Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Modernizing Suspension and Debarment Rules	)	Docket No. GN 19-309

COMMENTS OF CTIA AND USTELECOM

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CTIA[1] and USTelecom[2] (together, the "Associations") respectfully submit these comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("*NPRM*")[3] seeking comment on the potential adoption of the Office of Management and Budget ("OMB") Guidelines to Agencies on Government Debarment and Suspension (Nonprocurement) (the "OMB Guidelines" or "Guidelines").[4] The Associations support the Commission's dedication to preventing waste, fraud, and abuse in its programs and promoting responsible and efficient use of federal support program funds. The Associations' proposals described herein will help ensure the Commission's suspension and debarment rules achieve those objectives and promote participation in, and the success of, its critical support programs.

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[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] USTelecom is the nation's leading trade association representing service providers and suppliers for the broadband innovation industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications and broadband services to hundreds of millions of customers around the world.

[3] *In re Modernizing Suspension and Debarment Rules*, Notice of Proposed Rulemaking, 34 FCC Rcd 11,348 (2019) ("*NPRM*").

[4] *See* Office of Management and Budget, Guidance for Governmentwide Debarment and Suspension (Nonprocurement), 71 Fed. Reg. 66431 (Nov. 15, 2006) (final guidance) and 70 Fed. Reg. 51863 (Aug. 31, 2005) (interim guidance), *codified at* 2 C.F.R. pt. 180 (current guidance for government-wide suspension and debarment).

I. Introduction and Summary.

The Associations and their member companies strongly support the Commission's goal of "protecting [critical support programs] from fraud, waste, and abuse,"[5] and are committed to using program resources efficiently and responsibly. Companies that participate in the Commission's Universal Service Fund ("USF") programs are committed to deploying broadband to benefit eligible low-income consumers, schools, libraries, and rural communities throughout the country. To do so, they rely on clear, reasonable rules governing access to the Commission's support program resources. They also take steps to abide by the Commission's rules governing a range of conduct that is prohibited, and are aware that failure to comply with those rules may require the Commission to suspend or debar those entities that have been convicted of misconduct.

The Associations support the Commission's intent to help ensure that its programs are well managed, efficient and that fund resources are directed to expanding broadband deployment and supporting other equipment and services that help bridge the digital divide.[6] However, as proposed in the *NPRM*, the new suspension and debarment rules lack clear standards and sufficient due process procedures, set too low a threshold for suspension and debarment, and impose onerous compliance obligations on USF and other support program participants. The proposed rules reach a far broader range of conduct than contemplated by the OMB Guidelines, potentially punishing many good actors for the sake of expediting penalties against a few bad ones. The proposed rules would also impose burdensome reporting obligations, diverting scarce resources from USF and other support program participants, many of which are resource-constrained to begin with.

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[5] *NPRM*, 34 FCC Rcd at 11,349 ¶ 1

[6] *NPRM*, 34 FCC Rcd at 11,349 ¶ 2.

The Guidelines provide agencies discretion to implement them, and some of the Commission's proposals have gone beyond the spirit of the Guidelines, which are intended to protect the public interest by ensuring the integrity of federal programs, not for purposes of punishment.[7] The Associations support the Commission's efforts to bring greater efficiencies to its support programs and minimize waste, fraud, and abuse. But the proposed rule changes are more likely to hinder participation in USF programs and divert scarce company resources away from deployment than protect the Commission's program resources. As a result, consumers and communities intended to benefit from support programs would be harmed, as less participation could reduce access to broadband for unserved communities and potentially result in less affordable communications options that communities need, especially in rural areas.

The Commission should balance the need to reserve critical support program resources for qualified participants with the need to adopt fair, reasonable, clear rules and procedures that promote participants' ability to leverage those resources to expand broadband access, as other federal agency support programs have done. By protecting providers' due process rights, focusing suspension and debarment procedures on egregious conduct, and minimizing burdens on providers, the Commission can update its rules to combat misconduct and ensure that these scarce resources go to those who need them, while promoting participation in the USF and other support programs to help bridge the digital divide.

II. The Commission Can Protect Its Programs from Waste, Fraud, and Abuse While Ensuring Participants' Basic Due Process Rights Are Respected.

The Associations support the Commission's efforts to safeguard its support programs, but the proposed changes to its suspension and debarment procedures could inadvertently undermine

[7] 48 C.F.R. § 9.402(b) ("The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment.").

providers' fundamental due process rights to the detriment of consumers and providers alike. Ensuring that Commission licensees are able to understand their regulatory obligations, have notice and an opportunity to respond to allegations that they have violated those obligations, and receive fair treatment in contesting such allegations are core elements of the Commission's constitutional obligations under the Due Process Clause, as well as its authority under the Administrative Procedure Act ("APA").[8] Other federal agencies agree.[9] For these reasons, the Associations urge the Commission to protect providers' due process rights by adopting the following modest proposals:

- Notifying providers and giving them an opportunity to respond before suspension;
- Modifying its evidentiary standard and review process to ensure a fair and balanced process; and
- Adopting timelines to ensure expedited review of suspensions and debarments.

Adopting these basic safeguards would avoid chilling participation in USF and other support programs, which could result in less competition for funding and in turn higher costs overall. These protections would also help to avoid depriving consumers of service on the basis of misleading, incomplete, or even incorrect evidence regarding provider compliance. Given that the purpose of OMB's suspension and debarment system is "to protect the public interest," not

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[8] *See, e.g.*, *Howmet Corp. v. EPA*, 614 F.3d 544, 553 (D.C. Cir. 2010) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." (quoting *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987))); *Diabo v. Sec'y of Health, Educ. & Welfare*, 627 F.2d 278, 281 (D.C. Cir. 1980) (holding that an "administrative hearing did not comply with basic requirements of fairness and procedural due process"); *Hicks v. Comm'r of Soc. Sec.*, 909 F.3d 786, 798-804 (6th Cir. 2018) (holding that the Social Security Administration's refusal to provide beneficiaries a fair opportunity to rebut assertions that medical reports were fraudulent violated procedural due process).

[9] *See infra* Section II.A.

"exclude a person or commodity for the purposes of punishment,"[10] the Commission's rules should recognize and minimize such risks.[11]

A. Participants Should Receive Pre-Suspension Notice and Have the Opportunity to Respond.

The Commission should require that providers receive notice that suspension proceedings are being initiated, and that they have the opportunity to respond before suspension occurs, as its current rules do.[12] The proposed rules do not contemplate notifying providers when the Commission is initiating suspension procedures, or giving providers an opportunity to respond to such notice.[13] But notice and the opportunity to respond are basic protections that are necessary to protect due process for both providers and the communities that benefit from receiving supported services. Indeed, "individuals whose property interests are at stake [before the government] are entitled to 'notice and an opportunity to be heard.'"[14] A pre-suspension opportunity to respond is particularly critical here, where the harmful effects of an unwarranted suspension could linger once the suspension is lifted. For the Associations' member companies,

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[10] 2 C.F.R. § 180.125(c).

[11] The Guidelines themselves emphasize that "exclusion is a serious action." *Id.* *See also* 48 C.F.R. § 9.402(b) ("The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment."). If the suspension and debarment system were punitive, some form of conviction and sentence would be required wherever the requisite conduct and mental state had been sufficiently proven (much like the criminal justice system). Just the opposite is true, however; punishment is an impermissible use of the system. *See, e.g.*, *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989) ("Affording the contractor this opportunity to overcome a blemished past assures that the agency will impose debarment only in order to protect the Government's proprietary interest and not for the purpose of punishment."); *Silverman v. U.S. Dep't of Def.*, 817 F. Supp. 846, 848-49 (S.D. Cal. 1993) (agreeing with *Robinson* that debarment can only be imposed to protect the government's interest).

[12] *See NPRM*, 34 FCC Rcd at 11,351 ¶ 5; 47 C.F.R. 54.8(a)(7).

[13] *See NPRM*, 34 FCC Rcd at 11,373-74 ¶¶ 82-85.

[14] *Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993)). For example, before the IRS imposes a levy on taxpayer property, it "must provide the taxpayer with written notice of its intent to levy and inform the taxpayer of his right to a Collection Due Process hearing before a neutral official in the IRS's Appeals Office." *Ryskamp v. Comm'r*, 797 F.3d 1142, 1144 (D.C. Cir. 2015).

reputational damage and lost commercial opportunities could deter participation in the Commission's programs. For communities, less participation in support programs could hinder consumers' ability to access or afford important services, ultimately harming those the Commission's programs are meant to help.

Additionally, the Commission's proposed "adequate evidence" standard, discussed in more detail below, is far lower than evidentiary standards applied in the court proceedings that currently precede a suspension. As a result, this lower evidentiary bar may allow initiation of suspension proceedings based on allegations to that are incorrect or fail to include all material facts. The implications of a suspension are far-reaching because the Commission proposes to adopt reciprocity with other federal agencies that have implemented the OMB Guidelines. All of these factors render the need for pre-suspension notice and opportunity to respond even more important.

The Interagency Suspension and Debarment Committee's[15] most recent report on the status of the federal suspension and debarment system underscores the need for pre-suspension notices.[16] "Pre-notice letters," such as show cause letters or requests for information, inform the contacted party that "the agency debarment program is reviewing matters for potential [Suspending and Debarring Official ("SDO")] action, identify the assertion of misconduct, and give the recipient an opportunity to respond prior to formal SDO action."[17] The report observes that "[u]se of these letters helps agencies better assess the risk to Government programs and determine what measures

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[15] The Interagency Suspension and Debarment Committee was established by President Ronald Reagan in 1986 to monitor the implementation of the government-wide debarment and suspension regime, coordinate actions among the federal agencies, and make recommendations to the OMB concerning a comprehensive procurement and nonprocurement suspension and debarment system encompassing the full range of federal activities. Kenneth J. Allen, Federal Grant Practice: *Exclusion is an Executive Branch Function* § 55:4, Westlaw (2019 ed., database updated May 2019).

[16] Interagency Suspension and Debarment Comm., *FY18 Report on Federal Agency Suspension and Debarment Activities* (*ISDC FY18 Report*) (2019), https://www.acquisition.gov/sites/default/files/page_file_uploads/FY%202018%20873%20Report%20-%20Final%2010%2030%202019.pdf.

[17] *ISDC FY18 Report* at 4.

are necessary to protect the Government's interest without immediately imposing an exclusion action," and notes that the number of agencies reporting their use of such notice has more than doubled, from "seven in FY 2009 to 16 in FY 2018."[18] The Commission should adopt a similar process.

B. The Commission Should Adopt a Clearer Evidentiary Standard and Other Safeguards That Better Ensure a Fair and Reasonable Process.

The Commission's proposed rules seek to provide the agency greater flexibility to prevent fraud, including the ability to consider, and act immediately on, a broader range of misconduct than the current rules allow.[19] This goal may have public interest benefits in some contexts, such as giving the Commission discretion to tailor appropriate remedies in order to allow a provider to keep offering broadband to a community despite a finding of misconduct.[20] However, the overall effect of the proposed changes is to cause uncertainty regarding how the Commission will interpret and apply its authority, evidentiary standards, and review processes. The Commission should adopt a clearer evidentiary standard, limit the types of evidence that can trigger suspension proceedings, impose reasonable limits on the imputation of conduct from an individual to an organization, and require consideration of mitigating factors in a suspension and debarment review. Adopting the proposals above would still give the Commission significant discretion in determining which entities may be eligible for suspension or debarment, while also protecting due process rights by clarifying the standards with which providers and their employees and agents must comply.

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[18] *Id.*

[19] *See* Press Release: FCC, *FCC Proposes New Rules to Remove Bad Actors from Commission Programs* (Nov. 22, 2019), https://docs.fcc.gov/public/attachments/DOC-360978A1.pdf.

[20] Suspension and debarment officials can, and do, go beyond the Guidelines' requirements and impose standards that are more appropriately tailored to protect their agency's programs. *See, e.g.*, *infra* Section II.B.3; Section III; IV.A.

1. The Commission Should Use a Preponderance of the Evidence Standard.

The Commission should modify the proposed "adequate evidence" standard for suspension to a "preponderance of the evidence" standard. Allowing suspension on the basis of "adequate evidence"—*i.e.*, information "sufficient to support the reasonable belief that" some offending act has occurred[21]—risks suspensions based on incomplete or incorrect information. Given the far-reaching consequences of a suspension, such as deterring participation in support programs and hindering communities' access to affordable broadband and other services, discussed above, and the lack of any proposed notice and opportunity to respond to an allegation, the Commission should have more than "adequate evidence" that suspension is warranted.

2. A Notice of Apparent Liability Should Not Suffice for Suspension or Debarment.

The Commission should prohibit suspension or debarment based on a Notice of Apparent Liability.[22] Notices of Apparent Liability by definition do not represent final determinations, and allowing suspension or debarment on that basis—*i.e.*, before a Forfeiture Order issues—would risk inflicting service disruptions on consumers (as well as significant harms on participants) that could ultimately prove unwarranted. Given that Notices of Apparent Liability have the potential to remain outstanding for a considerable amount of time before they are rejected or a Forfeiture Order issues, providers should have the protection of a final agency decision before suspension or debarment occurs. Doing so is also consistent with section 504(c) of the Telecommunications Act, which prohibits the Commission from relying on a Notice of Apparent Liability to prejudice the

[21] *NPRM*, 34 FCC Rcd at 11,370 ¶ 71.

[22] The reasoning presented here applies equally to any use of pending litigation in making suspension or debarment determinations, which the Commission has proposed to consider. *NPRM*, 34 FCC Rcd at 11,354-55 ¶ 15. Like Notices of Apparent Liability, pending litigation is non-final, and should not serve as the basis for a suspension or debarment decision.

recipient of such notice in another proceeding before it, a prohibition that would extend to suspension or debarment proceedings.[23]

Requiring a Forfeiture Order not only protects due process rights but also avoids forcing providers to exit the program—potentially suspending service in an area with only one provider—based on incomplete information. If providers exit the market as a result of the Commission's actions, consumers may be left without service or facing fewer choices of providers.

3. The Commission Should Impose Meaningful Standards for the Imputation of Conduct.

The Commission should prohibit the imputation of conduct from an individual to an organization unless it was undertaken, at least in part, with the purpose of advancing the organization's interests, and was unexpected given the responsibilities of the actor. Overriding such fundamental agency law principles,[24] as the Commission's proposed rules do, would invite the risk that suspension, and the ensuing severe service disruptions, could occur simply because of one rogue contractor. The Guidelines themselves offer insufficient protection; though they do provide that suspension and debarment officials consider whether the misconduct 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,"[25] they do not incorporate the

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[23] 47 U.S.C. § 504(c).

[24] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 793 (1998) ("A 'master is subject to liability for the torts of his servants committed while acting in the scope of their employment.'" Restatement [(Second) of Agency] § 219(1). This doctrine has traditionally defined the 'scope of employment' as including conduct 'of the kind [a servant] is employed to perform,' occurring 'substantially within the authorized time and space limits,' and 'actuated, at least in part, by a purpose to serve the master . . . .'); *Davis v. Megabus Ne., LLC*, 301 F. Supp. 3d 105, 110 (D.D.C. 2018) ("An employee acts within the scope of his employment if the 'purpose of the act is, at least in part, to further the employer's business and if the act is not unexpected in view of the employee's duties.'") (quoting *Floyd-Mayers v. Am. Cab. Co.*, 732 F. Supp. 243, 246 (D.D.C. 1990))); *see also* Restatement (Second) of Agency § 229 (1957) (in weighing whether a servant's action was within the scope of employment courts should examine, *inter alia*, whether the act "has not been entrusted to any servant").

[25] 2 C.F.R. § 180.630.

broader agency principle that imputed conduct must have occurred within the scope of the alleged agent's employment. Nevertheless, suspension and debarment officials often go beyond the Guidelines' requirements and adhere to longstanding agency doctrine.[26] The Commission should follow this approach.

The Commission should also clarify that where a service provider has reasonable compliance structures and processes in place, makes good faith efforts to comply with regulatory requirements, and demonstrates a track record of compliance, that provider will not face suspension and debarment for isolated compliance lapses. The threat of suspension and debarment for a single instance of noncompliance should be reserved for service providers who have not made meaningful efforts to fulfill their compliance obligations, or who intentionally fail to comply.

4. The Commission Should Consider Mitigating Factors Before Suspension or Debarment.

To avoid harm to consumers and communities, the Associations support the Commission's proposal to include mitigating factors in the suspension or debarment review process. Specifically, the Commission proposes including as a factor mitigating against suspension or debarment the fact that a "provider is the sole source of services in an area."[27] Requiring consideration of this important fact will help ensure that much-needed service is not disrupted in a given area.

The Associations also support the proposal that an administrative settlement agreement or consent decree could be used to allow an area's only provider to continue to provide service subject

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[26] *See, e.g.*, *All Out Sewer & Drain Service, Inc*., Memorandum of Debarment Decision, EPA Case No. 13-0488-01A, 2015 WL 10767215, at *9 (EPA Apr. 3, 2015); *see also Michael J. Conrad*, Memorandum of Debarment Decision, EPA Case No. 15-0578-001, 2016 WL 2349871, at *4-5 (EPA Feb. 25, 2016).

[27] *NPRM*, 34 FCC Rcd at 11,369 ¶ 69.

to more robust monitoring.[28] Consideration of these factors is essential because suspending or debarring providers could deprive consumers of service options in rural, high cost areas, undermining the universal service program. The need to take appropriate remedial action against a provider must be balanced against the imperative to avoid harm to consumers and communities.

C. The Commission Should Specify a Process and Timeline for Review.

Although the Commission indicates it will "respond quickly to evidence of misconduct through a suspension mechanism prior to any debarment,"[29] it is unclear what process or timeline it envisions for review of suspension or debarment decisions. If the decision to suspend or debar in the first instance is delegated to a subordinate official, Office, or Bureau, the Commission should adopt an expedited process for such decisions to be reviewed by the full Commission. Absent such procedures, an appeal to the full Commission could linger and remain pending for years, leaving participants—and the communities they serve—in an uncertain state indefinitely. Because the suspension/debarment decision would not have issued from the full Commission and the APA provides review only of final agency action, participants would lack the ability to otherwise challenge their status.[30] Not only would this potentially punish providers who were erroneously suspended, it could deprive underserved consumers of crucial services without any clear timeline for relief.

The Associations therefore urge the Commission to adopt an expected review process, such as a shot clock for appealing decisions. For example, the Commission could use the 45-day review

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[28] *Id.* While the Guidelines provide only that the SDO "may" consider mitigating factors, 2 C.F.R. § 180.860, the Commission should instead adhere to the Federal Acquisition Regulations requirements ("FAR"), which provide that an SDO "should" consider such factors, 48 C.F.R. § 9.406–1(a).

[29] *NPRM*, 34 FCC Rcd at 11,354 ¶ 14.

[30] 5 U.S.C. § 704; *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) ("While the requirement of finality is not jurisdictional, without final agency action, 'there is no doubt that appellant would lack a cause of action under the APA.'" (quoting *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003))), *cert. denied*, 139 S. Ct. 1544 (2019).

period it has previously applied to determinations for certain USF waivers.[31] The Commission should also consider establishing that suspension and debarment decisions made pursuant to delegated authority can be judicially reviewed even without the filing of an application for review to ensure timely review and avoid potential service disruptions.[32]

D. The Commission Should Apply Any New Rules Prospectively.

The Associations urge the Commission to apply the rules prospectively, not retroactively.[33] Retroactive rulemaking is inappropriate, particularly where, as here, the Commission has existing rules in place for suspension and debarment. Doing so risks running afoul of the APA, which "prohibits retroactive rulemaking."[34] "[A] retroactive rule forbidden by the APA is one which 'alter[s] the past legal consequences of past actions,'"[35] and occurs where a change "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[36] Moreover, the Commission has not established that its current rules or other enforcement remedies are inadequate to address past conduct.

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[31] *See In re Connect Am. Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17842 ¶ 544 (2011) ("We direct the Bureaus to prioritize review of any applications for waiver filed by providers serving Tribal lands and insular areas, and to complete their review of petitions from providers serving Tribal lands and insular areas within 45 days of the record closing on such waiver petitions.").

[32] 47 C.F.R. § 1.115(k) (requiring such a filing).

[33] *NPRM*, 34 FCC Rcd at 11,374 ¶ 87 (proposing 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").

[34] *Treasure State Res. Indus. Ass'n v. EPA*, 805 F.3d 300, 305 & n.1 (D.C. Cir. 2015).

[35] *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988)).

[36] *See id.* (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)).

The Commission should therefore apply the proposed rules only prospectively, *i.e.*, to transactions occurring after the rules' effective dates. Doing so would protect providers' due process rights and remain consistent with the APA.

III. The Commission Should Limit Suspension and Debarment to Egregious Conduct.

The Commission's current standard for suspension or debarment requires a civil judgment against, or criminal conviction of, the party for whom action is contemplated,[37] which ensures both that the basis for suspension has been vetted, and that egregious cases of misconduct are properly addressed. The *NPRM*, by contrast, contemplates suspension or debarment for willful misconduct;[38] seeks comment on whether merely grossly negligent violations of rules or statutory provision could result in suspension or debarment;[39] and proposes to allow imposition of a limited denial of participation when approval of an applicant would constitute an "unsatisfactory risk,"[40] or imposition of debarment for "[a] history of . . . unsatisfactory performance of one or more public agreements or transactions."[41] These proposals go beyond the spirit of the Guidelines, and collectively go beyond other federal agencies' implementation of them. The concern about unduly low thresholds for suspension or debarment is particularly acute because the Commission proposes reciprocity with other federal agencies that have implemented the OMB Guidelines, which means the Commission's actions would have far-reaching ramifications.[42]

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[37] *NPRM*, 34 FCC Rcd at 11,354-55 ¶ 15.

[38] The FCC proposes to include as grounds for debarment *any* willful violation of a statutory or regulatory provision, including, for example, non-payment or under-payment of regulatory fees, submission of forms that *could* result in overpayments of funds, or failure to respond to requests for additional information about program operations generally. *See NPRM*, 34 FCC Rcd at 11,369 ¶ 67.

[39] *NPRM*, 34 FCC Rcd at 11,369 ¶¶ 67-68.

[40] *NPRM*, 34 FCC Rcd at 11,386 App'x A § 16.505.

[41] 2 C.F.R. § 180.800(b)(2).

[42] The impact is expansive because over two dozen federal agencies have implemented the OMB Guidelines in some form, including the Departments of Defense, 2 C.F.R. § 1125.10, Health and Human Services, 2 C.F.R. § 376.10, Energy, 2 C.F.R. § 901.10, Commerce, 2 C.F.R. § 1326.10, State, 2 C.F.R. § 601.10, and Interior, 2 C.F.R. § 1400.20.

The Commission acknowledges that its current rules are "clear-cut and mandatory, with little room for discretion and a targeted focus on a narrow set of misconduct."[43] The Guidelines it proposes to adopt, 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."[44] While this effort may be intended to more aggressively target abuses, the standards contemplated for suspension and debarment—encompassing willful conduct (which arguably could include a provider's accidental submission of incorrect information, so long as the submission itself was intended), grossly negligent willful rule violations (again, potentially including unintended errors), as well as "unsatisfactory" risks (for a limited denial of participation) or performances—are vague and overbroad, and would increase the risk of suspending or debarring providers acting in good faith.

Given that the Guidelines themselves provide the purpose of the nonprocurement suspension and debarment system is "to protect the public interest" rather than to "exclude a person or commodity for the purposes of punishment,"[45] the Commission should focus suspension and debarment on the most egregious misconduct. Suspension and debarment have substantial consequences, especially in communities where there are few or only one service provider and risks consumers losing access to broadband or other critical services. The Commission should strike a better balance by adopting rules that prohibit suspension or debarment in the absence of, at a minimum, reckless conduct, and omit "unsatisfactory" as a governing condition, or at least clarify what "unsatisfactory" means. By doing so, the Commission can help ensure that suspension

[43] *NPRM*, 34 FCC Rcd at 11,352 ¶ 8.

[44] *NPRM*, 34 FCC Rcd at 11,352 ¶ 8.

[45] 2 C.F.R. § 180.125.

and debarment are used judiciously to protect support program resources and promote affordable access to broadband and other important communications services that consumers need.

A. Suspension or Debarment Should Require at Least Recklessness, Particularly for Rule Violations.

The Commission should ensure that suspensions and debarment are limited to the most egregious conduct by requiring at least a reckless disregard of the rules. The federal government itself requires at least recklessness[46] before individuals are debarred in connection with the provision of health care services to federal employees through the Federal Employees Health Benefits Program.[47] Moreover, the Guidelines, which specifically enumerate the permitted grounds for debarment, do not list among them merely grossly negligent rule violations.[48] The Commission should therefore provide that suspension and debarment for support program rule violations require at least "reckless" disregard of the rules. The Commission's contemplated "willful (or grossly negligent) violation"[49] standard could harm consumers and communities that rely on USF program participants for access to broadband and voice services as well as consumers that rely on other support programs for accessible equipment and services.

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[46] Recklessness "in general requires deliberate action in the face of a known risk, the likelihood or impact of which the actor inexcusably underestimates or ignores." *United States v. Wallace*, 964 F.2d 1214, 1220 (D.C. Cir. 1992). For example, in *United States v. McCombs*, the Second Circuit observed that a defendant's civil liability for willfully failing to withhold taxes required, at a minimum, that the failure be "voluntary, conscious and intentional—as opposed to accidental." 30 F.3d 310, 320 (2d Cir. 1994) (quoting *Monday v. United States*, 421 F.2d 1210, 1215-16 (2d Cir. 1972)). Because the court concluded that the defendant's claims of ignorance did not refute the evidence that "she was aware of the payroll aspects of the business including the need to pay withholding taxes"—such as the fact that she was one of only two officers of the corporation, was a majority shareholder, and testified that she made sure people got paid—it affirmed the lower court's conclusion that she was liable for unpaid withholding taxes. *Id.* at 320-21.

[47] *Compare* 5 U.S.C. § 8902a(a)(1)(D) ("[T]he term 'should know' means that a person, with respect to information, acts in deliberate ignorance of, or in reckless disregard of, the truth or falsity of the information, and no proof of specific intent to defraud is required."), *with* 5 U.S.C. § 8902a(c)(3) (noting that the Office of Personnel Management may debar from the program "[a]ny individual who directly or indirectly owns or has a control interest in a sanctioned entity and who knows or *should know* of the action constituting the basis for the entity's conviction of any offense described in subsection (b), assessment with a civil monetary penalty under subsection (d), or debarment from participation under this chapter" (emphasis added)).

[48] *See* 2 C.F.R. 180.800(b).

[49] *NPRM*, 34 FCC Rcd at 11,369 ¶ 68.

While providers make good-faith efforts to comply with all the Commission's rules and regulations, the rules can be complicated and technical, which means honest mistakes happen not infrequently, and not for lack of effort. For example, some providers may possess a long history of compliance but nevertheless have occasional, minor, good-faith rule violations. The Commission should encourage, rather than discourage, self-reporting to correct such instances of inadvertent noncompliance. Permitting suspension or debarment for minor or single rule violations could reduce participation in the Commission's support programs, including its USF programs, depriving consumers and communities of much-needed broadband service. Moreover, if participation in USF declines, that could reduce competition for funding. This outcome risks increasing the Fund's costs as well as leaving consumers, particularly low-income consumers, with fewer options.

B. Debarment for "Unsatisfactory" Performance Fails to Give Providers Notice of What Conduct Is Covered.

The Commission proposes to permit debarment for "[a] history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions,"[50] and likewise proposes to consider, when deciding if imposition of a limited denial of participation is appropriate, whether approval of an applicant would constitute an "unsatisfactory risk."[51] The Associations are concerned that the vagueness of what qualifies as "unsatisfactory" performance (or risk) fails to provide participants notice of what conduct could trigger a suspension or debarment. Indeed, these risks implicate due process concerns by failing to notify participants of what conduct will be deemed prohibited. The Commission should decline to adopt such a vague

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[50] 2 C.F.R. § 180.800(b)(2).

[51] *NPRM*, 34 FCC Rcd at 11,386 App'x A § 16.505.

standard, and should at a minimum clarify what would constitute "unsatisfactory" performance or risk.

IV. The Commission Should Adopt Suspension and Debarment Rules that Protect the Government's Interest While Minimizing Burdens on Providers.

The Commission proposes to adopt extensive disclosure requirements by imposing, among other things, onerous reporting and certification obligations on primary tier (*e.g.*, carriers, schools and libraries, health care providers) and lower tier (*e.g.*, contractors, subcontractors, suppliers, consultants, or their agents or representatives) support program participants. The Associations support the Commission's intent to ensure its important support programs are well managed, efficient and that fund resources are directed to expanding broadband deployment and supporting other equipment and services that help bridge the digital divide.[52] The Associations also support the Commission's proposal to exclude all transactions other than those involving the USF, TRS, and NDBEDP from the scope of its proposed rules, including applications for equipment authorizations and spectrum licenses and transactions to or from licensees and those with spectrum usage rights.[53] The Associations agree with the Commission's finding that the Communications Act and the Commission's rules regarding those applications and transactions "provide more appropriate remedies" than the suspension or debarment rules.[54]

While the Associations support ensuring that USF and other support program participants are abiding by the Commission's rules, the proposed burdensome disclosures would mean resources better invested in providing service and equipment to unserved communities and consumers would instead be spent satisfying onerous compliance obligations. The Commission

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[52] *NPRM*, 34 FCC Rcd at 11,349, 11,357-58 ¶¶ 2, 28.

[53] *NPRM*, 34 FCC Rcd at 11,349, 11,358 ¶¶ 2, 29.

[54] *NPRM*, 34 FCC Rcd at 11,358 ¶ 29.

would strike a better balance by applying the nonprocurement suspension and debarment requirements to primary tier participants alone. If the Commission extends the rule to lower tier participants, it should adopt a safe harbor and raise the reporting threshold to reduce the burden on providers while ensuring that disqualified entities are not eligible to participate in the Commission's support programs.

A. The Rules Should Apply to Primary Tier Applicants Only.

A variety of federal agencies have concluded that extending the enhanced disclosure obligations to suppliers and subcontractors is not necessary to protect the public interest.[55] Moreover, the Commission has not explained why departure from its current rules, which do not extend to suppliers or subcontractors, is necessary to protect the public interest.[56] Because communications networks are capital-intensive and include a wide array of subcontractor inputs, the number of lower tier participants is significant, so extending the requirements to them would impose unduly burdensome investigation obligations on primary tier participants. The proposed rules may also result in suspending or debarring a primary tier participant because of a good-faith mistake or failure to identify, out of the large number of subcontractors it works with, a single subcontractor who is in some way disqualified. Time and effort spent on such investigations would be better invested in network upgrades and other efforts to close the digital divide. Moreover, including subcontractors could also limit choice and competitive options for primary tier contractors. Because the number of suppliers may be limited in high-cost rural areas, the Commission should be careful not to further limit those choices, which could increase costs or

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[55] *See, e.g.*, 2 C.F.R. § 1125.220 (Department of Defense); 2 C.F.R. § 901.220 (Department of Energy), 2 C.F.R. § 1400.220 (Department of Interior), 2 C.F.R. § 2200.220 (Corporation for National and Community Service), 2 C.F.R. § 2336.220 (Social Security Administration).

[56] *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.").

even make providing service untenable. The Commission should therefore limit the new rules to primary tier participants.

B. The Commission Should Adopt a Safe Harbor If It Extends the Requirements to Lower Tier Participants.

If the Commission nevertheless decides to extend the disclosure requirements to lower tier participants, it should reduce burdens and protect the companies that are acting in good faith by adopting the safe harbor used in the Guidelines. The safe harbor gives providers three options for checking subcontractors in a covered transaction: (1) consulting the federal System for Award Management ("SAM") database; (2) collecting certifications; or (3) adding a clause or condition to the covered transaction with that person.[57] The Commission should also clarify that the obligation to check lower tier participants is satisfied after any of the above options are performed once prior to the award of the contract, to avoid subjecting primary tier participants to needlessly burdensome recurring obligations.

Adopting this safe harbor would still require providers to conduct due diligence, but would offer providers flexibility in how they evaluate whether they are entering into a covered transaction with an excluded or disqualified person or entity.

C. If the Commission Extends the Requirements to Lower Tier Participants, It Should Raise the Threshold for What Constitutes a "Covered Transaction."

The Commission proposes treating transactions worth at least $25,000 between primary and lower tier participants as "covered," which would oblige the primary tier participant to verify that its lower tier partner is not excluded or disqualified.[58] If the Commission does extend the requirements to lower tier participants, it should raise the applicable contract valuation threshold

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[57] 2 C.F.R. § 180.300.

[58] *NPRM*, 34 FCC Rcd at 11,360-61 ¶ 34.

to at least $100,000. Although the $25,000 threshold comes from the Guidelines,[59] the Commission has discretion to make changes and increase the threshold.

First, because communications networks are capital- and infrastructure-intensive in general—as are contracts for the USF programs in particular—the $25,000 threshold would likely sweep in nearly all subcontractors. Other agencies facing similar challenges have recognized this. For example, $100,000 is the threshold used by the Emergency Steel Guarantee Loan Board and the Emergency Oil and Gas Guaranteed Loan Board, both of which are, like communications networks, capital- and infrastructure-intensive industries.[60] Raising the threshold would give the Commission oversight into disclosures by a wide range of subcontractors without diverting an unduly large amount of time and money from providers via disclosure obligations. Those resources could, as noted above, be better spent on network deployment through the USF programs.

Second, raising the threshold would also help account for inflation over time. The Guidelines' threshold was adopted in 2006, and various calculations show a cumulative inflation rate of just under 27% since then. That inflation means the number of covered transactions, and the associated burden of investigating such transactions, has grown significantly beyond the status quo at the time of adoption. The Commission annually adjusts civil monetary penalties to reflect inflation because of precisely this logic,[61] calibrating those penalties to maintain their deterrent effect. The Commission should adjust the threshold here for the same reason: Any balance of the

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[59] *See NPRM*, 34 FCC Rcd at 11,359 ¶ 31 & n.60; 2 C.F.R. § 180.220(b).

[60] *See* 13 C.F.R. § 400.109(b)(1)(ii)(B); *see also* 13 C.F.R. § 500.109(b)(1)(ii)(B). Similarly, the FAR exempt from disclosure requirements subcontractors "providing a commercially available off-the-shelf item," significantly reducing the scope of covered transactions. 48 C.F.R. § 52.209–6(c).

[61] *See, e.g.*, *In re Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 33 FCC Rcd 12,278, 12,278 ¶ 1 (EB 2018).

burdens imposed and efficiencies achieved by the $25,000 threshold in 2006 is now out of date, and that threshold, applied today, would be unduly burdensome.

D. The Commission Should Exclude or at Least Clarify What Constitutes a State or Local "Transaction."

The Commission proposes requiring primary tier participants to inform the Commission if they "[h]ave had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default."[62] The Associations are concerned about the potential ramifications of including all state and local transactions and encourage the Commission to limit notification to federal transactions.

Because many of the Associations' members conduct business in every state and in thousands of municipalities nationwide, identifying every state and local "transaction" terminated for cause or default over the previous three years would be highly burdensome. Given the breadth of the conduct covered—"State" is defined to include "[a]ny agency or instrumentality of a state,"[63] and "transaction" is undefined[64]—it appears that merely one *erroneous* rejection by one state agency official of a filing for, say, a perceived failure to conform to applicable margin requirements could trigger the provider's notification obligations.[65] It is also unclear whether this notification would apply even where such determinations were later rescinded, vacated, or otherwise reversed as unwarranted. The Commission should decline to adopt notification

[62] *See* 2 C.F.R. § 180.335(d) (emphasis added); *see also NPRM*, 34 FCC Rcd at 11,364 ¶ 48.

[63] 2 C.F.R. § 180.1005(a)(5).

[64] While the Guidelines define "[n]onprocurement transaction," 2 C.F.R. §180.970, and "covered transaction," 2 C.F.R. § 180.200, those definitions explain what *kinds* of transactions are "nonprocurement" or "covered" transactions, but do not explain what a "transaction" itself is. The Commission does tentatively propose to define the term "'public agreement or transaction' . . . as encompassing contracts between USF applicants and their selected service providers and/or consultants," but defines that phrase only "as used in section 180.800(b) of the Guidelines *relating to causes for debarment*," *NPRM*, 34 FCC Rcd at 11,369 ¶ 68 (emphasis added)—leaving it unclear whether that definition would apply to the separate disclosure requirement at issue here.

[65] *NPRM*, 34 FCC Rcd at 11,364 ¶ 48.

requirements for state or local transactions to avoid imposing unworkable and unnecessarily burdensome obligations on providers.

V. Conclusion.

The Associations appreciate and commend the Commission's goal of ensuring that its support program funds are dedicated to eligible low-income consumers and rural communities and are invested as efficiently and effectively as possible. To that end, the Associations encourage the Commission to adopt suspension and debarment rules that, by providing clear and fair process protections, targeting egregious conduct, and minimizing burdens on participants, promote participation in the Commission's support programs and ensure that unserved communities remain connected to broadband services that benefit their daily lives.

Respectfully submitted,

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