



Debarment and Suspension Provisions Applicable to Federal Grant Programs

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March 24, 2010

Congressional Research Service

7-....

www.crs.gov

R40993

Summary

Federal agencies have general authority to debar or suspend persons from participating in federal grant programs and other nonprocurement transactions. Grounds for debarment of a federal grantee include criminal or civil convictions for various crimes including fraud, embezzlement, theft, bribery, tax evasion, and making up false claims, among others, as well as other causes indicating a person is not “presently responsible” as a federal grantee. Debarment and suspension in the context of federal grant programs is described in each agency’s regulations, and such provisions may vary for individual programs depending upon the grant program’s authorizing statute. Executive Order 12549, issued by President Ronald Reagan, directed the Office of Management and Budget (OMB) to issue government-wide criteria for debarment and suspension in federal grants and further directed executive departments and agencies to issue regulations consistent with OMB’s guidelines. OMB’s government-wide guidelines may be found at 2 C.F.R. Part 180. The issue of debarment and suspension for federal grant recipients is particularly timely given Congress’s interest in the activities of the Association of Community Organizations for Reform Now (“ACORN”) and its affiliates. Title VI of H.R. 3221, which was passed by the House in September of 2009, barred certain organizations (including ACORN) from receiving federal grants and contracts under certain circumstances, such as an indictment for a violation of various campaign finance or election laws. This legislation, along with similar legislative vehicles, prompted interest in the current status of debarment and suspension in the context of federal grant programs. This report discusses the background of debarment and suspension for federal grant programs, the specific rules established by OMB, and related legislation and activities in the 111th Congress.

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Background

On February 18, 1986, President Ronald Reagan signed Executive Order 12549, “Debarment and Suspension.”¹ This executive order was intended to “curb fraud, waste, and abuse in Federal programs, increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension of participants in Federal programs.”² It specifically covered such federal activities as “grants, cooperative agreements, contracts of assistance, loans, and loan guarantees,” but did not include federal procurement programs.³

The order directed the Office of Management and Budget (OMB) to issue guidelines for its implementation, including which agencies were covered and the “government-wide criteria [for debarment and suspension] and government-wide minimum due process procedures.”⁴ It further directed executive departments and agencies to issue regulations consistent with OMB’s guidelines.⁵ Thus, the OMB guidelines are applicable to individual grantees through each agency’s regulations that incorporate the government-wide guidelines.

OMB first issued guidelines in 1987. Executive departments and agencies adopted a government-wide common rule in 1988 that was consistent with the guidelines and revised the rule in 2003. OMB revised this rule again in 2006 and placed it in the Code of Federal Regulations as guidance.⁶ Most agencies already have adopted this rule into their own regulations along with any additions or exceptions that specifically apply to the individual agency.⁷

OMB Guidelines for Debarment and Suspension

OMB’s government-wide guidance for debarment and suspension in federal grant programs is found at 2 C.F.R. Part 180. Federal agencies use this guidance to promulgate their own regulations for debarment and suspension, and a grantee must look at the individual agency’s regulations for the specific rules that affect grants with that agency. Although OMB’s guidelines are not considered mandatory, it is useful to look at them for a general understanding of the common rules pertaining to debarment and suspension in federal grant programs.

¹ 51 Fed. Reg. 6370 (Feb. 18, 1986).

² *Id.* In addition to debarment and suspension of persons, federal agencies have the authority to order appropriate remedial action when a grantee is not complying with applicable grant requirements. These remedies may include suspension or termination of the grant agreement, as well as disallowing grant costs and requiring the return of grant funds to the federal government.

³ *Id.* at §§ 1(b)-(c). Other activities not covered by the Executive Order include “direct Federal statutory entitlements or mandatory awards, direct awards to foreign governments or public international organizations, benefits to an individual as a personal entitlement, or Federal employment.” *Id.*

⁴ *Id.* at § 6.

⁵ *Id.* at § 3. Under the order, agencies were directed to submit their proposed regulations to OMB for review.

⁶ 2 C.F.R. Part 180.

⁷ These regulations that are adopted by the agencies give regulatory effect to the OMB Guidelines as supplemented by the individual agency. Most agencies’ regulations are found at 2 C.F.R. Subtitle B, which starts at Part 376.

Applicability of the Debarment and Suspension Provisions

The debarment and suspension provisions found in the OMB guidelines apply to a “[p]erson who has been, is, or may reasonably be expected to be, a participant or principal in a covered transaction,”⁸ as well as “a person against whom a Federal agency has initiated a debarment or suspension action.”⁹ A “person” is defined as “any individual, corporation, partnership, association, unit of government, or legal entity, however organized.”¹⁰ The provisions also apply to agency officials who have authority to enter into “covered transactions” and who have authority to debar or suspend grantees.¹¹

Under the guidelines, “covered transactions” include nonprocurement transactions, which are defined as “any transaction, regardless of type (except procurement contracts),” such as grants and cooperative agreements.¹² A few nonprocurement transactions are not considered “covered transactions” for the purposes of the debarment and suspension rules. These transactions include direct awards to foreign entities or public international organizations, individual benefits that are personal entitlements (such as social security benefits under the Supplemental Security Income provisions of the Social Security Act), federal employment, those related to national or agency-recognized emergencies, permits for regulating “public health, safety or the environment” unless specifically designated otherwise, incidental benefits from “ordinary government operations,” and transactions that are exempted from coverage by law.¹³

“Covered transactions” also include “some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions,”¹⁴ such as a contract or subcontract for goods and services for at least \$25,000 or a contract requiring the consent of a federal agency official, regardless of amount.¹⁵ However, “procurement contracts awarded directly by a Federal agency” are not covered.¹⁶

The guidelines distinguish between two types of covered transactions: “primary tier” and “lower tier.” A “primary tier covered transaction” is one “between a Federal agency and a person,” and a

⁸ 2 C.F.R. § 180.120(a). A “principal” is defined as “[a]n officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or ... [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 influencing the development or outcome of an activity required to perform the covered transaction.” *Id.* at § 180.995.

⁹ *Id.* at § 180.120(b).

¹⁰ *Id.* at § 180.985.

¹¹ *Id.* at §§ 180.120(c)-(d).

¹² *Id.* at § 180.970(a)(1)-(2). The guidelines also include the following in their definition of nonprocurement transactions: scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurances, payments for specified uses, and donation agreements. *Id.* at § 180.970(a)(3)-(11). However, this is not an all-inclusive list. *Id.* at § 180.970(a).

¹³ *Id.* at §§ 180.215.

¹⁴ *Id.* at § 180.220(a)(2).

¹⁵ *Id.* at §§ 180.220(b)-(c). Federally required audit services are also considered to be “covered transactions.” *Id.* at § 180.220(b)(3).

¹⁶ *Id.* at § 180.220(a)(1).

“lower tier covered transaction” is one “between a participant in a covered transaction and another person,” including subgrants and contracts under grants.¹⁷

Causes for Debarment

Agencies may debar a person for the following reasons:

- “Conviction of or civil judgment for” any of the following activities:
 - 1) Commission of fraud or another criminal offense related to “obtaining, attempting to obtain, or performing a public or private agreement or transaction;”
 - 2) Violation of antitrust statutes (both federal or state);
 - 3) Commission of “embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice;” or
 - 4) Commission of other offenses “indicating a lack of business integrity or business honesty that seriously and directly affects ... [the person’s] present responsibilities;”¹⁸
- “Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program;”¹⁹
- “A nonprocurement debarment by any Federal agency taken before October 1, 1988;”²⁰
- “[A] procurement debarment by any Federal agency taken pursuant to 48 C.F.R. part 9, subpart 9.4, before August 25, 1995;”²¹
- “Knowingly doing business with an ineligible person,” unless that person has been granted an exception under the guidelines;²²
- Failure to pay a debt or debts to any agency (not including payments owed under the Internal Revenue Code), as long as the debtor has not contested the debt(s) or has exhausted all remedies for contesting the debt(s);²³

¹⁷ Id. at §§ 180.200(a)-(b).

¹⁸ Id. at § 180.800(a).

¹⁹ Id. at § 180.800(b). Examples of such violations include “willful failure to perform in accordance with” the agreement or transaction’s terms, “[a] history of a failure to perform or unsatisfactory performance,” or “willful violation of a statutory provision or requirement” related to the agreement or transaction. Id.

²⁰ Id. at § 180.800(c)(1).

²¹ Id. For more information about debarment and suspension in the context of government procurement, see CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by (name redacted).

²² 2 C.F.R. § 180.800(c)(2). An agency may grant an exception to an excluded person for a particular covered transaction. Id. at § 180.135. See id. at §§ 180.300-180.365 for the participant eligibility requirements and disclosure requirements that apply to persons entering covered transactions.

²³ Id. at § 180.800(c)(3). A voluntary exclusion is permitted under 2 C.F.R. § 180.640.

- “Violation of a material provision of a voluntary exclusion agreement ... or of any settlement of a debarment or suspension action;”²⁴
- Violations of the Drug-Free Workplace Act of 1988;²⁵ or
- “Any other cause of so serious or compelling a nature that it affects ... [the person’s] present responsibility.”²⁶

Causes for Suspension

An agency official must make two determinations in order to suspend a person. First, the official must determine that one of the following exists:

- “[A]n indictment for, or other adequate evidence to suspect, an offense” for which a conviction or civil judgment would result in debarment (as listed in 2 C.F.R. § 180.800(a) and described above); or
- “[A]dequate evidence to suspect any other cause for debarment” (as listed in 2 C.F.R. §§ 180.800(b)-(d) and described above).²⁷

After making this determination, the official may suspend the person only when he or she further determines that “[i]mmediate action is necessary to protect the public interest.”²⁸

Procedures for Debarment and Suspension Actions

The OMB guidelines outline the specific procedures for a debarment or suspension action. Generally, an action begins when an agency receives information about a cause for debarment or suspension. The agency investigates the information, and the agency’s debarment or suspension official ultimately decides whether a person should be debarred or suspended.²⁹ Written notification of the action is sent by mail, fax, or e-mail to one of the following: the person, the person’s legal counsel, the person’s agent for service of process, or any of the person’s “partners, officers, directors, owners, or joint venturers.”³⁰ If a person is subject to multiple debarment or suspension proceedings, the agencies can coordinate their debarment or suspension actions and designate a lead agency for making the decision.³¹

Debarment Actions

A debarment action is initiated when a debarring official sends a written Notice of Proposed Debarment to the person that the official has proposed to debar.³² This notice advises the person

²⁴ 2 C.F.R. § 800.180(c)(4).

²⁵ Id. at § 800.180(c)(5). The Drug-Free Workplace Act of 1988 is found at 41 U.S.C. § 701.

²⁶ 2 C.F.R. § 180.800(d).

²⁷ Id. at §§ 180.700(a)-(b).

²⁸ Id. at § 180.700(c).

²⁹ Id. at § 180.600.

³⁰ Id. at § 180.615(a).

³¹ Id. at § 180.620.

³² Id. at § 180.805.

that the official is considering debarment, states the reasons for proposing debarment “in terms sufficient to put ... [the person] on notice of the conduct or transactions upon which the proposed debarment is based,” and the cause or causes in 2 C.F.R. § 180.800 upon which the official relied.³³ Also, this notice informs the person of the federal government’s procedures for debarment and any additional debarment procedures of the agency.³⁴ Finally, the notice states the “governmentwide effect of a debarment from procurement and nonprocurement programs and activities.”³⁵

A person must have “an opportunity to contest the proposed debarment” before the debarring official issues a decision.³⁶ If the person wishes to contest, he or she must, within 30 days of receiving the Notice of Proposed Debarment, “either send, or make arrangements to appear and present, the relevant information and argument to the debarring official.”³⁷ The person also must submit the following information: “[s]pecific facts that contradict the statements contained in the Notice of Proposed Debarment,” including any information about the mitigating and aggravating factors³⁸ considered by the debarring official;³⁹ “[a]ll existing, proposed, or prior exclusions under regulations implementing Executive Order 12549 and all similar actions taken by Federal, State, or local agencies, including administrative agreements that affect only those agencies;” “[a]ll criminal and civil proceedings not included in the Notice of Proposed Debarment that grew out of facts relevant to the cause(s) stated in the notices;” and the person’s affiliates.⁴⁰ A failure to truthfully disclose this information may result in “further criminal, civil or administrative action” against the person.⁴¹

Debarment proceedings are not subject to formal rules of evidence or procedure.⁴² The proceedings may include fact-finding only if (1) the person presents a “genuine dispute over facts material to the proposed debarment;” (2) the debarment is not “based upon a conviction or civil judgment;” and (3) the person’s opposition does not contain merely general denials of the Notice of Proposed Debarment or solely raise issues that are immaterial to the debarment decision.⁴³ The

³³ Id. at §§ 180.805(a)-(c).

³⁴ Id. at § 180.805(d).

³⁵ Id. at § 180.805(e).

³⁶ Id. at § 180.810.

³⁷ Id. at § 180.820(a). A Notice of Proposed Debarment is considered “received” by a person at the time it is delivered, “if the agency mails the notice to the last known street address” or “if the agency sends the notice by e-mail,” or at the time it is sent, “if the agency sends the notice by facsimile.” Id. at § 180.820(b). If the letter, facsimile, or e-mail is undeliverable, then it is considered “received” five days after the agency sends it. Id.

³⁸ See id. at § 180.860 for a complete list of the mitigating and aggravating factors that a debarment official may consider.

³⁹ “A general denial is insufficient to raise a genuine dispute over facts material to the debarment.” Id. at § 180.825(a)(1).

⁴⁰ Id. at § 180.825(a).

⁴¹ Id. at § 180.825(b).

⁴² Id. at § 180.835(a).

⁴³ Id. at § 180.830. If the proceedings do include fact-finding, the person may “present witnesses and other evidence, and confront any witness presented.” Id. at § 180.840(a)(1). Written findings of fact must be prepared for the record by the fact-finder, and transcribed records must be made available for purchase. Id. at § 180.840. Disputed material facts may be referred to another official for fact-finding by the debarring official, and those findings may be partially or completely rejected only after the debarring official determines that they are “arbitrary, capricious, or clearly erroneous.” Id. at § 180.845(c).

federal agency has the burden of proof to show that a cause for debarment exists,⁴⁴ which must be established by a preponderance of the evidence.⁴⁵ If the basis for a proposed debarment is a conviction or civil judgment, then the agency has met its burden.⁴⁶ Once the agency meets its burden, the person then must “demonstrate to the satisfaction of the debarring official that ... [he or she is] presently responsible and that debarment is not necessary.”⁴⁷

A debarring official may, but is not required, to debar a person for any of the causes of debarment discussed above.⁴⁸ In making the debarment decision, the official may consider “the seriousness of ... [the person’s] acts or omissions and the mitigating or aggravating factors” included in the OMB guidelines,⁴⁹ as well as other appropriate factors related to the particular circumstances of the case.⁵⁰ Mitigating and aggravating factors listed in the OMB guidelines include the “actual or potential harm or impact that results or may result from the wrongdoing,” the “frequency of incidents,” a “pattern or prior history of wrongdoing,” the planning and extent of involvement in the wrongdoing, and the acceptance of responsibility for the wrongdoing, including bringing the activity to the attention of the federal agency in a timely manner.⁵¹ This decision is to be based on all of the information that is part of the official record.⁵²

Within 45 days of closing the official record, a debarring official must issue a written notice of his or her decision on the proposed debarment.⁵³ This written notice states whether or not the person is debarred.⁵⁴ In the event of debarment, the notice also includes a reference to the Proposed Notice of Debarment, the specific reasons for debarment, the time period of the debarment, and a statement that the debarment is effective for “covered transactions and contracts that are subject to the Federal Acquisition Regulations” in the Executive Branch of the federal government.⁵⁵ A person may ask the debarring official to reconsider the debarment decision or the time period in a written request supported with documentation.⁵⁶ The debarring official may alter the debarment decision based on newly discovered evidence, a reversal of the relevant conviction or civil judgment that led to the debarment, or other reasons.⁵⁷

⁴⁴ Id. at § 180.855(a).

⁴⁵ Id. at § 180.850(a).

⁴⁶ Id. at § 180.850(b).

⁴⁷ Id. at § 180.855(b).

⁴⁸ Id. at § 180.845(a).

⁴⁹ Id.

⁵⁰ Id. at § 180.860(s).

⁵¹ Id. at §§ 180.860(a)-(c), (f)-(g), (n). *See id.* at § 180.860 for the complete list of the mitigating and aggravating factors.

⁵² Id. at § 180.845(b). The record includes information supporting the proposed debarment, arguments presented for and against the proposed debarment, and the transcription of fact-finding proceedings, if any. *Id.*

⁵³ The record is officially considered “closed” when the debarring official receives “final submissions, information, and findings of fact, if any.” *Id.* at § 180.870(a). The 45-day period may be extended “for good cause” by the debarring official. *Id.*

⁵⁴ Id. at § 180.870(b)(1)-(2).

⁵⁵ Id. at § 180.870(b)(2). An agency head (or an “authorized designee”) can grant an exception that would allow the person to continue to contract or conduct covered transactions with the agency despite the debarment action. *Id.* at § 180.870(b)(iv).

⁵⁶ Id. at § 180.875.

⁵⁷ Id. at § 180.880.

Debarments “should not exceed three years,” but the debarring official “may impose a longer period of debarment” based on the circumstances.⁵⁸ Debarments may be extended by the debarring official, provided that the official determines that “an extension is necessary to protect the public interest.”⁵⁹ The debarment official must follow the procedures for a debarment action and cannot base the decision solely on the facts that led to the original debarment action.⁶⁰

Suspension Actions

Upon determining that a cause for suspension exists, the suspending official signs a decision to suspend a person that takes immediate effect.⁶¹ The suspending official then promptly sends a Notice of Suspension to the person who is suspended, advising that the person is suspended and that the suspension is based on an indictment, a conviction, “[o]ther adequate evidence that ... [the person] has committed irregularities which seriously reflect on the propriety of further Federal Government dealings” with the person, or “[c]onduct of another person that been imputed” to the person or affiliation with “a suspended or debarred person.”⁶² The notice also includes “any other irregularities in terms sufficient to put ... [the person] on notice without disclosing” the government’s evidence and the cause or causes in 2 C.F.R. § 180.700 upon which the official relied.⁶³ Finally, the notice states that the suspension is temporary “pending the completion of an investigation or resulting legal or debarment proceedings,” the applicable provisions governing the proceedings, and “the governmentwide effect of ... [the person’s] suspension from procurement and nonprocurement programs and activities.”⁶⁴

If a person wishes to contest the suspension, he or she must, within 30 days of receiving the Notice of Suspension, “either send, or make arrangements to appear and present, the information and argument to the suspending official.”⁶⁵ The person must submit the same information that is required to be submitted when contesting a proposed debarment as described above, and a failure to truthfully disclose this information may result in “further criminal, civil or administrative action” against the person.⁶⁶

⁵⁸ Id. at § 180.865(a). The debarring official may consider the aggravating and mitigating factors in 2 C.F.R. Part 180 and “must consider the time ... [the person] was suspended” if the debarment was preceded by a suspension. Id. at § 180.865(b). Debarments for violations of the Drug-Free Workplace Act of 1988 “may not exceed five years.” Id. at § 180.865(c).

⁵⁹ Id. at § 180.885(a).

⁶⁰ Id. at §§ 180.885(b)-(c). The Administrative Procedure Act allows for judicial review of a final agency action “for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. See 5 U.S.C. §§ 700 *et. seq.* for more information about the judicial review process for an agency’s action.

⁶¹ Id. at § 180.710.

⁶² Id. at §§ 180.715(a)-(b).

⁶³ Id. at §§ 180.715(c)-(d).

⁶⁴ Id. at §§ 180.715(e)-(g).

⁶⁵ Id. at §§ 180.720-180.725(a). A Notice of Suspension is considered “received” by a person at the time it is delivered, “if the agency mails the notice to the last known street address” or “if the agency sends the notice by e-mail,” or at the time it is sent, “if the agency sends the notice by facsimile.” Id. at § 180.725(b). If the letter, facsimile, or e-mail is undeliverable, then it is considered “received” five days after the agency sends it. Id.

⁶⁶ Id. at § 180.730.

Like debarment proceedings, suspension actions are informal.⁶⁷ Fact-finding is permitted under the same conditions as in debarment proceedings with one additional requirement: “substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension” must not be prejudiced by the fact-finding.⁶⁸ Within 45 days of closing the official record, a suspending official must make a written decision “whether to continue, modify, or terminate” the person’s suspension.⁶⁹ A suspending official bases a decision on all of the information that is part of the official record.⁷⁰

Generally, a suspension lasts for 12 months.⁷¹ However, if legal or debarment proceedings “are initiated at the time of, or during ... [the person’s] suspension,” then the suspension may last until those proceedings are over.⁷²

Responsibilities of Agencies and Persons Entering Covered Transactions

Both agencies and persons are responsible for verifying that they are not entering a covered transaction with a person who is excluded or disqualified. A person who is “excluded” is one who is prohibited from entering covered transactions because of suspension, debarment, proposed debarment, or voluntary exclusion.⁷³ A person who is “disqualified” is one who is prohibited from entering specific covered transactions by statute, executive order, or other authority.⁷⁴ Agencies are required to check on the status of a person prior to entering a “primary tier covered transaction,” approving a “primary tier” principal, or approving a “lower tier” participant or principal.⁷⁵ Persons are required to check on the status of a person at the next lower tier prior to

⁶⁷ Id. at § 180.740(a).

⁶⁸ Id. at § 180.735. The determination of whether the fact-finding would prejudice legal proceedings is based on “advice from the Department of Justice, an office of the United States Attorney, a State attorney general’s office, or a State or local prosecutor’s office.” Id. at § 180.735(a)(4). If the proceedings do include fact-finding, the person may “present witnesses and other evidence, and confront any witness presented.” Id. at § 180.745(a)(1). Written findings of fact must be prepared for the record by the fact-finder, and transcribed records must be made available for purchase. Id. at §§ 180.745(a)-(b). Disputed material facts may be referred to another official for fact-finding by the debarring official, and those findings may be partially or completely rejected only after the debarring official determines that they are “arbitrary, capricious, or clearly erroneous.” Id. at § 180.750(b).

⁶⁹ Id. at § 180.755. The record is officially considered “closed” when the debarring official receives “final submissions, information, and findings of fact, if any.” Id.

⁷⁰ Id. at § 180.750(a). The record includes information supporting the proposed debarment, arguments presented for and against the proposed debarment, and the transcription of fact-finding proceedings, if any. Id.

⁷¹ Id. at § 180.760(a). This limit may be extended for 6 months by the suspending official if requested in writing by “an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official,” but the suspension may not extend past 18 months without legal or debarment proceedings being initiated. Id. at § 180.760(b). The suspending official must notify these officials of the end of the 12 month period at least 30 days before it expires. Id. at § 180.760(c).

⁷² Id. at § 180.760(a). The Administrative Procedure Act allows for judicial review of a final agency action “for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. *See* 5 U.S.C. §§ 700 *et. seq.* for more information about the judicial review process for an agency’s action.

⁷³ Id. at § 180.940(a). A “voluntary exclusion” is a “person’s agreement to be excluded under the terms of a settlement between the person and one or more agencies,” which must have government-wide effect. Id. at § 180.1020(a).

⁷⁴ Id. at § 180.935.

⁷⁵ Id. at § 180.425. *See id.* at §§ 180.400-180.450 for more specific information about entering into covered transactions with excluded and disqualified persons and principals.

entering a covered transaction.⁷⁶ Information about persons who are excluded or disqualified from covered transactions is available through the Excluded Parties List System (EPLS) (<http://www.epls.gov>), which includes information about both nonprocurement and procurement debarments and suspensions.⁷⁷ For both agencies and persons, a federal agency may grant an exception that permits excluded persons to participate in covered transactions,⁷⁸ and an exception for a disqualified person may be granted under the applicable statute, executive order, or other applicable authority.⁷⁹

Both “primary tier participants” and “lower tier participants” are required to disclose their exclusions or disqualifications prior to entering a covered transaction.⁸⁰ As discussed earlier, a “primary tier covered transaction” is one “between a Federal agency and a person,” and a “lower tier covered transaction” is one “between a participant in a covered transaction and another person,” including subgrants and contracts under grants.⁸¹ Failure to disclose this information allows the agency to pursue all available remedies, including suspension and debarment.⁸²

Consequences of Nonprocurement Debarment and Suspension

Generally, if a person is excluded by any federal agency, the person may not “[b]e a participant in a Federal agency transaction that is a covered transaction” or “[a]ct as a principal of a person participating in one of those covered transactions.”⁸³ The debarment or suspension applies to all “divisions and other organizational elements” of the person, unless the debarring or suspending official limits the debarment or suspension to “specifically identified individuals, divisions, ... other organizational elements[,] ... [or] specific types of transactions.”⁸⁴ As discussed above, a person may be granted an exception by an agency.⁸⁵

Debarment and suspension under the OMB Guidelines also affect a person’s eligibility for federal procurement transactions. A person excluded on the basis of the guidelines starting on August 25, 1995, is also ineligible for federal procurement transactions governed by the Federal Acquisition

⁷⁶ Id. at § 180.300. *See id.* at §§ 180.300-180.330 for more specific information about entering into covered transactions with excluded and disqualified persons and principals.

⁷⁷ *See id.* at §§ 180.500-180.530 for a detailed explanation of the EPLS.

⁷⁸ Id. at § 180.135(a).

⁷⁹ *See id.* at § 180.305(b) for persons entering covered transactions and *id.* at § 180.400 for agencies entering covered transactions.

⁸⁰ *See id.* at §§ 180.335-180.340 for primary tier participants and *id.* at §§ 180.355 for lower tier participants. Primary tier participants are also required to disclose convictions, indictments, and public transactions terminated within the past 3 years for cause or default. *Id.* at §§ 180.335(b)-(d). If required information is discovered after entering a written transaction, a primary tier participant must immediately notify the agency in writing, *Id.* at § 180.350. A lower tier participant who subsequently discovers relevant information must immediately notify the person at the next highest tier in writing. *Id.* at § 180.365.

⁸¹ *Id.* at §§ 180.200(a)-(b).

⁸² *See id.* at § 180.345(b) for primary tier participants and *id.* at § 180.360 for lower tier participants. *See also id.* at §§ 180.440-180.450. A federal agency may also terminate a covered transaction with a primary tier participant for “material failure to comply with the terms and conditions of the transaction.” *Id.* at § 180.345(a).

⁸³ *Id.* at § 180.130.

⁸⁴ *Id.* at § 180.625(a). Affiliates may be included in the action as long as the debarring or suspending official has “officially name[d] the affiliate in the notice” and “give[n] the affiliate an opportunity to contest the action.” *Id.* at § 180.625(b).

⁸⁵ *Id.* at § 180.135.

Regulations (the FAR).⁸⁶ Conversely, a person excluded from federal procurement transactions under the FAR starting on August 25, 1995, is also ineligible for nonprocurement covered transactions.⁸⁷

Legislation and Activities in the 111th Congress

On September 17, 2009, the House passed H.R. 3221, the Student Aid and Fiscal Responsibility Act of 2009. Title VI of this Act, known as the Defund ACORN Act, would limit certain organizations so they could not be a party to any federal contract, grant, cooperative agreement, or any other form of agreement (including a memorandum of understanding) or receive federal funds. These provisions would apply to any organization that had been indicted for a violation under any federal or state law governing campaign financing or election administration; any organization that had its state corporate charter terminated due to its failure to comply with federal or state lobbying disclosure requirements; and any organization that has filed a fraudulent form with any federal or state regulatory agency, as well as any organization which has employed, has under contract, or gives express or apparent authority to an individual who has been indicted for a violation under federal or state law relating to an election for federal or state office. Organizations covered by the bill include ACORN and its known affiliates.⁸⁸

ACORN and its affiliates were barred from receiving funds by Section 163 of the 2010 Continuing Appropriations Resolution, which provides that “[n]one of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organization[s] for Reform Now (ACORN) or any of its affiliates, subsidiaries, or allied organizations.”⁸⁹ On December 11, however, this prohibition against ACORN was found to be an unconstitutional bill of attainder.⁹⁰ Additionally, the Consolidated Appropriations Act, 2010, signed by the President on December 16, 2009, provides in various places that none of the funds made available under various divisions of the act or any prior act may be provided to ACORN or any of its affiliates, subsidiaries, or allied organizations.⁹¹

The issue of debarment and suspension in federal grant programs was discussed during a House Oversight and Government reform hearing on March 18, 2010.⁹² Although the main focus of this

⁸⁶ Id. at § 180.410.

⁸⁷ Id. at § 180.145. For more information about debarment and suspension in the context of government procurement, see CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by (name redacted).

⁸⁸ For a more detailed discussion of the Defund ACORN Act and legal issues raised by the bill, see CRS Report R40826, *The Proposed “Defund ACORN Act,” the Continuing Resolution, and the Consolidated Appropriations Act: Are They Bills of Attainder?*, by (name redacted).

⁸⁹ Continuing Appropriations Resolution, 2010, H.R. 2918, 111th Cong. § 163 (2009), Division B of P.L. 111-68 (CR) § 163. It should be noted that Department of Justice has interpreted this language as not applicable to pre-existing contractual obligations between the United States and ACORN. See David J. Barron, Acting Assistant Attorney General, Memorandum Opinion for the Deputy General Counsel, Department of Housing and Urban Development (October 23, 2009) (available at <http://www.justice.gov/olc/2009/obligations-public-law11168.pdf>).

⁹⁰ *ACORN v. United States*, 2009 U.S. Dist. LEXIS 115558 (December 11, 2009).

⁹¹ H.R. 3288, 111th Cong., 1st Sess. (enrolled version).

⁹² See “Rewarding Bad Actors: Why Do Poor Performing Contractors Continue to Get Government Business?”, http://oversight.house.gov/index.php?option=com_content&task=view&id=4842&Itemid=2 (last visited March 23, 2010).

hearing was debarment and suspension of government contractors, officials from the Department of Transportation discussed debarment and suspension in DOT grant programs as part of their testimony, particularly DOT grants under the American Recovery and Reinvestment Act (ARRA).⁹³

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⁹³ Statement of the Honorable Calvin L. Scovel III, Inspector General, U.S. Department of Transportation (March 18, 2010), *available at* http://oversight.house.gov/images/stories/Hearings/Committee_on_Oversight/2010/031710_Rewarding_Bad_Actors/TESTIMONY-Scovel.pdf; Statement of Gregory Woods, Deputy General Counsel, U.S. Department of Transportation (March 18, 2010), *available at* http://oversight.house.gov/images/stories/Hearings/Domestic_Policy/2010/030410_Horse_Slaughter/TESTIMONY-Woods.pdf.

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