tier participants in the Lifeline program. First, we propose to include parties (except for the primary tier Lifeline carrier) to any contract or award in which a person is reimbursed based on the number of Lifeline subscribers enrolled, by commission, or any combination thereof, regardless of tier or dollar value. Second, we propose that lower tier participants would include contractors, subcontractors, suppliers, consultants, or their agents or representatives and third-party marketing organizations for Lifeline-supported

[25] Our proposed new rules would provide: "The term 'Principal' means, in addition to those individuals described at 2 CFR § 180.995, any person who has a critical influence on, or substantive control over, a covered transaction, whether or not employed by the participant or paid with federal funds. Persons who have a critical influence on, or substantive control over, a covered transaction may include, but are not limited to: management and marketing agents, accountants, consultants, investment bankers, engineers, attorneys, and other professionals who are in a business relationship with participants in connection with a covered transaction under an FCC program").

transactions, regardless of the dollar value of the contract or agreement, if (1) such person has a material role relating to, or significantly affecting, claims for disbursements related to the Lifeline program, or (2) such person is considered a "principal." Finally, we propose that contractors, subcontractors, suppliers, consultants, or their agents or representatives and third-party marketing organizations be treated as lower tier participants for Lifeline-supported transactions, if the amount of the transaction is expected to be at least $25,000.

38. *Primary and lower tiers – E-Rate Program.* In the E-Rate program, after a school, library, or consortium enters into a signed contract or other legally binding agreement for services eligible for E-Rate discounts, the school, library, or consortium will identify the selected service provider using FCC Form 471. For the E-Rate program, we propose that both the program applicant (the school, library, or consortium) and the service provider(s) selected by the applicant (as indicated on FCC Form 471) be designated as primary tier participants. Extending the primary tier designation to applicants will allow us to obtain the more extensive primary tier disclosures from the applicants themselves, while also ensuring that the applicants will verify during their selection process that a service provider is not excluded or disqualified. We also propose that the service providers selected by the applicant schools, libraries, and consortia also be considered primary tier participants, regardless of whether they submit invoices directly to USAC. The experience of the Commission is that service providers may often be responsible for waste, fraud, and abuse, and therefore the imposition of the more substantial primary tier obligations (particularly disclosure requirements) on these entities would best achieve the Commission's goals of protecting federal funds. We seek comment on this proposal.

39. Under the E-Rate programs, schools and libraries may create "consortia" that can seek competitive bids or E-rate funding on behalf of all their members. When schools and libraries act through consortia, we propose that the consortium itself, acting through its lead member, would be a primary tier participant, along with the member schools or libraries. However, in considering any proposed suspension or debarment action, we anticipate that the

suspension and debarring officer should evaluate which particular school or library consortium member was responsible for the bad conduct (in many cases, this may be the lead member) and direct the suspension and debarment orders to those responsible for the bad acts, rather than to all consortium members. We seek comment on this proposal and how best to implement the Guidelines in this context.

40. Finally, we propose that lower tier participants for the E-Rate program include contractors, subcontractors, suppliers, consultants, or their agents or representatives (with the exception of the service provider(s) designated on FCC Form 471, which would be treated as a primary tier participant) for USF-supported E-Rate transactions. We propose that all such persons be treated as lower tier participants, regardless of the dollar value of their contract or agreement, if (1) they have a material role relating to, or significantly affecting, claims for disbursements related to the E-Rate program, or (2) they are considered a "principal." We also propose that such persons be treated as lower tier participants for all other E-Rate-supported transactions if the amount of the transaction is expected to be at least $25,000.

41. *Primary and lower tiers –Rural Health Care Program.* We propose a structure for the RHC program that is substantially similar to the E-Rate program. After an individual health care provider (HCP) or a consortium enters into a signed contract or other legally binding agreement for services eligible for RHC support, the HCP or consortium will identify the selected service provider using FCC Form 462 or 466. As with the E-Rate program, we propose that both the program applicant and the service provider(s) selected by the applicant (as indicated on FCC Form 462 or 466) be designated as primary tier participants, for the reasons discussed above.

42. Similarly, we propose that a consortium applicant, acting through its lead entity, would be the primary tier participant, along with its member HCPs, but that the suspension and debarring officer should evaluate which particular consortium member (for example, the lead entity) was responsible for the bad conduct and direct the suspension and debarment orders to those responsible for the bad acts, rather than to all consortium members.

43. Finally, as with the E-Rate program, we propose that lower tier participants for the RHC program include contractors, subcontractors, suppliers, consultants, or their agents or representatives (with the exception of the service provider(s) designated on FCC Forms 462 or 466, which would be treated as a primary tier participant) for USF-supported RHC program transactions. We propose that all such persons be treated as lower tier participants, regardless of the dollar value of their contract or agreement, if (1) they have a material role relating to, or significantly affecting, claims for disbursements related to the RHC program, or (2) they are considered a "principal." We also propose that contractors (except for the service provider designated on FCC Forms 462 or 466), subcontractors, suppliers, consultants, or their agents or representatives be treated as lower tier participants for all other RHC-supported transactions if the amount of the transaction is expected to be at least $25,000. We seek comment on this proposal and how best to implement the Guidelines in this context.

44. *Primary and lower tiers –TRS programs and NDBEDP*. We propose that in the TRS programs and the NDBEDP, the service and equipment providers receiving payments shall be deemed the primary tier participants. In these programs, the service and equipment providers evaluate the qualifications of customers to participate in the programs. In addition, the service (or equipment) providers submit requests for payment to the program administrators and are in the best position to carry out the obligations of primary tier participants under the Guidelines. For the TRS programs (other than TRS that is provided through state programs) and the NDBEDP, the primary tier participants would be the certificated entities that are reimbursed by the Commission and the TRS Fund administrator for providing services and equipment under the covered transactions. For TRS that is provided through state TRS programs, the primary tier participants would be the TRS providers that are authorized by each state to provide intrastate TRS under the state program and that, accordingly, are compensated by the TRS Fund for the provision of interstate TRS. For these programs, are there certain types of participants that the rules should treat differently? We note that, for the NDBEDP, some participants are state or local

governments, and others are non-profits. Are there reasons why participants that are state or local governments or non-profit entities would require different treatment under the Guidelines and the rules we propose in this document? In contrast to the service providers, the direct interaction of TRS and NDBEDP beneficiaries (i.e., individuals with disabilities) with the FCC or the administrators is incidental. Moreover, because beneficiaries (i.e., individuals with disabilities) in the TRS program and NDBEDP do not directly submit applications to the program administrators, we propose that these beneficiaries not be considered either primary or lower tier participants, and not be subject to the debarment rules. We also note that the burden of imposing lower tier obligations on these individual beneficiaries would be substantial and their obligations under the rules, if they were considered participants, could well be beyond their ability or resources to carry out.

45. Consistent with the USF programs, we propose that lower tier participants for the TRS programs and the NDBEDP include contractors, subcontractors, suppliers, consultants, or their agents or representatives for TRS- or NDBEDP-supported transactions. We propose that all such persons be treated as lower tier participants, regardless of the dollar value of their contract or agreement with the service provider, if (1) they have a material role relating to, or significantly affecting, claims for disbursements related to the TRS or NDBEDP programs, or (2) they are considered a "principal." We also propose that contractors, subcontractors, suppliers, consultants, or their agents or representatives be treated as lower tier participants for all other TRS- or NDBEDP-supported transactions if the amount of the transaction is expected to be at least $25,000. We seek comment on this proposal.

46. *Transactions with the USF, TRS Fund, and NDBEDP Administrators.* We also propose adoption of a clarification to section 180.200 of the Guidelines explaining that covered transactions include not only transactions between a person and the Commission, but also any transactions between a person and the administrators of the USF and TRS programs and the NDBEDP, when those entities are acting as agents of the Commission for purposes of

administering the programs. We seek comment on this proposal.

47. As noted, the Guidelines impose important disclosure requirements on both primary and lower tier participants. In addition to the discussion in this section, we refer interested parties to the Guidelines in 2 CFR part 180, subpart C (Responsibilities of Participants Regarding Transactions Doing Business with Other Persons). We note that entities who participate in federal grant programs (e.g., schools, libraries, or rural health care providers) or seek federal contracts (e.g., service providers) should already be familiar with similar requirements. As noted above, we propose to exclude individual beneficiaries in the Lifeline and TRS programs and the NDBEDP (i.e., low-income individuals and individuals with disabilities) from these requirements.

48. *Primary tier participants.* Disclosures required of *primary tier participants* (i.e., those who deal directly with the agency or its agents by submitting a proposal for, or entering into, a covered transaction) are extensive. They must not only advise the agency if they are presently excluded or disqualified, but must also state whether the participant or any of its principals for the transaction "have been convicted within the preceding three years of any of the offenses listed in § 180.800(a) or had a civil judgment rendered against [them] for one of those offenses within that time period," "are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in § 180.800(a)," or "[h]ave had one or more public transactions . . . terminated within the preceding three years for cause or default."

49. We anticipate that disclosure requirements could be implemented through changes to existing program forms and certification rules and seek comment on how to implement such requirements in a manner that minimizes burdens on primary tier participants. We also seek comment on what changes to our rules and form instructions may be required to further communicate disclosure requirements to primary tier participants. Finally, we propose clarifying the disclosure rules to require that such disclosures by primary tier participants be made not only

to the USF, TRS, and NDBEDP administrators, as the Commission's agents for the covered transactions, but also to the Commission (with disclosures to be submitted to the attention of the applicable bureaus). We seek comment on these proposals.

50. *Lower tier participants.* The Guidelines disclosure requirements for lower tier participants are less extensive; these parties need only disclose whether they are excluded or disqualified from participating in covered transactions. As a further protection for agency transactions, should any implementing rules adopted by the Commission require that participants at all or some of the lower tiers also disclose the information applicable to primary tier participants to both the Commission and to the higher tier participant with which they seek to conduct business? For example, in the E-Rate program, a service provider would be required to disclose the primary tier information to the Commission, but the program beneficiaries (the schools and libraries) might also find that information useful in evaluating the services offered by their potential service providers.

51. We note that under the Guidelines, a disclosure of unfavorable information by a primary tier participant would not necessarily cause the federal agency to deny participation (except for instances of exclusion or disqualification), and our proposal would extend this protection to disclosures by lower tier participants. However, it would allow the agency and the higher tier participant to whom the disclosure was made the opportunity to consider this information to better determine whether participation seems appropriate under the circumstances presented. The requirement to notify lower tier participants of such additional disclosure obligations could be an additional duty for both primary and lower tier program participants under any new rules. We seek comment on this proposal and any alternatives.

52. Subpart C of the Guidelines describes the responsibilities of participants in lower tier transactions, and specifically requires such participants to pass down the requirements to persons at lower tiers with whom they intend to do business. We propose that primary and lower tier participants include a term or condition in their transactions with the next lower tier participants

requiring compliance with 2 CFR part 180, subpart C, as supplemented by any Commission rules.

53. Lifeline *and other participant disclosures.* As proposed in this document, under the Lifeline program, eligible telecommunications carriers (ETCs), their agents, and subagents would be subject to disclosure obligations. We seek comment on how those disclosure obligations should be accomplished. Should the disclosure rules require all primary and lower tier participants in the Lifeline program to file disclosure statements, upon penalty of perjury, reporting all required disclosures or certifying that they have no reportable disclosures to make? For eligible telecommunications carriers, are there existing forms or submissions to which this disclosure should be added?[26] How often should such disclosure statements be required to be filed? For individuals who have registered with USAC for access to the Lifeline National Verifier or National Lifeline Accountability Database systems, should we require such disclosure statements to be filed upon registration and every subsequent recertification? Should ETCs be required to maintain such disclosure statements as part of their record retention requirements? What remedies should be available if participants fail to disclose the required information? We seek comment on these matters and on similar issues related to the implementation of disclosures for the other programs that may be made subject to the suspension and debarment rules, as proposed in this document.

54. *USF competitive bidding short forms.* In some instances, the Commission conducts competitive bidding to determine recipients of universal service support, as in the Connect America Fund auctions. We consider here the Commission's own processes for auctioning support, rather than the competitive bidding that schools, libraries, and health care providers must conduct prior to selecting a service provider in the E-Rate and RHC programs. In the Commission's competitive bidding process, an applicant for support first files a "short-form" application to participate in bidding. Having a simpler standard for "short-form" applications as

[26] For example, in the case of Lifeline, this could be effected through Form 555, reimbursement claims, or registration in the Representative Accountability Database.

opposed to "long-form" applications streamlines the competitive bidding process and encourages participation by keeping participation as simple as possible. Thus, at the short-form stage an applicant to participate in bidding for universal service support is only required to certify "that the applicant is in compliance with all statutory and regulatory requirements for receiving the universal service support that the applicant seeks, or, if expressly allowed by the rules specific to a high-cost support mechanism, . . . that the applicant . . . must be in compliance with such requirements before being authorized to seek support," and is not required to demonstrate fully its qualifications and compliance. Only after becoming a winning bidder must an applicant file a "long-form" application demonstrating in detail the applicant's qualification to receive the support. For example, auction participants need not demonstrate eligible telecommunications carrier (ETC) qualifications until the long-form stage.

55. Primary tier participants would at a minimum provide all required disclosures with their long-form applications. As discussed above, the Guidelines require primary tier participants not only to disclose whether they are presently excluded or disqualified, but to make several additional disclosures that could assist the agency in evaluating whether to enter into the transaction with that person. The Guidelines give the agency discretion to consider the disclosed information before determining whether or not to enter into the covered transaction. We recognize that requiring all of the disclosures and evaluations at the short-form stage could slow the auction process. On the other hand, a problem would be created in situations where an entity participates in an auction, wins, and then is disqualified from receiving support. This problem may weigh in favor of more requiring more disclosure in the short-form application. Accordingly, we seek comment on the appropriate balance at the short-form stage between requiring helpful disclosures while preserving the simplicity and speed of applying to participate in the competitive bidding process, and more specifically on the three options discussed below or any other alternatives that commenters want to propose.

56. At the short-form application stage, the Commission could limit the application of the

Guidelines to a review of the status of the applicant and wait until a winning bidder files a long-form application to have the applicant disclose additional parties and conduct further review. As noted, in a short-form application in connection with universal service support, an applicant must certify that it is "in compliance with all . . . regulatory requirements for receiving the universal service support." Therefore, a presently excluded applicant could not make the required certification and could not successfully submit a complete short-form application. This approach permits the Commission to process applications to participate in competitive bidding more quickly and minimizes the disclosures required of potential participants. The applicant would bear the risk that required disclosures in its long-form application could result in its disqualification from support and a default on its application.

57. Alternatively, a second approach would be to require at the short-form stage that applicants disclose just whether the applicant or any of its principals are presently excluded or disqualified.[27] As under the first approach, a presently excluded or disqualified applicant could not make the required certification and would be unable to submit successfully a complete short-form application. In addition, under this second approach, an applicant with a principal that is presently excluded or disqualified would have to address those circumstances and come into compliance in the event it should become a winning bidder. If it failed to do so adequately, it could not successfully submit a complete short-form application. This approach seeks to balance requiring the most critical disclosures at this stage and maintaining an expeditious competitive bidding process.

58. Finally, a third approach would be to require applicants to make all disclosures required of a primary tier participant at the short-form stage, as well as the long-form stage. This would allow the Commission to review the disclosures and resolve any issues prior to the

[27] Thus, the applicant to participate in competitive bidding would be required to disclose the same information required of lower tier participants under the Guidelines.

bidding. However, it also would significantly delay the competitive bidding process and the ultimate award of support. Furthermore, it would not eliminate the need for considering additional disclosures and assessments at the long-form stage, as an applicant might have additional disclosures to make due to developments during the course of competitive bidding. We seek comment on all these options and any other alternatives commenters may feel are appropriate at the short-form stage.

59. *Primary tier participants.* If a primary tier participant discloses unfavorable information (other than an exclusion or disqualification) to the Commission (or the Administrators) before it enters into a transaction (such as an E-Rate funding commitment), one possible way for the Commission to prevent the transaction is to institute and complete a suspension and/or debarment proceeding before the transaction is approved or concluded.

60. We seek comment on whether our rules should include less drastic remedies. For example, should the Commission adopt specific rules to afford itself (in consultation with the Administrators) the discretion to merely preclude the participant from entering into the transaction at hand, prior to or in lieu of suspending or debarring the participant? Or should rules permit the agency to choose to not enter into covered transactions with that party (for example, a service provider who is a primary tier participant) for some specified period, akin to the "limited denial of participation" process described further below? Should our rules be modified to permit the Commission to consider this unfavorable information in TRS or NDBEDP certification proceedings and, if so what modification to our certification rules would be appropriate to ensure that the Commission could take appropriate action to reflect such information?[28] If the agency should be afforded discretion not to enter into the covered transaction based on the unfavorable information without using a suspension or debarment mechanism, what procedures should be provided to ensure due process for the party or parties affected by that decision?

[28] The TRS certification rules are quite specific on what constitutes grounds for granting certification.

61. *Lower tier participants.* If the Commission adopts rules requiring lower tier participants, such as an E-Rate or Rural Health Care consultant or a TRS subcontractor, to disclose unfavorable information currently only required to be disclosed by primary tier participants (i.e., convictions, etc.), the current Guidelines would not provide a mechanism for the Commission or the Administrators to reject a related primary tier participant's application solely because of that lower tier participant's disclosure. For example, if a school is utilizing an E-Rate consultant who has been convicted of fraud in another government program but has not yet been debarred, the Guidelines do not provide a mechanism for the rejection of the school's E-Rate application. However, requiring disclosure of additional information (in this example, the conviction) would give the Commission the opportunity to advise the program administrators to closely monitor the lower tier participant and, if appropriate, would enable the agency to initiate a suspension/debarment proceeding against the lower tier participant (if the disclosures are so significant that suspension or debarment is warranted).

62. We seek comment on whether the Commission should adopt rules that would allow the Commission, or the Administrators, to reject a nonprocurement transaction (e.g., an application for USF funding, or a request for TRS compensation) where the Commission or the Administrators consider the disclosure of unfavorable information relating to the lower tier participant so significant that the transaction should be denied, even without initiation of a suspension or debarment proceeding. What factors should be considered in such a determination? For example, should the primary tier participant first be given the opportunity to terminate its relationship with the lower tier participant? We believe that providing the Commission, or the Administrators as its agents, the discretion to reject such primary participant transactions based on unfavorable information disclosed by lower tier participants would provide the Commission with maximum flexibility to protect the USF and TRS funds, and seek comment on this proposal.

63. Under the Guidelines, an agency head may grant an "exception" to allow an excluded

person to participate in a transaction.[29] Should any Commission rules implementing the Guidelines spell out factors for invoking such an "exception" or should that determination be left solely to the discretion of the full Commission or the Chairman? If any factors are enumerated, we tentatively propose that one consideration be whether the provider of services—whether primary tier or lower tier—may be the sole source of services in the area, such that its exclusion could place consumers and/or beneficiaries at risk of losing service and more broadly the extent to which the exclusion would substantially impair delivery of services to customers and beneficiaries. Are there additional factors that should be identified as relevant to this determination? In addition, should the agency head alone be given authority to grant exceptions, or should the Commission consider a delegation of authority to the bureaus overseeing the programs (or perhaps to those bureaus in combination with the Enforcement Bureau) to grant such exceptions where the sole provider question is raised?

64. At least one other federal agency, the Department of Housing and Urban Development (HUD), specifically provides for a "limited denial of participation" for up to twelve months under its rules as a parallel mechanism to debarment. Many of the procedures under this mechanism resemble those under the Guidelines, including due process protections. However, HUD's limited denial of participation process does not trigger inter-agency reciprocity because that process is deemed to be outside the government-wide suspension and debarment system. Therefore, invoking a limited denial of participation would prevent a bad actor from continuing to participate in the particular agency program that triggered the limited debarment, but would not result in the party's exclusion on the System for Award Management exclusion list so as to trigger reciprocal exclusions government-wide.

65. Under the HUD rules, if at any time after invoking the limited debarment process the

[29] Section 180.135 provides that an agency head "may grant an exception permitting an excluded person to participate in a particular covered transaction." Such an exception "must be in writing and state the reason(s) for deviating from the government-wide policy in Executive Order 12549."

agency determines that a suspension and debarment is the more appropriate mechanism, the agency may initiate either suspension or debarment proceedings. Adopting such a mechanism as part of the Commission's rules would allow the agency to protect its programs from conduct of bad actors for a shorter period than a suspension or debarment, while affording the party the opportunity to come into compliance expeditiously, without causing the wrongdoer to be automatically excluded across all agency programs or government-wide. We seek comment on whether adopting this mechanism could be a useful tool for the Commission to employ and, if so, what standards might be appropriate for triggering this remedy. Should such a mechanism be employed primarily to ensure that a program participant responds to information requests and other Commission directives, but not be employed where there is evidence of fraud or other substantial wrongdoing that would warrant debarment? Or would a limited denial of participation be appropriate where a bureau or the Commission wanted to recommend exclusion of a party from one agency program due to malfeasance, but not from all covered agency transactions? In what other circumstances might such a mechanism be appropriate or inappropriate?

C. Suspension and Debarment Process

66. The default procedural requirements applicable to suspension and debarment actions are set forth in subparts F, G, and H of the Guidelines. We seek comment on Commission-specific modifications to those procedures. We also invite comment on any other changes that parties believe should be made to the default procedures. Commenters should set forth their proposals, and the rationales supporting the proposed change, with specificity.

67. Under the Guidelines, agencies look to individual circumstances and factors in rendering suspension and debarment determinations. Some of the grounds for suspension or debarment are described in the Guidelines, but each agency can modify that list.[30] If the

[30] Grounds for suspension or debarment are set forth in section 180.800 of the Guidelines, and include not only convictions of or civil judgments for fraud or certain criminal offenses, including any "offense indicating a lack of business integrity," but also violations of the requirements of public transactions "so

Commission adopts rules consistent with the Guidelines, are there specific additional suspension and/or debarment factors that should be expressly taken into consideration? We tentatively propose that additional factors that would militate in favor of suspension or debarment should include: repeat offenders of Commission rules; habitual non-payment or under-payment of Commission regulatory fees and/or contributions to the USF and TRS programs and NDBEDP; willful violation of USF, TRS, and NDBEDP rules; the willful submission of FCC forms or statements made to the FCC or to the Administrators that result in or could result in overpayments of federal funds to the recipients, including the willful submission of false documentation to obtain USF or TRS funds; and the failure to respond to requests made by the FCC or the Administrators for additional information to justify payment or continued operation under their certifications.

68. We also tentatively propose as an additional factor the willful violation of a statutory or regulatory provision applicable or related to any submission made to obtain USF or TRS funds, or such a violation caused by gross negligence. For example, within the High-Cost program, we seek comment on whether the following should constitute grounds for debarment: willful (or grossly negligent) violation: improper cost accounting, including putting expenses not supported by the universal service fund in the carrier's revenue requirement; using high-cost support for non-supported expenses; and allocating non-regulated expenses to the regulated entity. Further, we tentatively propose to define the term "public agreement or transaction," as used in section 180.800(b) of the Guidelines relating to causes for debarment, as encompassing contracts between USF applicants and their selected service providers and/or consultants.

69. The Guidelines also list numerous mitigating and aggravating factors that may

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serious as to affect the integrity of an agency program" (including willful or repeated violations). In addition, the Guidelines provide that suspension or debarment could be warranted for "[f]ailure to pay a single substantial debt, or a number of outstanding debts . . . owed to any Federal agency." Finally, the Guidelines provide the discretion to suspend or debar for "[a]ny other cause of so serious or compelling a nature that it affects [the party's] present responsibility."

influence the debarring official's decision.[31] We have sought comment on whether the Commission should consider granting an exception to an excluded service provider if that provider is the sole source of services in an area. More generally, during a debarment proceeding, should the Commission consider the impact that debarment would have on the provision of services to customers under agency programs, whether the TRS program, the NDBEDP, or the various USF programs? How would the Commission determine whether the person subject to suspension and/or debarment proceedings would be the sole provider of services, and to what extent should that influence the outcome of a suspension and debarment proceeding? Should debarment of an entity that appears to be the sole provider of services in an area be subject to a more extended transition period to permit customers or the agency to search for alternative sources of services? Where an entity is the sole source provider, should the Commission's rules provide for a remedy other than debarment, perhaps in the form of either a settlement agreement or a "consent decree" permitting continued service but subject to an appropriate compliance plan and strict oversight? What other vehicles or regulations might best accomplish the goal of protecting the USF and TRS programs and the NDBEDP from fraud or abuse without disrupting service to customers?

70. Finally, we note that a program participant may choose to continue with an excluded entity "if the transactions were in existence when the agency excluded the person."[32] To what extent should continuation be permitted under those programs in which beneficiaries are receiving services on a month to month (or similarly short term) basis? For example, if a school or library receives E-Rate services by tariff on a month-to-month basis, should the school or

[31] The list of factors is extensive and includes, by way of example, the actual or potential harm or impact that results or may result from the wrongdoing, and the frequency of incidents and/or duration of the wrongdoing.

[32] We recognize that adoption of this provision would constitute a change of course from policies currently in effect for the E-Rate program that now preclude the distribution of any USF funds to debarred entities and would require appropriate changes to our rules.

library be required to transition to a different provider if the initial service provider is suspended or debarred since the school or library is not under a binding long-term contract with that carrier? Or should we construe the term "transactions . . . in existence" to cover these monthly purchases? Should those beneficiaries receiving services for an indefinite term be required to seek a different service provider and, if so, what length of transition period would be appropriate? We seek comment on all these considerations and proposals, in addition to the other factors set forth in the Guidelines.

71. The Guidelines for suspension require "adequate evidence," defined as "information sufficient to support the reasonable belief that a particular act or omission has occurred." Under the Guidelines the suspending official first imposes the suspension, and then promptly notifies the suspended person, who is then afforded an opportunity to contest the suspension. Debarment in contrast requires a "preponderance of the evidence" and an opportunity for the target entity to respond before it goes into effect.

72. We seek comment on whether the Commission should adopt these evidentiary standards. Should the Commission adopt any suspension and debarment rules that include additional factors relating to the evidentiary standards (with particular attention as to what constitutes "adequate evidence")?

73. The typical debarment period is not more than three years, but that period may be adjusted based on the "seriousness of the causes" for debarment and evaluation of the factors listed in the Guidelines. Further, a debarred person may ask the debarring official to reconsider the decision or to reduce the time period or scope of the debarment. Are there additional mitigating factors beyond those set forth in the Guidelines that may warrant a reduction in the debarment period in response to a request for reconsideration?

74. Should the absence of an alternative service provider be a mitigating factor? Should the Commission adopt a mechanism that would permit a debarred person that is the sole provider of services to request, after the first year of debarment, a reduction in the debarment period?

Should other participants have an opportunity to petition for a reduction of their debarment period by demonstrating that they have instituted compliance measures with training and oversight that will facilitate program compliance? In the context of the E-Rate and Rural Health Care programs, should the Commission treat applicant schools, libraries, and health care providers differently than other parties (either for determining the period of debarment, or in the review of applicable factors) and, if so, under what circumstances? Should the Commission provide for an additional requirement that supplements the Guidelines to require debarred parties to petition for readmission into FCC programs after the debarment period? If so, should the burden be on the petitioner to demonstrate that it has taken remedial actions to avoid future violations? Should any such petition be resolved by the bureau responsible for program oversight, by the debarring official, or by the Chairman or full Commission?

75. Should the debarring official have authority to tailor debarments for particular circumstances or propose remedies in lieu of suspension and debarment?[33] Should any such determinations be made only after input from appropriate bureau staff who are likely to have the best knowledge of how entities are certified (in the case of TRS or NDBEDP) or how alternative remedies might impact delivery of services to beneficiaries? What types of alternative remedies might be appropriate for the USF and TRS programs and the NDBEDP? Should alternative remedies be fashioned in a different way from consent decrees in Enforcement Bureau enforcement actions? For example, should the official be afforded authority to negotiate a settlement under which the respondent would agree to the repayment of funds or a reduction in program support, rather than suspension or debarment? Under what circumstances would such a resolution be appropriate? Are there other alternative remedies that the agency should consider?

76. We seek comment on several significant process questions to ensure that implementation of any new rules be efficient and fair.

[33] One possibility is to allow the debarring official to issue a limited denial of participation similar to that utilized by HUD.

77. One issue is who should present the evidence supporting suspension or debarment to the suspending or debarring official. If the Office of the Inspector General (OIG) has conducted the underlying investigation supporting the suspension and debarment, we would propose that the OIG have primary responsibility for presenting the evidence to the suspending or debarring official because it would be the entity most familiar with the underlying facts. In other situations, however, it may be appropriate for the presentation to be made by the other units within the Commission that may have conducted the investigation, such as the Enforcement Bureau. In addition, the Commission may want to develop coordination procedures to permit the bureaus most responsible for the implementation of its USF and TRS programs and the NDBEDP to make presentations in the proceedings because they are likely to have insights on ways to implement suspension or debarment without adversely impacting the persons or entities the programs are designed to assist. We seek comment on these options.

78. A second consideration is the mechanisms for appeal and review of any suspending or debarring action. We propose that a determination by the suspending or debarring official would be an action on which reconsideration could be sought under section 405 of the Communications Act or an application for review filed under section 155(c)(4) of the Communications Act. Would it be appropriate or necessary to adopt any supplemental rules applicable to applications for review or petitions for reconsideration of such actions, or are existing rules and procedures sufficient and appropriate to handle such petitions? If reconsideration could be sought or an application for review filed, as proposed, would it be appropriate for the Commission to adopt rules providing that the suspending or debarring official or Commission, as the case may be, would make every effort to act on such motions or applications within 180 days? Would some other time frame be more reasonable? Should we consider supplemental rules providing guidance for what constitutes "good cause" under section 1.106(n) of our rules for granting a stay of any suspension or debarment action taken by the Commission en banc, pending a decision on a petition for reconsideration? If a stay of a

suspension or debarment is granted, we propose that any such stay not exceed 120 days to ensure that expedited review of the suspending or debarring action is provided. We also seek comment on whether the initial suspending or debarring actions, taken pursuant to delegated authority, should be subject to the procedures under section 1.102(a) or section 1.102(b) of our rules. If such actions would otherwise subject to section 1.102(a), which provides for automatic stays of hearing orders pending an application for review, we propose that suspension or debarment orders be exempt from such stays. We seek comment on all these proposals and on any other procedures governing the appeal and review of determinations by the suspending or debarring official. If an interested party proposes such procedures, it should set forth that proposal and any supporting rationales with specificity.

79. A third procedural consideration is the designation of the "suspending official" and the "debarring official" who shall conduct fact finding for FCC suspensions and debarments. Currently, the Enforcement Bureau has authority to resolve universal service suspension and debarment proceedings.[34] We seek comment on whether we should revisit that determination given our proposal to significantly expand the scope of the Commission's suspension and debarment rules beyond the current non-discretionary USF suspensions and debarments.

80. We recognize that officials who conduct suspension and debarment proceedings should be neutral. Although suspension and debarment proceedings are not formal adjudications subject to APA formal hearing provisions that prohibit agency staff from performing both prosecutorial and decisional activities, we believe that the agency's appointment of suspending and debarring officials should reflect the "separation of functions" principle that shields agency decisionmakers from off-record presentations by staff who have presented evidence or argument on behalf of or against a party to a proceeding and prohibits such staff from participating in the decision. The separation of functions requirement in section 409(c)(1) of the Communications

[34] Section 54.8 was originally adopted as 54.521 and redesignated in 2007.

Act, which applies to both formal and informal adjudications that have been designated for hearing, prevents a person who has participated in the presentation of a case at a hearing or upon review from making any additional presentation respecting such case to the presiding officer or to any authority within the Commission performing a review function, absent notice and opportunity for all parties to participate.[35]

81. Consistent with these principles, if the Commission found that the Chief, Enforcement Bureau (or his or her designee) would be the most appropriate person to serve as the suspending official and debarring official, would it be appropriate for that person to conduct proceedings in which staff of the Enforcement Bureau identified the alleged misconduct that forms the basis for the proceeding, participated in the investigation or prosecution of the case, or are expected to be involved in any capacity in any appeal or review of the suspending or debarring official's determination? If not, should the Commission designate more than one suspending or debarring official to ensure that cases involving the Enforcement Bureau are resolved by a person not associated with that Bureau? Or would it be sufficient that any suspending or debarring official within the Enforcement Bureau not be involved in any way with the case presented by the Enforcement Bureau to the official? We seek comments on these questions. Should persons other than Enforcement Bureau personnel be considered for appointment as the suspending or debarring official, and, if so, what should be their qualifications? Would, for example, the Managing Director be a more appropriate person for this authority, since the Office of Managing Director is responsible for oversight of the USF and TRS funds and for the agency's financial management? Should the suspending and debarring official be subject to appointment for a specific term, or may that person be subject to removal by the Commission at will? What is the relevance to these questions, if any, of the Appointments Clause

[35] Consistent with this, the Administrative Conference recommends that agencies require internal separation of decisional and adversarial personnel in adjudications that are not subject to formal APA hearing requirements.

to the U.S. Constitution and the Supreme Court's decision in *Lucia v. SEC*? We seek comment on these and all other issues related to the designation of such officials.

82. We seek comment on whether any persons or entities that currently participate in the Commission's programs would be debarred through the application of reciprocity and, if so, seek comment on whether they seek any modifications to the Guidelines to allow them to continue to participate in Commission programs.[36] Should Commission rules further provide that when an entity or person is excluded by another agency, that entity or person should immediately advise the Commission's debarring officer whenever it believes it is the sole provider of services for particular consumers under covered transactions? This would afford the agency head (or other official with delegated authority) an opportunity to grant a temporary exception for good cause while the agency evaluates the effect of the exclusion on program beneficiaries. If we adopt such a provision, should the Commission be required to act within a certain period, such as 90 days? Should the rules further specify that in appropriate cases, the agency head, full Commission, or other official with delegated authority could "except" the excluded party from reciprocity affecting participation in one or more FCC covered transactions subject, if appropriate, through a negotiated agreement that would include provisions such as mandatory independent audits, additional reporting requirements, or similar forms of oversight? We seek comment on these options, as well as other mechanism that might afford flexibility in protecting program funds while also ensuring that consumers are not without program services.

83. We note that suspension and debarment could present a particularly difficult situation if a TRS provider were excluded based on the action of another agency, through reciprocity, causing potential immediate adverse consequences to consumers who rely on TRS to meet their communications needs. Because TRS providers do not have contracts with their TRS customers,

[36] Under the Guidelines, a program participant may continue receiving services from an excluded person under an existing contract, but may not renew or extend the contract (other than no-cost time extensions) without an exception from the agency.

each service provided to customers could be viewed as a new "covered transaction." Without an exception, an excluded TRS provider could be barred from receiving payments for any services provided after the date it was suspended or debarred. We propose that any excluded TRS provider would be required to immediately notify the TRS Fund administrator when it is placed on the System for Award Management exclusion list, and that it could request and obtain a temporary exception for the 30-day period following its suspension or debarment to allow for a smooth transition for consumers. We propose further that the excluded TRS provider may file with the Commission a request for a longer exception within 30 days after the date of its suspension or debarment by another government agency. Such a request, if timely filed, would serve as a stay of the government-wide suspension and debarment for purposes of the TRS program for not more than 6 months or until issuance of a decision on the exception request, whichever occurs first. Such a grace period would permit the Commission to determine whether a longer exception would be appropriate and would afford customers (as well as agencies running the certified state programs) the opportunity to transition to a new provider. We seek comment on this proposal. We also seek comment about whether for the NDBEDP special exceptions to any suspension and debarment might be fashioned to address similar service disruption concerns.

84. Finally, we seek comment on what steps we would need to take to provide information regarding entities suspended or debarred by the Commission to the government-wide System for Award Management. While the Commission already uses this system for purposes of its agency procurements, and many participants in the USF and TRS programs and the NDBEDP are registered in the System for Award Management for other purposes, the Commission does not currently require persons to register before participating in its USF and other programs. Should the Commission require a party that is not already registered to do so when it initiates a suspension or debarment proceeding, or when it makes a final decision to suspend or debar the entity? How can we best implement our goal of reflecting future suspensions or debarments in the System for Award Management?

85. The rules under several USF-related programs, Mobility Fund I and II, and Rural Broadband Experiments under the Connect America Fund, already provide for the remedy of disqualification for recipients of support who fail to meet their obligations.[37] The Guidelines allow agencies to consider whether persons "disqualified" from specified nonprocurement transactions pursuant to a specific statute, executive order or legal authority other than the suspension and debarment process should be listed as excluded in the System for Award Management Exclusions (effectively debarring the disqualified person government-wide). Under our USF rules, disqualification only applies to participation in the USF program. Therefore, we propose that a disqualified person should be referred to the suspending and debarring official for a full suspension and/or debarment proceeding and would be listed by the Commission as excluded in the government-wide system only after an adverse determination in that proceeding. Alternatively, should we provide for automatic suspension or debarment of any entity disqualified under our USF rules?

86. In the case of the TRS program, a certification can be suspended or revoked for failure to meet any number of mandatory minimum standards, only some of which relate to fraudulent practices. In the case of the NDBEDP, many of the qualifications for certification of a state program relate to factors unrelated to fraudulent practices, and such certification can be suspended or revoked for failure to meet such qualifications. In other words, for both of these programs, it appears that causes for suspension and revocation under the existing procedures overlap with, but are not the same as, the proposed new suspension and debarment rules. We therefore propose that the procedures proposed in this document, if adopted, would be in addition to the existing program procedures, and seek comment on these proposals.

[37] In addition, under section 54.320(c) of our rules, eligible telecommunications carriers in the High-Cost program that fail to comply with public interest obligations or any other terms and conditions may be subject to reductions in support amounts, potential revocation of ETC designation, and suspension or debarment pursuant to current section 54.8 of our rules.

D. Application of Revised Rules to Conduct Occurring Prior to Their Effective Date

87. We propose, in appropriate cases, to authorize the suspending or debarring officer to apply any revised suspension and debarment rules to conduct in Commission programs that occurred before the effective date of such rules where expeditious suspension or debarment would be in the public interest to prevent or deter further harm to Commission programs. However, where that conduct has already resulted in settlements with the Commission by a party responsible for the alleged misconduct, no suspension or debarment of that party based on such antecedent conduct would be authorized if such party has and continues to comply with the settlement terms. We seek comment on this proposal.

88. We further seek comment on whether the ineligibility to participate in Commission programs based on inclusion on the System for Award Management exclusion list should be applicable to those exclusions made by another federal agency (whether for nonprocurement transactions or procurement transactions) only on or after the effective date of any revised Commission rules. If such a rule were adopted, would program participants who are required to check the System for Award Management exclusion list before entering into contracts be able to determine the date an exclusion was made and, if that information were not readily ascertainable, what alternative mechanisms would afford participants (or the Commission) the ability to distinguish whether an exclusion by another agency would trigger reciprocity or not by the Commission, based on when it went into effect?

89. Alternatively, if such exclusions were made by another federal agency before the effective date of revised Commission rules, should the Commission provide for ineligibility for Commission programs as a default, subject to review? For example, the Commission could provide for a transitional mechanism for three years or less[38] that would allow persons debarred

[38] The standard debarment period under the Guidelines is three years.

by other federal agencies before the effective date of the Commission's revised rules to seek expeditious review to determine whether an exception to the exclusion is warranted. We seek comment on this approach. Under this approach, if the Commission authorized exceptions to suspension and debarment, should it attach (where appropriate) conditions such as a compliance plan or audit mechanisms, at the discretion of the suspending or debarring officer? What special standards, if any, should be applied during such any transitional period to evaluate whether an exception to reciprocal suspension or debarment would be warranted?

90. Conversely, after any revised suspension and debarment rules become effective, would it be appropriate for the Commission to refer any entities suspended or debarred under current section 54.8 to GSA for inclusion on the government-wide System for Award Management exclusion list? We seek comment on this question. If the Commission determines that such referrals would be inappropriate, in whole or in part, then we propose that the Commission maintain its current separate listing of suspensions and debarments that predate any new rules (at least until such time as the applicable suspension and debarment periods have terminated), and propose that the term "excluded or exclusion" in the Guidelines shall include those individuals and entities previously suspended or debarred by the Commission, in addition to those included on the System for Award Management exclusion list. We would also propose to modify the obligations of participants to ensure that before entering into a covered transaction with persons at the next lower tier, the participant check both the Commission's listings of suspensions and debarments and the System for Award Management exclusions. We seek comment on this proposal. We also seek comments on any additional modifications that would be required to ensure that persons debarred or suspended by the Commission before the effective date of any new rules be deemed to be excluded persons.

E. Preclusion of Excluded Persons from Serving on Commission Advisory Committees

91. The appointment of members to federal advisory committees rests within the

discretion of the Commission as the appointing authority. We propose that any persons or entities that are debarred or suspended be barred (during their period of debarment or suspension, as shown by inclusion on the government-wide exclusion list) from serving on the Commission's advisory committees or comparable Commission groups or task forces established by the Commission. If a person or entity that is already a member of such an advisory group is suspended or debarred after an initial appointment to a Commission advisory group, we propose that such person or entity be removed from that position. We seek comment on these proposals.

IV. PROCEDURAL MATTERS

92. *Ex Parte Rules–Permit-but-Disclose*. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding,

and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

93. *Comment Period and Filing Procedures*. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: https://www.fcc.gov/ecfs/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one active docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

94. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

95. Availability *of Documents*. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., Room CY-A257, Washington, D.C. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

96. *Initial Regulatory Flexibility Analysis*. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix B of the NPRM and is summarized in Part V below. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the NPRM, and should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

97. *Paperwork Reduction Act Analysis*. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Pub. Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Pub. Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

98. Further *Information*. For additional information on this proceeding, contact Paula Silberthau of the Office of General Counsel at paula.silberthau@fcc.gov or (202) 418-1874.

99. *Statement of Authority*: This NPRM is authorized by sections 4(i), 4(j), 225, 254, and 719 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 225, 254, 620.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

100. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the Notice of Proposed Rulemaking (Notice). Written comments are requested on this IRFA. Comments must be identified as responses to the IRFA.

A. Need for, and Objectives of, the Proposed Rules

101. The Commission oversees a number of critical support programs such as the Universal Service Fund (USF) programs, the Telecommunications Relay Services (TRS) programs, and the National Deaf-Blind Equipment Distribution Program (NDBEDP). As part of its oversight role, the Commission seeks to protect these programs from waste, fraud, and abuse to ensure that government funds are efficiently used for their intended purposes. To date, in the USF context, the Commission's rules allows it to suspend and debar those against whom there has been a conviction or civil judgment arising from or related to USF programs.

102. In the Notice, the Commission has proposed to expand its arsenal of tools to root out bad actors more effectively and expeditiously by adopting new rules consistent with the Office of Management and Budget Guidelines to Agencies on Government Debarment and Suspension (Nonprocurement), 2 CFR part 180 (OMB Guidelines). The Commission proposes to apply any new suspension and debarment rules to transactions under the USF and TRS programs, which are its primary permanent nonprocurement programs, as well as to transactions under the

NDBEDP. Other Commission nonprocurement programs would be exempt. Significantly, under the OMB Guidelines, the Commission would have authority, like other government agencies, to evaluate the wrongful or fraudulent conduct of companies or individuals in other dealings with the government and to take remedial action before the issuance of a judgment or conviction. The Commission believes that adopting rules consistent with the OMB Guidelines will provide a more advantageous mechanism for deterring and stopping wrongdoing affecting agency programs.

103. The Commission's proposals in the Notice fall into three areas. First, the Commission proposes to apply the suspension and debarment rules to a broader category of entities than are now covered, by defining "covered transactions" as including conduct taken by participants in the USF, TRS, and NDBEDP programs, and by defining covered "tiers" of transactions, including those involving contractors of service providers in these programs. Second, the Commission proposes to adopt requirements that program participants confirm that those with whom they do business are not already excluded or disqualified from government activities. Such confirmation is consistent with the OMB Guidelines and many entities who participate in federal grant programs or seek federal contracts should already be familiar with the process. We seek comment on possible exceptions and how to implement the principle of reciprocity, which would prevent a party that is suspended or debarred by another agency from participation in covered Commission transactions. Third, again consistent with the OMB Guidelines, the Commission proposes new procedural requirements that would allow the agency to respond quickly to evidence of misconduct through a suspension mechanism, while providing for an evidentiary proceeding, evaluating a broader range of wrongful conduct than is now considered,[39] prior to any disbarment.

[39] The OMB Guidelines provide federal agencies with substantial discretion to suspend and debar participants based on consideration of numerous factors. Moreover, through imputation rules, action could be taken against an organization, not just a principal, or the reverse, in appropriate circumstances. The imputation rules too would plug a gap in the Commission's current suspension and debarment mechanism.

B. Description of the Small Entities To Which Proposed Rules Would Apply

104. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rule changes. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

105. *Small Businesses, Small Organizations, Small Governmental Jurisdictions*. The Commission's actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.

106. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

107. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[40] U.S. Census Bureau data

[40] 5 U.S.C. 601(5).

from the 2012 Census of Governments[41] indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,132 general purpose governments (county, municipal, and town, or township) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000. Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."

108. Small entities potentially affected by the proposals herein include eligible schools and libraries, eligible rural non-profit and public health care providers, and the eligible service providers offering them services, including telecommunications service providers, Internet Service Providers (ISPs), and vendors of the services and equipment used for telecommunications and broadband networks.

1. Schools and Libraries

109. As noted, "small entity" includes non-profit and small government entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools and libraries, an elementary school is generally "a non-profit institutional day or residential school, that provides elementary education, as determined under state law." A secondary school is generally defined as "a non-profit institutional day or residential school, that provides secondary education, as determined under state law," and not offering education beyond grade 12. A library includes "(1) a public library, (2) a public elementary school or secondary school library, (3) an academic library, (4) a research library . . . ,

[41] *See* 13 U.S.C. 161. The Census of Government is conducted every five (5) years compiling data for years ending with "2" and "7". *See also* Program Description, Census of Governments, https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#.

and (5) a private library, but only if the state in which such private library is located determines that the library should be considered a library for the purposes of this definition." For-profit schools and libraries, and schools and libraries with endowments in excess of $50,000,000, are not eligible to receive discounts under the program, nor are libraries whose budgets are not completely separate from any schools. Certain other statutory definitions apply as well. The SBA has defined for-profit, elementary and secondary schools and libraries having $6 million or less in annual receipts as small entities. In funding year 2007, approximately 105,500 schools and 10,950 libraries received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 105,500 schools and 10,950 libraries might be affected annually by our action, under current operation of the program.

2. Healthcare Providers

110. The healthcare providers that could be affected by the proposed rules in the NPRM include the following: Office of Physicians (except Mental Health Specialists); Offices of Physicians, Mental Health specialists; Offices of Dentists; Offices of Chiropractors; Offices of Optometrists; Offices of Mental Health Practitioners (except physicians); Offices of Physical, Occupational and Speech Therapists and Audiologists; Offices of Podiatrists; Office of all Other Miscellaneous Health Practitioners; Family Planning Centers; Outpatient Mental Health and Substance Abuse Centers; HMO Medical Centers; Freestanding Ambulatory Surgical and Emergency Centers; All other Outpatient Care Centers; Blood and Organ Banks; All Other Miscellaneous Ambulatory Health Care Services; Medical Laboratories; Diagnostic Imaging Centers; Home Health Care Services; Ambulance Services; Kidney Dialysis Centers; General Medical and Surgical Hospitals; Psychiatric and Substances Abuse Hospitals; Specialty (Except Psychiatric and Sustances Abuse) Hospitals; and Emergency and Other Relief Services.

3. Providers of Telecommunications and Other Services

111. The telecommunications service providers that could be affected by the proposed

rules include the following categories: Incumbent Local Exchange Carriers (LECs); Interexchange Carriers (IXCs); Competitive Access Providers; Operator Service Providers (OSPs);Local Resellers; Toll Resellers; Telecommunications Resellers; Wired Telecommunications Carriers; Wireless Telecommunications Carriers (except Satellite); Common Carrier Paging; Wireless Telephony (for which the closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite); Satellite Telecommunications; All Other Telecommunications.

112. The Internet Service Providers that could be affected by the proposed rules including the following categories: Internet Service Providers (Broadband); and Internet Service Providers (Non-Broadband).

113. The Vendors and Equipment Manufacturers that could be affected by the proposed rules include the following categories: Vendors of Infrastructure Development or "Network Buildout"; Telephone Apparatus Manufacturing; Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing; Other Communications Equipment Manufacturing; Administrative Management and General Management Consulting Services; Marketing Consulting Services; and Other Management Consulting Services.

C. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

114. The Notice proposes to adopt new rules consistent with the OMB Guidelines in 2 CFR part 180 in order to obtain additional tools to prevent fraud, waste, and abuse. The Commission proposes to apply any new suspension and debarment rules to transactions under the USF and TRS programs, its primary permanent nonprocurement programs, as well as transactions under the NDBEDP. Adopting such rules would impose certain new obligations on program participants, including: (1) requirements that program participants confirm that those with whom they do business are not already excluded or disqualified from government activities (which can be accomplished by checking the Government wide System for Award Management Exclusions

(SAM exclusion list), by a certification, or by addition of terms to the applicable transaction); and (2) mandatory disclosures for participants that may include (i) notification to the Commission and its program agents of whether any of the participants' principals have been either convicted, indicted or civilly charged by any government entity for certain offenses during the past three years, and (ii) notification of whether the participants are excluded or disqualified from participating in covered transactions. Any person suspended or debarred by a Commission order would be excluded from participation in any Commission programs (not just the program in which the bad actions occurred) and would be placed on the Government wide System for Award Management Exclusions , triggering reciprocity barring that person from participating in other government programs (including procurement transactions) unless the person were granted an exemption by another agency.

115. At this time, the Commission is not in a position to determine whether, if adopted, the potential rule changes raised in the Notice will require small entities to hire attorneys, engineers, consultants, or other professionals and cannot quantify the cost of compliance with the potential rule changes raised herein. The Notice seeks comment on these proposals, including the benefits and any adverse effects from joining the government-wide nonprocurement suspension and debarment system, as well as on alternative approaches and any other steps we should consider taking. The Notice also seeks comment on how broadly this proposed rule should apply in terms of program transactions and persons covered, and how it should be implemented. We expect the information we receive in comments on our proposals to help the Commission identify and evaluate relevant matters for small entities, including compliance costs and other burdens that may result from the matters raised in the Notice.

D. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

116. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include

the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."

117. The Commission has taken several steps that may minimize the economic impact for small entities if the proposals in the Notice are adopted. We ask whether short-form applications to participate in competitive bidding for USF support should be excluded from the scope of covered transactions for purposes of suspension and debarment rules or possibly be subject to different participant disclosure rules. We also propose to exempt incentive auction payments associated with the auction of new spectrum licenses from the scope of "covered transactions" subject to suspension and debarment rules. Similarly, the Commission proposes to exempt payments related to the broadcast incentive auctions, including reimbursement payments from any suspension and debarment rules that are adopted. With regard to the disclosure requirements that would be applicable if the OMB Guidelines are adopted, we anticipate that these requirements can be implemented with modifications to existing program forms and certification rules rather than fashioning new and additional forms which could increase the administrative burden for small entities.

118. The economic impact for small entities may also be minimized as a result of the Commission's proposal to adopt a minimum dollar value threshold for certain transactions in order for suspension and debarment rules to apply. More specifically, the *NPRM* proposes that the suspension and debarment rules should apply to all contractors, subcontractors, suppliers, consultants or any agent or representative thereof for USF, TRS, or NDBEDP transactions only where those transactions are expected to equal or exceed $25,000, subject to certain exceptions. Therefore, small entities that do not meet the transaction threshold amount may be able to avoid

application of any adopted suspension and debarment requirements provided they do not fall into one of the threshold exceptions. The Notice proposes that the $25,000 threshold not be applicable where a party to the transaction would have a material role affecting claims for reimbursement under the Commission programs or if the party is a "principal" to the transaction. An exception to the threshold amount is also proposed for contracts or awards under the Lifeline program for those transactions in which a person is reimbursed based on commission or by Lifeline subscribers enrolled. The Notice seeks comment on these proposals.

119. To assist in the Commission's evaluation of the economic impact on small entities, and to better explore options and alternatives, the Commission has sought comment from the parties on the above proposals and other matters discussed in the Notice. We expect to more fully consider the economic impact on small entities following our review of comments filed in response to the Notice in reaching our final conclusions and promulgating rules in this proceeding.

E. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

120. If the Commission adopts rules consistent with the OMB Guidelines, such rules would replace those Commission rules that currently provide for different suspension and debarment procedures. At present, the Commission rules addressing suspension and debarment are codified in 47 CFR § 54.8 and apply only to USF programs. If the Commission adopts new rules as proposed in the Notice, we anticipate that the Commission would repeal the existing suspension and debarment rules in section 54.8. If commenters suggest that any other rules now in effect duplicate, overlap, or conflict with the rules proposed in the Notice, the Commission will closely review and consider those situations.

List of Subjects in 47 CFR Part 16

Administrative practice and procedure, Common Carriers, Communications, Communications common carriers, Communications Equipment, Subsidies, Telecommunications, Telephone

For the reasons discussed in the preamble, the Federal Communications Commission proposes to add a new part 16 to chapter I, subchapter A of title 47 of the Code of Federal Regulations:

PART 16—NONPROCUREMENT DEBARMENT AND SUSPENSION

1. Add part 16 to read as follows:

Subpart A—General

Sec.

Subpart B—Covered Transactions

Sec.

Subpart C—Responsibilities of Participants Regarding Transactions Doing Business With Other Persons

Sec.

16.517 What is the scope of a limited denial of participation?

16.519 May the FCC impute the conduct of one person to another in a limited denial of participation?

16.521 What is the effect of a suspension or debarment on a limited denial of participation?

16.523 What is the effect of a limited denial of participation on a suspension or a debarment?

16.525 May a limited denial of participation be terminated before the term of the limited denial of participation expires?

16.527 How is a limited denial of participation reported?

Authority: 47 U.S.C. 154, 225, 254, 620; Sec. 2455, Pub. L. 103-355, 108 Stat. 3327 (31 U.S.C. 6101 note); E.O. 11738 (3 CFR, 1973 Comp., p. 799); E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235)

Subpart A—General

§ 16.100 Supplemental definitions.

In addition to the definitions set forth in subpart I of 2 CFR Part 180, for purposes of this part,

(a) The term "E-Rate Program" means the program providing universal service support for schools and libraries, as set forth in part 54, subparts A and F of the Commission's rules.

(b) The term "Eligible Telecommunications Carrier" means an Eligible Telecommunications Carrier as defined in section 54.5 of the Commission's rules.

(c) The term "Guidelines" means the OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement), as set forth in 2 CFR part 180.

(d) The term "High-Cost Program" means the programs providing universal service support for rural, insular, and high cost areas, as set forth in part 54, subparts A, B, C, D, J, K, L, M, and O of the Commission's rules.

(e) The term "Lifeline Program" means the program providing universal service support for low-income consumers set forth in part 54, subparts A, B, C and E of the Commission's rules.

(f) The term "NDBEDP" means the National Deaf-Blind Equipment Distribution Program, under which payments from the TRS Fund are made to support programs distributing communications equipment to low-income individuals who are deaf-blind, pursuant to Chapter 64, subpart GG of the Commission's rules, 47 CFR 64.6201 *et seq*.

(g) The term "NDBEDP Administrator" means the administrator of the NDBEDP.

(h) The term "Principal" means, in addition to those individuals described at 2 CFR 180.995, any person who has a critical influence on, or substantive control over, a covered transaction, whether or not employed by the participant or paid with federal funds. Persons who have a critical influence on, or substantive control over, a covered transaction may include, but are not limited to: management and marketing agents, accountants, consultants, investment bankers, engineers, attorneys, and other professionals who are in a business relationship with participants in connection with a covered transaction under an FCC program.

(i) The term "Rural Health Care Program" means the program providing universal service support for health care providers set forth in part 54, subparts A and G of the Commission's rules.

(j) The term "SAM Exclusions" means the System for Award Management Exclusions, which is a widely available source of the most current information about persons who are excluded or disqualified from covered transactions, as further described in subpart E of 2 CFR part 180.

(k) The term "TRS Programs" means all programs described in Chapter 64, subpart F of the Commission's rules.

(l) The term "TRS Fund Administrator" means the entity selected as the administrator of the Telecommunications Relay Services Fund pursuant to 47 CFR 64.604(c)(5)(iii).

(m) The term "USF Programs" means the programs implementing the Universal Service Fund pursuant to section 254 of the Communications Act of 1934, as amended, 47

U.S.C. 254.

(n) The term "USF Administrator" means the administrator of the universal service mechanisms appointed pursuant to section 54.701 of the Commission's rules, 47 CFR 54.701.

§ 16.105 What does this part do?

In this part, the Federal Communications Commission ("FCC" or "Commission") adopts, as Commission policies, procedures, and requirements for nonprocurement debarment and suspension, the Guidelines in subparts A through I of 2 CFR part 180, as supplemented by this part. This adoption thereby gives regulatory effect for the FCC to the Guidelines, as supplemented by this part. All persons affected by these rules should consult the Guidelines in subparts A through I of 2 CFR part 180 in order to be informed of all the provisions of the suspension and debarment rules (as supplemented by this part).

§ 16.110 Does this part apply to me?

This part and, through this part, pertinent portions of subparts A through I of 2 CFR part 180 (see table at 2 CFR § 180.100(b)), apply to you if you are a—

(a) "Participant" or "principal" in a "covered transaction" under subpart B of 2 CFR part 180, as supplemented by this part;

(b) Respondent in a Commission suspension or debarment action;

(c) Commission debarment or suspension official; or

(d) Commission official, or agent, authorized to enter into any type of nonprocurement transaction that is a covered transaction.

§ 16.115 What policies and procedures must I follow?

The Commission policies and procedures that you must follow are the policies and procedures specified in each applicable section of the Guidelines in subparts A through I of 2 CFR part 180, as that section is supplemented by this part. The transactions that are covered transactions, for

example, are specified by section 220 of the Guidelines (i.e., 2 CFR 180.220), as supplemented by section 16.220 in this part. For any section of Guidelines in subparts A through I of 2 CFR 180.5 that has no corresponding section in this part, Commission policies and procedures are those in the Guidelines.

§ 16.120 Who in the Commission may grant an exception to let an excluded person participate in a covered transaction? And what considerations should be relevant?

(a) The Chairman of the Commission or designee may grant an exception permitting an excluded person to participate in a particular covered transaction. If the Chairman or a designee grants an exception, the exception must be in writing and state the reason(s) for deviating from the governmentwide policy in Executive Order 12549.

(b) In evaluating whether to grant an exception, the Chairman or designee shall consider whether the excluded person, if a provider of services under any Commission program, may be the sole source of services in any affected areas and whether, as a result, the exclusion of that person could put consumers and/or program beneficiaries at risk of losing services. The Chairman or designee may exercise their discretion in considering any other factors that may be relevant to the exception determination, and if an exception is granted, shall explain those considerations in any exception decision.

(c) When a person is excluded by another agency, the Chairman or designee may also grant an exception for a limited time period to afford the Commission an opportunity to evaluate the effect of the exclusion on program beneficiaries.

(d) Any exception granted under this section may also be subject to appropriate conditions, such as the agreement by the excepted person to mandatory audits, additional reporting requirements, compliance plans or monitoring, or similar forms of oversight in addition to those otherwise provided by the FCC programs.

§ 16.125 What are exempted Commission transactions?

Any transactions involving the Commission that are not related to or do not arise in connection with the USF Programs, the TRS Programs, or the NDBEDP shall be exempted transactions under this part.

Subpart B—Covered Transactions

§ 16.200 What additional transactions are covered transactions?

For purposes of determining what is a covered transaction under 2 CFR 180.200 of the Guidelines, this part applies to any transaction at the primary tier between a person and the Commission or any agents of the Commission, including the USF Administrator, which administers the USF programs as agent for the Commission, the TRS Fund Administrator, which administers the TRS programs as agent for the Commission, and the NDBEDP Administrator, which administers the NDBEDP, as agent for the Commission. For purposes of 2 CFR 180.200, any transactions between two primary tier participants (as clarified by section 16.340 in this part), other than the Commission, shall be considered to be a transaction at a lower tier within the meaning of subsection (b) of 2 CFR § 180.200.

§ 16.220 What contracts and subcontracts, in addition to those listed in 2 CFR § 180.220, are covered transactions?

In addition to the contracts covered under 2 CFR 180.220 of the Guidelines, this part applies to additional lower tiers of transactions supported by the Commission's programs involving the participants described below. This rule extends the coverage of the Commission nonprocurement suspension and debarment requirements to all lower tiers of contracts or subcontracts (regardless of tier) awarded under covered nonprocurement transactions, as permitted under the Guidelines at 2 CFR 180.220(c) (see optional lower tier coverage in the figure in the appendix to 2 CFR part 180).

(a) For the High-Cost Program, contractors, subcontractors, suppliers, consultants, or their agents or representatives for High-Cost supported transactions, if:

(1) Such person has a material role relating to, or significantly affecting, claims for disbursements related to the program;

(2) Such person is considered a "principal"; or

(3) The amount of the transaction is expected to be at least $25,000.

(b) For the Lifeline Program:

(1) Any participant in the Lifeline program (except for the primary tier carrier), regardless of tier or dollar value, that is reimbursed based on the number of Lifeline subscribers enrolled, commissions, or any combination thereof; and

(2) Contractors, subcontractors, suppliers, consultants, or their agents or representatives and third-party marketing organizations for Lifeline-supported transactions, if

(i) Such person has a material role relating to, or significantly affecting, claims for disbursements related to the program;

(ii) Such person is considered a "principal"; or

(iii) The amount of the transaction is expected to be at least $25,000.

(c) For the E-Rate Program, contractors, subcontractors, suppliers, consultants, or their agents or representatives for E-Rate-supported transactions if:

(1) Such person has a material role relating to, or significantly affecting, claims for disbursements related to the program;

(2) Such person is considered a "principal"; or

(3) The amount of the transaction is expected to be at least $25,000.

(d) For the RHC Program, contractors, subcontractors, suppliers, consultants, or their agents or representatives for RHC-supported transactions if:

(1) Such person has a material role relating to, or significantly affecting, claims for disbursements related to the program;

(2) Such person is considered a "principal"; or

(3) The amount of the transaction is expected to be at least $25,000.

(e) For the TRS Programs and the NDBEDP, contractors, subcontractors, suppliers, consultants, or their agents or representatives for TRS- or NDBEDP-supported transactions, if:

(1) Such person has a material role relating to, or significantly affecting, claims for disbursements related to the program;

(2) Such person is considered a "principal"; or

(3) The amount of the transaction is expected to be at least $25,000. For the TRS programs (other than TRS that is provided through state programs) and the NDBEDP, the service providers are the certificated entities that are reimbursed by the Commission and the TRS Fund administrator for providing services and equipment under the covered transactions. For TRS that is provided through state TRS programs, the service providers are the TRS providers that are authorized by each state to provide intrastate TRS under the state program and that, accordingly, are compensated by the TRS Fund for the provision of interstate TRS.

Subpart C—Responsibilities of Participants Regarding Transactions Doing Business With Other Persons

§ 16.300 What must I do before I enter into a covered transaction with another person at the next lower tier? (FCC supplement to 2 CFR 180.300)

(a) You, as a participant, are responsible for determining whether you are entering into a covered transaction with an excluded or disqualified person. You may decide the method by which you do so using any of the methods described in 2 CFR 180.300.

(b) In the case of an employment contract, the FCC does not require employers to check the SAM Exclusions before making salary payments pursuant to that contract.

§ 16.330 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?

To communicate the requirements to lower tier participants, you must include a term or condition in the transaction requiring compliance with subpart C of the Guidelines in 2 CFR part 180, as supplemented by this subpart.

§ 16.335 Additional information disclosures for lower tier participants

(a) Before entering into a covered transaction at any lower tier, all lower tier participants shall be obligated to notify and disclose to the higher tier participant with whom it is doing business the information described in 2 CFR 180.335 (pertaining to disclosures by primary tier participants). If the lower tier participant is participating in competitive bidding to provide services to the higher tier participant, such information must be disclosed at the time the bid is submitted. Any such disclosures must be simultaneously submitted to the USF Administrator (for transactions related to or arising in connection with USF programs), to the TRS Fund Administrator (for transactions relating to TRS programs), to the NDBEDP Administrator (for transactions relating to the NDBEDP) and to the FCC (at the addresses identified in paragraph (b) of this section). Any disclosures made under this rule will not necessarily cause other participants to deny your participation in the covered transaction, but will be considered a relevant factor in evaluating the transaction. The provisions of 2 CFR 180.345 shall be applicable to any failures to disclose under this rule and, in addition, any such failure to disclose shall permit the higher tier participant (with whom the lower tier participant is doing business) to terminate the transaction for failure to comply with its terms and condition, or to pursue any other available remedies. Participants subject to this rule shall also comply with 2 CFR 180.350, requiring notifications upon learning new information, and such notifications shall be provided not only to the USF Administrator, the TRS Fund Administrator, the NDBEDP Administrator, and to the FCC, but also to the higher tier participant (with whom the lower tier participant is doing business).

(b) The disclosures required by 2 CFR 180.335 through 180.350 of the Guidelines shall be made not only to the Commission, but also to the USF Administrator (for transactions related to or arising in connection with USF Programs), to the TRS Fund Administrator (for transactions relating to TRS Programs), and to the NDBEDP Administrator (for transactions relating to the NDBEDP). Disclosures to the Commission regarding the USF Program shall be submitted via email to [address] or via mail to the Federal Communications Commission, Telecommunications

Access Policy Division, Wireline Competition Bureau, at the Commission's address specified in 47 CFR 0.401(a). Disclosures to the USF Administrator shall be submitted via email to [address] or via mail to: Universal Service Administrative Co., 700 12th Street, NW, Suite 900, Washington, DC 20005. Disclosures to the TRS Fund Administrator shall be submitted via email to [address] or to: TRS Fund Administrator, 4450 Crums Mill Road, Suite 303, Harrisburg, PA 17110. Disclosures to the NDBEDP Administrator shall be submitted via email to [address] or to: NDBEDP Administrator, Federal Communications Commission, Disability Rights Office, at the Commission's address specified in 47 CFR 0.401(a).

§ 16.340 Clarification of tiers related to Commission programs

(a) For the E-Rate Program and the Rural Health Care Program, the primary tier participants shall be both the schools or libraries (or consortia) that submit applications to the USF Administrator (for the E-Rate program) or the health care providers (including consortia) that submit applications to the USF Administrator (for the Rural Health Care Program), as well as the service providers selected by these applicants.

(b) For the High-Cost Program, the Lifeline Program, and the TRS Programs, the primary tier participants shall be the service providers that request and receive support from the USF Administrator and TRS Fund Administrator, respectively.

(c) For the NDBEDP, the primary tier participants shall be the certified programs that request and receive reimbursements from the NDBEDP Administrator.

Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions

§ 16.435 What method should the Commission or participants use to implement the requirements described in the Guidelines at 2 CFR 180.435?

To implement the requirements described in 2 CFR 180.435, the Commission may require as a condition of participation in the USF or TRS programs or the NDBEDP that participants:

(a) Comply with subpart C of 2 CFR part 180, as supplemented by this part, and

(b) Communicate the requirement to comply with subpart C of 2 CFR part 180, as supplemented by this part, to persons at the next lower tier with whom the participant enters into covered transactions. The Commission, or the USF, TRS Fund, or NDBEDP Administrators, may also obtain an assurance or certification of compliance at the time of application for approval of the covered transaction or upon submission of an invoice for payment.

§ 16.440 Who conducts fact finding for FCC suspensions?

In all FCC suspensions, the official designated as the Suspending Official shall be responsible for conducting additional proceedings where disputed material facts are challenged unless another person is designated to serve as fact finder by the Chairman of the Commission.

§ 16.445 Who conducts fact finding for FCC debarments?

In all FCC debarments, the official designated as the Debarring Official shall be responsible for conducting additional proceedings where disputed material facts are challenged unless another person is designated to serve as fact finder by the Chairman of the Commission.

§ 16.450 What additional factors should the Commission consider for suspension or debarment determinations?

(a) In addition to the causes for debarment described under the Guidelines at 2 CFR 180.800 (which are also applicable to suspension determinations under 2 CFR 180.700), the suspending or debarment official may also take the following factors into consideration: whether the person is a repeat offender of Commission rules; habitual non-payment or under-payment of Commission regulatory fees or of required contributions to FCC programs such as USF or TRS; the willful or grossly negligent submission of FCC forms or statements or other documentation to the FCC or to the USF Administrator, TRS Fund Administrator, or NDBEDP Administrator that result in or could result in overpayments of federal funds to the recipients; the willful or grossly negligent violation of a statutory or regulatory provision applicable to the USF programs, TRS program or the NDBEDP; and the willful or habitual failure to respond to requests made by the FCC or the USF, TRS Fund, or NDBEDP

administrators for additional information to justify payment or continued operation under their certifications.

(b) As used in the Guidelines at 2 CFR 180.800(b), the term "public agreement or transaction" shall encompass contracts between USF program applicants and their selected service providers and/or consultants or other principals.

§ 16.455 What Commission alternatives to suspension or debarment may be appropriate?

If the suspending or debarment official determines that circumstances justify an alternative to suspension or debarment, such as when a participant's suspension or debarment could have a substantial detrimental impact on the provision of services under a Commission program, then the official, in his or her discretion, may temporarily suspend the suspension or debarment proceedings and refer the case to [the Chief, Enforcement Bureau]. The [Chief] shall have discretion to evaluate and decide whether, in lieu of suspension or debarment, the [Enforcement Bureau] or Commission should condition the participant's continued participation upon agreement to additional requirements on the transaction that may include, among other things, transitioning beneficiaries to other providers, replacing principals, or agreeing to an appropriate compliance plan (with strict oversight and audits).

§ 16.460 What must I do to be reinstated after my period of debarment is over?

A debarment official may determine that a person's conduct is so egregious that the debarred party must petition for readmission into FCC programs after the debarment period is over. In that case, the debarred party as petitioner must demonstrate that it has taken sufficient remedial actions to avoid future program violations. In the absence of such a determination in the debarment decision, reinstatement will be automatic once the debarment period is over.

Subpart E—Limited Denial of Participation

§ 16.501 What is a limited denial of participation?

A limited denial of participation excludes a specific person from participating in a specific FCC program or programs for a specific period of time. The decision to impose a limited denial of

participation is discretionary and based on the best interests of the federal government. For purposes of this subpart, the term "person" shall have the same meaning as set forth in 2 CFR 180.985.

§ 16.503 Who may issue a limited denial of participation?

The Chairperson designates FCC officials who are authorized to impose a limited denial of participation affecting any participant, or their affiliates, or both. A limited denial of participation is normally issued by the chief of a bureau responsible for administering an FCC program.

§ 16.505 When may a Commission official issue a limited denial of participation?

(a) An authorized FCC official may issue a limited denial of participation against a person, based upon adequate evidence of any of the following causes:

(1) Approval of an applicant for a USF Program, a TRS Program, or the NDBEDP would constitute an unsatisfactory risk;

(2) There are irregularities in a person's current and/or past performance in an FCC program;

(3) The person has failed to honor contractual obligations or abide by FCC regulations associated with an FCC program;

(4) The person has documented deficiencies in ongoing FCC programs;

(5) The person has made a false certification in connection with any FCC program, whether or not the certification was made directly to the FCC;

(6) The person has committed any act or omission that would be cause for debarment under 2 CFR 180.800;

(7) The person has violated any law, regulation, or procedure relating to an FCC program; or

(8) The person has made or procured to be made any false statement for the purpose of influencing in any way an action of the Commission.

(b) Filing of a criminal indictment or information shall constitute adequate evidence for the purpose of limited denial of participation actions. The indictment or information need not be based on offenses against the Commission.

(c) Imposition of a limited denial of participation related to any other FCC program shall constitute adequate evidence for a concurrent limited denial of participation for another FCC program. Where such a concurrent limited denial of participation is imposed, participation may be restricted on the same basis without the need for an additional conference or further hearing.

(d) An affiliate or organizational element may be included in a limited denial of participation solely on the basis of its affiliation, and regardless of its knowledge of or participation in the acts providing cause for the sanction. The burden of proving that a particular affiliate or organizational element is not controlled by the primary sanctioned party (or by an entity that itself is controlled by the primary sanctioned party) is on the affiliate or organizational element. For purposes of this subsection, the term "affiliate" shall have the same meaning as provided by 2 CFR 180.905.

§ 16.507 When does a limited denial of participation take effect?

A limited denial of participation is effective immediately upon issuance of the notice unless the notice otherwise specifies.

§ 16.509 How long may a limited denial of participation last?

A limited denial of participation may remain in effect up to 12 months.

§ 16.511 How does a limited denial of participation start?

A limited denial of participation is made effective by providing the person, and any specifically named affiliate, with notice:

(a) That the limited denial of participation is being imposed;

(b) Of the cause(s) under § 16.505 of this part for the sanction;

(c) Of the potential effect of the sanction, including the length of the sanction and the FCC program(s) and geographic area (if relevant) affected by the sanction;

(d) Of the right to request, in writing, within 30 days of receipt of the notice, a conference under § 16.513(a) of this part; and

(e) Of the right to contest the limited denial of participation under § 16.513 of this part.

§ 16.513 How may I contest my limited denial of participation?

(a) Within 30 days after receiving a notice of limited denial of participation, you may request a conference with the official who issued such notice. The conference shall be held within 15 days after the Commission's receipt of the request for a conference, unless you waive this time limit. The official or designee who imposed the sanction shall preside. At the conference, you may appear with a representative and may present all relevant information and materials to the official or designee. Within 20 days after the conference, or within 20 days after any agreed-upon extension of time for submission of additional materials, the official or designee shall, in writing, advise you of the decision to terminate, modify, or affirm the limited denial of participation. If all or a portion of the remaining period of exclusion is affirmed, the notice of affirmation shall advise you of the opportunity to contest the notice and to request a hearing before an attorney within the Enforcement Bureau so designated for this function by the Chairman of the Commission. You have 30 days after receipt of the notice of affirmation to request this hearing.

(b) You may skip the conference with the official and you may request a hearing before an attorney within the Enforcement Bureau so designated for this function by the Chairman of the Commission. This must also be done within 30 days after receiving a notice of limited denial of participation. If you opt to have a hearing before an attorney within the Enforcement Bureau, you must submit your request to [address]. The designated attorney within the Enforcement Bureau will issue findings of fact and make a recommended decision. The sanctioning official who issued the initial notice will then make a final decision, as promptly as possible, after the recommended decision is issued. The sanctioning official may reject the recommended decision or any findings of fact, only after specifically determining that the decision or any of the facts are arbitrary, capricious, or clearly erroneous.

(c) In deciding whether to terminate, modify, or affirm a limited denial of participation, the Commission official or designee may consider the factors listed at 2 CFR 180.860. The

designated attorney within the Enforcement Bureau may also consider the factors listed at 2 CFR 180.860 in making any recommended decision.

§ 16.515 Do Federal agencies coordinate limited denial of participation actions?

Federal agencies do not coordinate limited denial of participation actions. As stated in § 16.501 of this part, a limited denial of participation is an FCC-specific action and applies only to FCC activities.

§ 16.517 What is the scope of a limited denial of participation?

The scope of a limited denial of participation is as follows:

(a) A limited denial of participation generally extends only to participation in the program(s) under which the cause arose. A limited denial of participation may, at the discretion of the authorized official, extend to other programs, initiatives, or functions within the jurisdiction of the FCC. The authorized official, however, may determine that where the sanction is based on an indictment or conviction, the sanction shall apply to all programs throughout the FCC.

(b) For purposes of this subpart, participation includes receipt of any benefit or financial assistance through subsidies, grants, or contractual arrangements; benefits or assistance in the form of any loan guarantees or insurance; awards of procurement contracts; or any other arrangements that benefit a participant in a covered transaction.

(c) The sanction may be imposed for a period not to exceed 12 months, and may be imposed on either a nationwide or a more restricted basis.

§ 16.519 May the FCC impute the conduct of one person to another in a limited denial of participation?

For purposes of determining a limited denial of participation, the Commission may impute conduct as follows:

(a) Conduct imputed from an individual to an organization. The Commission may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the

improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval, or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence.

(b) Conduct imputed from an organization to an individual or between individuals. The Commission may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed participated in, had knowledge of, or had reason to know of the improper conduct.

(c) Conduct imputed from one organization to another organization. The Commission may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association, or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control, or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval, or acquiescence.

§ 16.521 What is the effect of a suspension or debarment on a limited denial of participation?

If you have submitted a request for a hearing pursuant to § 16.513(b) of this part, and you also receive, pursuant to subpart A of this part, a notice of proposed debarment or suspension that is based on the same transaction(s) or the same conduct as the limited denial of participation, as determined by the debarring or suspending official, the following rules shall apply:

(a) During the 30-day period after you receive a notice of proposed debarment or suspension, during which you may elect to contest the debarment under 2 CFR 180.815, or the suspension

pursuant to 2 CFR 180.720, all proceedings in the limited denial of participation, including discovery, are automatically stayed.

(b) If you do not contest the proposed debarment pursuant to 2 CFR 180.815, or the suspension pursuant to 2 CFR 180.720, the final imposition of the debarment or suspension shall also constitute a final decision with respect to the limited denial of participation, to the extent that the debarment or suspension is based on the same transaction(s) or conduct as the limited denial of participation.

(c) If you contest the proposed debarment pursuant to 2 CFR 180.815, or the suspension pursuant to 2 CFR 180.720, then:

(1) Those parts of the limited denial of participation and the debarment or suspension based on the same transaction(s) or conduct, as determined by the debarring or suspending official, shall be immediately consolidated before the debarring or suspending official.

(2) Proceedings under the consolidated portions of the limited denial of participation shall be stayed before the hearing officer until the suspending or debarring official makes a determination as to whether the consolidated matters should be referred to a hearing officer. Such a determination must be made within 90 days of the date of the issuance of the suspension or proposed debarment, unless the suspending/debarring official extends the period for good cause.

(3) If the suspending or debarring official determines that there is a genuine dispute as to material facts regarding the consolidated matter, the entire consolidated matter will be referred to the designated hearing official within the Enforcement Bureau hearing the limited denial of participation, for additional proceedings pursuant to 2 CFR 180.750 or 180.845.

(4) If the suspending or debarring official determines that there is no dispute as to material facts regarding the consolidated matter, jurisdiction of the designated attorney within the Enforcement Bureau to hear those parts of the limited denial of participation based on the same transaction[s] or conduct as the debarment or suspension, as determined by the

debarring or suspending official, will be transferred to the debarring or suspending official, and the hearing officer responsible for hearing the limited denial of participation shall transfer the administrative record to the debarring or suspending official.

(5) The suspending or debarring official shall hear the entire consolidated case under the procedures governing suspensions and debarments, and shall issue a final decision as to both the limited denial of participation and the suspension or debarment.

§ 16.523 What is the effect of a limited denial of participation on a suspension or a debarment?

The imposition of a limited denial of participation does not affect the right of the Commission to suspend or debar any person under this part.

§ 16.525 May a limited denial of participation be terminated before the term of the limited denial of participation expires?

If the cause for the limited denial of participation is resolved before the expiration of the 12–month period, the official who imposed the sanction may terminate it.

§ 16.527 How is a limited denial of participation reported?

When a limited denial of participation has been made final, or the period for requesting a conference pursuant to section 16.513(a) has expired without receipt of such a request, the official imposing the limited denial of participation shall notify the Enforcement Bureau and the USF Administrator, the TRS Fund Administrator and the NDBEDP Administrator of the scope of the limited denial of participation.

Federal Communications Commission.

Katura Jackson,
Federal Register Liaison Officer.
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