

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

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

**COMMENTS OF INCOMPAS, NTCA–THE RURAL BROADBAND ASSOCIATION,
AND ACA CONNECTS–AMERICA’S COMMUNICATIONS ASSOCIATION**

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SUMMARY

Representing a variety of service providers from diverse industries, the Joint Association Commenters appreciate the opportunity to provide their input on the proposed reforms to the FCC's suspension and debarment rules. The Joint Association Commenters share the FCC's goal of ensuring that the Universal Service Fund and other communications-related funding programs administered by the agency are protected against potential malfeasance. The Joint Association Commenters therefore support the proposed reforms as an improvement over the current FCC suspension and debarment rules, which provide minimal flexibility to address potential misconduct or pursue alternative remedies.

However, given the detrimental impacts suspension and debarment have on participants as well as intended beneficiaries of the affected programs, the Joint Association Commenters urge the FCC to draw upon the experience of other agencies and adopt balanced rules that not only allow for an appropriate response to incidents of noncompliance or misconduct, but also incorporate strong due process protections for service providers. **First**, the FCC should recognize that initiating a suspension or debarment proceeding is a drastic action and should not be used as a tool for punishment or as a response to political pressure against disfavored service providers. The suspension and debarment process is meant to assess a service provider's "present responsibility" to participate in an affected funding program, not to punish past violations. It should be used sparingly. **Second**, the FCC should not expand the grounds for suspension and debarment to include considerations of service provider compliance or regulatory fee payment history that do not rise to the level of an inability to conform conduct to FCC rules. Consideration of such conduct ignores existing FCC mechanisms to recoup improper payments or impose forfeitures and risks conflating the agency's enforcement functions with the forward-looking purpose of the suspension and debarment rules. **Third**, the FCC must ensure that the

agency official issuing suspension and debarment determinations operates as a neutral, objective decision maker. To achieve this, the responsibility is best placed in the agency's Office of Managing Director. By contrast, suspension and debarment authority should not be placed within the substantive bureaus overseeing the affected funding programs or the investigative bureaus, where conclusions may already have been reached in initiating any action. **Fourth**, the FCC should take into account mitigating factors demonstrating efforts to comply with program rules before excluding a service provider from an affected funding program and thereby encourage providers to self-police and self-report potential issues. **Fifth**, the FCC should make use of alternative remedies, such as pre-notice letters and administrative agreements, before initiating suspension or debarment proceedings to spur compliance without undermining participation in the affected funding programs. **Sixth**, the FCC should establish clear timeframes for suspension and debarment determinations and ensure that such determinations are based on a complete administrative record and not solely on allegations contained in a Notice of Apparent Liability or other non-final agency action, which would violate fundamental fairness principles and the Communications Act's due process protections. **Seventh**, the FCC should address continuity of service concerns in its suspension and debarment proceedings to avoid harming supported schools and libraries, rural communities, those with limited hearing, and others that depend on the affected funding programs. **Finally**, the FCC should adopt targeted safe harbors for suspension and debarment to provide affected program participants with predictability, encourage voluntary compliance, and protect the public from unnecessary service terminations. With these improvements, the FCC's proposed suspension and debarment reforms could better serve the public interest without sacrificing essential due process protections for participating service providers and program participants.

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. THE FCC SHOULD RECOGNIZE THAT SUSPENSION OR DEBARMENT IS A DRASTIC ACTION, NOT A GENERAL TOOL FOR PUNISHMENT 4

III. THE FCC SHOULD NOT EXPAND THE GROUNDS FOR SUSPENSION AND DEBARMENT BEYOND THE GUIDELINES 11

IV. THE FCC SHOULD DESIGNATE THE MANAGING DIRECTOR AS THE SUSPENDING AND DEBARRING OFFICIAL 15

V. THE FCC MUST CONSIDER MITIGATING FACTORS IN SUSPENSION AND DEBARMENT PROCEEDINGS AND ENCOURAGE SELF-GOVERNANCE..... 17

VI. THE FCC SHOULD CONSIDER ALTERNATIVE MEASURES BEFORE INITIATING SUSPENSION OR DEBARMENT PROCEEDINGS..... 19

VII. THE FCC SHOULD ESTABLISH CLEAR TIMEFRAMES AND DUE PROCESS PROTECTIONS FOR SUSPENSION AND DEBARMENT PROCEEDINGS 21

VIII. THE FCC SHOULD ADDRESS CONTINUITY OF SERVICE CONCERNS IN SUSPENSION AND DEBARMENT PROCEEDINGS 24

IX. THE FCC SHOULD ADOPT TARGETED SAFE HARBORS FOR SUSPENSION AND DEBARMENT..... 26

X. CONCLUSION 27

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INCOMPAS,¹ NTCA–The Rural Broadband Association,² and ACA Connects–America’s Communications Association³ (collectively, the “Joint Association Commenters”), hereby provide comments in response to the Notice of Proposed Rulemaking (“NPRM”) issued by the Federal Communications Commission (“FCC”) regarding proposed reforms to the agency’s suspension and debarment rules.⁴

I. INTRODUCTION

The Joint Association Commenters represent a variety of service providers and vendors of all sizes across the voice, cable, broadband, and other communications industries. Many Joint

¹ INCOMPAS is the preeminent national industry association for providers of internet and competitive communications networks and services, including both wireline and wireless providers in the broadband and voice marketplaces.

² NTCA represents approximately 850 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All NTCA service provider members are full-service rural local exchange carriers and broadband providers, and many provide fixed and mobile wireless, video, satellite and other competitive services in rural America as well.

³ ACA Connects’ membership is made up of nearly 800 small- and medium-size independent operators providing video, broadband, and phone services. ACA Connects’ members serve over 7 million households and businesses, mainly in rural areas.

⁴ *Modernizing Suspension and Debarment Rules*, GN Docket No. 19-309, Notice of Proposed Rulemaking, FCC 19-120 (Nov. 25, 2019) (“NPRM”).

Association Commenters' members participate in at least one of the FCC's Universal Service Fund ("USF") programs or the Telecommunications Relay Services ("TRS") programs, and some members participate in multiple programs. In doing so, Joint Association Commenters' members play an important role in helping the FCC close the "digital divide" between rural and urban areas as well as low-income and more affluent communities.⁵ As a result, the Joint Association Commenters and the FCC share the goal of ensuring that the USF and other affected funding programs are protected from potential waste, fraud, and abuse without imposing undue burdens on participating service providers and consumers.⁶

The Joint Association Commenters submit that the proposed reforms represent an important step forward for the FCC in its stewardship of the USF and other communications-related funding programs. The Joint Association Commenters therefore applaud the FCC for working to replace its existing procedures with new rules consistent with the Office of Management and Budget Guidelines ("Guidelines").⁷ As the FCC recognizes in the NPRM, its current suspension and debarment rules are largely non-discretionary and provide minimal flexibility to advance the goals of the affected funding programs while protecting against potential misconduct.⁸ At the same time, in the absence of rules, the fund administrators sometimes have initiated *de facto* suspensions. These *de facto* suspensions can occur without notice or an opportunity to respond, and can be of indefinite duration; they can have a

⁵ See *id.* at para. 2.

⁶ See *id.*

⁷ See Office of Management and Budget, Guidance for Governmentwide Debarment and Suspension (Nonprocurement), 71 Fed. Reg. 66,431 (Nov. 15, 2006), codified at 2 C.F.R. pt. 180 ("Guidelines").

⁸ NPRM at para. 4.

devastating impact on service providers, particularly small to medium sized entities, and on the individual consumers and entities that the USF and TRS programs are meant to help. The proposed rules are a significant advancement and, with the additional improvements described herein, could provide a solid basis for protecting the public trust.

Specifically, the Joint Association Commenters urge the FCC to improve the suspension and debarment proposals by learning from the experience of other agencies that have implemented the Guidelines. Given the drastic impact that exclusion from federal funding programs can have on the participants in the programs as well as the intended beneficiaries of the subsidies overseen by the FCC, the agency's suspension and debarment rules should not be lightly invoked and must be balanced to ensure that they are fundamentally fair and provide due process to service providers in addition to protecting against potential misconduct. Under the Guidelines, suspension and debarment are to be determined based on a participant's "present responsibility" to conform to rules prospectively. Good-faith differences in interpretation of ambiguous rules are not a basis for determining a lack of present responsibility. This is critical because suspension and debarment can be a death knell for a service provider's cash flow and put at risk services to targeted communities, be they rural areas, schools and libraries, low-income consumers, or rural healthcare systems. To protect these important public purposes of the underlying programs, the suspension and debarment process should be used judiciously and there should be protections to ensure that suspension and debarment are not used as punishment for unpopular entities and industries or even as a response to political pressure. It should be akin to license revocation for lack of character.

The comments below are aimed at bringing the FCC's proposed rules into alignment with the Non-procurement Common Rule ("NCR") suspension and debarment regulations of other

federal agencies.⁹ The NCR programs represent the product of more than 30 years of refinement and court-tested procedural and substantive considerations, and offer a number of mechanisms to ensure that FCC suspension and debarment proceedings are conducted effectively and fairly.

II. THE FCC SHOULD RECOGNIZE THAT SUSPENSION OR DEBARMENT IS A DRASTIC ACTION, NOT A GENERAL TOOL FOR PUNISHMENT

The Guidelines are clear that an agency should not take its suspension and debarment authority lightly and should undertake such actions only in response to misconduct “so serious as to affect the integrity of an agency program.”¹⁰ Thus, any new rules adopted by the FCC should take into account that suspension or debarment is a drastic action.¹¹ Importantly, because an exclusion from federal programs “is a serious action,” it should be used “only to protect the public interest” and not “for purposes of punishment.”¹²

The suspension and debarment process is meant to assess a service provider’s “present responsibility” to participate in an affected funding program, not to recoup past payments or to punish past violations. The NCR provides that, “[t]o protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.”¹³ In *Caiola v. Carroll*,¹⁴ the D.C. Circuit tied suspension and debarment to integrity in contracting:

The Federal acquisition regulations system operates on the *assumption that all individuals with whom the government does*

⁹ See *id.* at para. 24 (inviting comment on how other federal agencies implemented and apply the Guidelines).

¹⁰ *Id.* at para. 6 (citing 2 C.F.R. § 180.800).

¹¹ See, e.g., 2 C.F.R. § 180.700; 2 C.F.R. § 180.125(c).

¹² 2 C.F.R. § 180.125(c).

¹³ 2 C.F.R. § 180.125(a).

¹⁴ 851 F.2d 395 (D.C. Cir. 1988).

business are persons of integrity who abide by the terms of their government contracts Debarment reduces the risk of harm to the system by eliminating the source of the risk, that is, the unethical or incompetent contractor.¹⁵

An agency's "present responsibility" review examines whether the respondent's actions reveal: (1) a lack of business integrity or business honesty; (2) an inability to satisfactorily carry out government programs; or (3) some other cause of so serious and compelling nature that it affects the respondent's present responsibility.¹⁶ The Government Accountability Office has further described "integrity" in connection with government programs, stating that the meaning of the term "does not differ from the generally accepted connotation of uprightness of character, moral soundness, honesty, probity, and freedom from corrupting influence or practice."¹⁷ Thus, the present responsibility examination in a suspension or debarment is similar to the FCC's process for determining whether a service provider possesses the "character" and qualifications to hold a FCC license or authorization.¹⁸ The FCC's character assessments "focus on misconduct that demonstrates the licensee's or applicant's proclivity to deal truthfully with the Commission and to comply with its rules or policies."¹⁹ The FCC will reconsider a service provider's character

¹⁵ *Id.* at 398-99 (emphasis added).

¹⁶ 2 C.F.R. § 180.800.

¹⁷ *Domco Chem. Corp.*, B-165915, 48 Comp. Gen. 769 (1969), 1969 CPD ¶ 37, 3 (citing *In re Gordon's Estate*, 75 P. 672, 674 (Cal. 1904)).

¹⁸ See 47 U.S.C. § 308(b) (requiring applicants for FCC licenses and authorizations to demonstrate sufficient "character . . . and financial, technical, and other qualifications").

¹⁹ *Robert D. Landis, Amateur Radio Operator and Licensee of Amateur Radio Station N6FRV*, EB Docket No. 06-149, Order of Revocation, 22 FCC Rcd 19979, para. 6 (EB 2007) (revoking amateur radio license for past criminal felony convictions); see *Policy Regarding Character Qualifications in Broad. Licensing*, Gen. Docket No. 81-500, BC Docket No. 78-108, Report, Order and Policy Statement, 102 FCC 2d 1179 (1986), *recons. granted in part on other grounds*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom.*, *Nat'l Ass'n for Better Broad. v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987).

only under limited circumstances and has found that even substantial violations of agency rules are insufficient to warrant revocation of a provider’s license or authorization.²⁰ As a result, the suspension and debarment process should be used to determine a service provider’s current ability to comply with the affected funding program rules and not as a tool to punish prior conduct.

The current FCC approach to suspension and debarment often leads to a blurring of the objectives of the FCC Office of Inspector General (“OIG”) and Enforcement Bureau (“EB”) in ensuring past violations are prosecuted and improperly-disbursed funds are recovered with the determination of whether, going forward, an entity constitutes a responsible business partner for the agency so that the government’s expenditures are protected from waste, fraud, and abuse. Clarifying that suspension and debarment proceedings are aimed at safeguarding the future viability of the affected funding programs, and not to punish past misconduct, would avoid conflating the FCC’s enforcement functions with its program management responsibilities. In addition, the Universal Service Administrative Company (“USAC”) at times has ventured

²⁰ See, e.g., *Applications of T-Mobile US, Inc., and Sprint Corp., et al.*, WT Docket No. 18-197, *et al.*, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, 34 FCC Rcd 10578, para. 45 (2019) (finding that incidents of potential non-compliance with Lifeline rules, while extensive, did not rise to a level warranting a finding that a service provider did not possess the character and qualifications to hold a FCC license or authorization); *Joint Application of Securus Inv. Holdings, LLC, Securus Techs., Inc, T-NETIX, Inc., T-NETIX Telecomms. Servs., Inc. and SCRS Acquisition Corp. for Grant of Authority Pursuant to Section 214 of the Commc’ns Act of 1934, as Amended, and Sections 63.04 and 63.24 of the Commission’s Rules to Transfer Indirect Ownership and Control of Licensees*, WC Docket No. 17-126, Memorandum Opinion and Order, 32 FCC Rcd. 9564, paras. 22, 25 (2017) (approving transaction over character objections despite finding applicant’s “cavalier and willful attitude towards the Commission and its transaction review process unacceptable” and despite allegations of “allegedly misleading customers as to the effects of the Commission’s earlier orders; misrepresentations about the vulnerability of its businesses in the face of Commission action; and repeated violations of the Commission’s procedural rules”).

beyond its administrative role and embarked on investigations and implemented *de facto* suspensions or debarments through slowed administrative processing or improperly tainting certain applications based on commonalities such as use of the same service provider or consultant.²¹ Clarifying that suspension and debarment actions are the exclusive responsibility of the FCC, not USAC or any other non-governmental fund administrator, will lead to greater efficiency and fairness in program management.²² Fund administrators are not governmental

²¹ See, e.g., *Request for Review of the Decision of the Universal Serv. Adm'r by Academy of Careers and Techs., San Antonio, Tex.*, File No. SLD-418938, *et al.*, Order, 21 FCC Rcd 5348, para. 6 (2006) (granting appeals where USAC engaged in an improper “pattern analysis” of applications, because “the mere presence of similar language in Form 470s by different program participants ultimately selecting the same service provider is not sufficient evidence of a rule violation”); State E-Rate Coordinators Alliance, Comments on the Report on FCC Process Reform, GN Docket No. 14-25, Attachment p. 3 (Mar. 4, 2014) (“State E-Rate Coordinators Alliance Comments”) (observing, in the E-Rate context, that “[w]hile an investigation may be pending, however, all funding requests associated with the party being investigated—particularly when it is a service provider being investigated – may be stayed indefinitely and unfairly penalize innocent applicants as well as other service providers with which those applicants may have contracted”).

²² The FCC’s rules place strict limitations on USAC’s authority. See, e.g., 47 C.F.R. § 54.702(c) (stating that USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress,” and must seek the FCC’s guidance “[w]here the Act or the Commission’s rules are unclear, or do not address a particular situation”). Currently, service providers must appeal USF audit findings to USAC before coming to the FCC for a decision – a process that can often take years. 47 C.F.R. § 54.719(b). USAC decisions are often reversed upon review. See, e.g., *Requests for Review and/or Waiver of a Decision of the Universal Serv. Adm'r by Eastchester UN Free Sch. Dist.*, File No. SLD-326886, *et al.*, Order, 34 FCC Rcd 7776 (WCB 2019) (granting two requests for review and two requests for waiver of USAC decisions denying requests for E-Rate funding). In the meantime, however, the FCC’s proposals could subject respondents to suspension or debarment proceedings for potential violations alleged by USAC. Additionally, an unchallenged USAC finding is more likely to represent a business decision not to expend resources on further review than an admission of wrongdoing. Recognizing the severity of the exclusion sanction and the need to restrict USAC to its administrative province, the FCC should expressly exclude USAC decisions from serving as causes for suspension or debarment.

entities, and thus should not be exercising inherently governmental functions, such as adjudicating a suspension or debarment.²³

The Joint Association Commenters’ concerns regarding punitive suspension and debarment proceedings with unspecified standards and timeframes are not hypothetical. The absence of detailed FCC suspension and debarment procedures has led the agency to adopt unorthodox techniques on an *ad hoc* basis in the past to implement funding holds. For example, following a Notice of Apparent Liability (“NAL”) issued against Total Call Mobile, Inc., the Wireline Competition Bureau directed USAC to impose a temporary hold on all payments to the company related to requests for Lifeline reimbursement.²⁴ Total Call Mobile had argued that the

²³ The basic notion that governmental functions, including regulatory actions, may not be delegated to “private persons” is long-established. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding that regulatory power cannot be conferred upon “private persons”). A 2011 Office of Management and Budget Policy Letter provides “a single definition of ‘inherently governmental function’ built around the well-established statutory definition in the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270,” which states:

["Inherently governmental function"] includes activities that require either *the exercise of discretion* in applying Federal Government authority or the *making of value judgments* in making decisions for the Federal Government, *including judgments relating to monetary transactions and entitlements*. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as--

* * *

(v) to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or *disbursement of appropriated and other Federal funds*.

See Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 FR 56227-01, 1 (2011) (emphasis added); FAIR Act, Public Law 105-270, Sec. 5(2)(B)(v).

²⁴ *See Total Call Mobile, Inc.*, WC Docket No. 11-42, Order Directing Temporary Hold of Payments, 31 FCC Rcd 7052, para. 1 (WCB 2016) (“*Total Call Mobile Order*”).

proposed action was improper under Section 54.8 of the FCC’s rules because the criteria for suspension or debarment had not been met.²⁵ The Bureau disclaimed reliance on the suspension and debarment rules, instead claiming that it was not suspending Total Call Mobile from the program but merely “temporarily *holding payments* to [the company]” pending completion of its investigation.²⁶ Putting aside any questions regarding the company’s conduct that might have been addressed through other proper means, this is, of course, the same as a “suspension” under the NCR.

Although the Bureau characterized the hold as “limited” and “temporary,” it resulted in a *de facto* suspension of all Lifeline reimbursement payments to the company until an indeterminate time when the FCC “receive[d] adequate assurance” that the requested payments would be proper.²⁷ The Bureau provided no criteria for assessing the adequacy of the assurances to be provided by the company or a timeframe for rendering a decision on the company’s further receipt of Lifeline reimbursement payments. In actuality, the temporary hold remained in place indefinitely, despite a timely Petition for Reconsideration which also remained pending,²⁸ and did not end until Total Call Mobile settled all allegations with the FCC. At that point, just under

²⁵ See 47 C.F.R. § 54.8. Specifically, the Bureau ordered the payment hold even though the company had not been convicted of or received a civil judgment related to fraud or other offenses specified in the FCC’s suspension and debarment rules. The Bureau chose not to rely on the suspension and debarment rules and instead grounded the hold in the FCC’s “broad discretion” to discharge its USF obligations under Section 254 of the Communications Act as well as an assortment of FCC rules and orders related to the mechanics of Lifeline reimbursement. *Total Call Mobile Order* at para. 13.

²⁶ *Total Call Mobile Order* at para. 12 (emphasis in original).

²⁷ *Id.*

²⁸ See *Total Call Mobile, Inc., Petition for Reconsideration of Unlawful Funding Hold*, WC Docket No. 11-42 (July 22, 2016).

\$7.5 million had been withheld, a substantial sum for most entities.²⁹ The FCC has taken similar action to suspend (or threaten to suspend) funding to entities during investigations in other USF programs without a clear dispute resolution process.

The Joint Association Commenters do not mean to argue that the FCC was unjustified in pursuing enforcement action against Total Call Mobile or other alleged bad actors. Whether the actions were justified or not on the merits simply is not the point here. Rather, the example illustrates the uncertain legal ground the FCC was forced to tread, the delay involved, the lack of clear guidelines for the entity subject to the FCC's (or a fund administrator's) scrutiny, and the lack of a timely avenue for judicial review. These concerns can be fixed with the adoption of fair suspension and debarment rules. The example thus is offered to demonstrate the need for clear and comprehensive rules for the FCC's suspension and debarment process to help avoid intractable USF (and TRS) funding holds while providing due process protections for affected program participants.³⁰

²⁹ See *Total Call Mobile, Inc.*, File No. EB-IHD-14-00017650, Consent Decree, 31 FCC Rcd 13204, para. 20 (EB 2016) (stating that \$7,460,884 had been withheld).

³⁰ In light of suspension and debarment's severity, the FCC's proposed rules should only apply prospectively to conduct occurring after their adoption. The FCC seeks comment on whether to apply the proposed suspension and debarment rules retroactively to cover prior conduct, except when such conduct already resulted in a settlement with the FCC and the service provider continues to comply with the settlement terms. NPRM at para. 87. But there is no deterrent effect or other justification for such an approach, which would impose a severe sanction that could not have been anticipated at the time of the challenged conduct. Moreover, rules cannot deter past, already-performed conduct. As discussed below, existing remedies for preventing and recovering potentially improper disbursements and collecting duly-imposed forfeitures obviate any need to rely upon retroactive application of suspension and debarment to prevent or recover improper payments. In addition, retroactive exclusion would not assist the FCC in obtaining recoveries where existing mechanisms already provide no relief, such as for judgment-proof entities. In short, the FCC's proposal to apply the Guidelines retroactively would neither "protect the public interest" nor serve any other legitimate purpose. 2 C.F.R. § 180.125(c).

III. THE FCC SHOULD NOT EXPAND THE GROUNDS FOR SUSPENSION AND DEBARMENT BEYOND THE GUIDELINES

The FCC should not expand the scope of actions that may result in a suspension or debarment beyond the grounds set forth in the Guidelines. In the NPRM, the FCC proposes an agency-specific list of “additional factors” that may result in a suspension and debarment determination, including considerations of a service provider’s “willful” violations and regulatory fee payment history.³¹ Consideration of such conduct ignores existing FCC mechanisms to protect affected funding programs and threatens to conflate the FCC’s enforcement function to prosecute past violations with the forward-looking purpose of the suspension and debarment rules.

The concerns identified by the FCC are already addressable through existing agency mechanisms that provide the agency with significant flexibility to act quickly to protect affected funding programs. For example, FCC rules already provide USAC and the agency with the authority to audit contributors and withhold or offset payments in response to audit findings.³²

³¹ NPRM at para. 67. The Joint Association Commenters note that it is unclear whether the FCC intends to use the proposed additional factors as (1) independent bases for initiating a suspension or debarment proceeding or (2) supplemental criteria to take into account when determining whether a suspension or debarment is warranted under the actions specified in the Guidelines. The NPRM suggests that either may be the case. On the one hand, the NPRM cites to section 180.800 of the Guidelines, which enumerates the “causes” for suspension and explains that “each agency can modify that list.” NPRM at para. 67 & n.89. On the other hand, the NPRM suggests that the proposals are “factors that would militate in favor of suspension or debarment.” *Id.* at para. 67. The Guidelines contain separate provisions addressing the factors that should be considered in determining the extent of a debarment sanction. 2 C.F.R. §§ 180.845(a), 180.860. Thus, as currently drafted, the NPRM does not provide parties with fair notice as to when they could face suspension or debarment for the proposed additional factors, such as compliance history.

³² 47 C.F.R. § 54.707(a). *See, e.g., Request for Review of a Decision of the Universal Serv. Adm’r by Integrity Commc’ns, Ltd.*, CC Docket No. 02-6, Order, 27 FCC Rcd 772 (2012) (“The primary goal of the audit program is to identify and prevent waste, fraud, and

The FCC also can direct USAC “to suspend or delay universal service support amounts, either wholly or in part, when the Commission has proof, or credible information, that leads it to reasonably believe, based on the totality of the information available, that all or part of a payment would be in violation of the statutes and regulations applicable to the [applicable] program.”³³ Further, the Debt Collection Improvement Act provides the FCC with robust tools to collect established debts after judicial review, including offsets against other payments from the federal government.³⁴ When specifically identified payments are withheld on a targeted (rather than categorical) basis, the withholding and recoupment mechanisms can be appropriate measures to determine if a particular payment is justified under program rules. The suspension and debarment rules do not replace these recoupment mechanisms.³⁵

Suspension and debarment – with the consequence of funding program and government-wide exclusion – should not be employed to duplicate these recoupment measures. In particular, reliance on a conclusion that a violation was “willful” – a term which in enforcement has a

abuse in the programs administered by USAC. Audit letters, including the one issued here, provide USAC with essential tools to combat waste, fraud, and abuse.”).

³³ *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd. 3962, para. 143, n.403 (2016).

³⁴ 47 C.F.R. pt. 1, subpt. O.

³⁵ These recoupment mechanisms also should be employed with transparency and due process protections, which are frequently absent from existing USF withholding decisions. *See* State E-Rate Coordinators Alliance Comments at Attachment p. 3 (observing, in the E-Rate context, that “[w]hile an investigation may be pending . . . all funding requests associated with the party being investigated – particularly when it is a service provider being investigated – may be stayed indefinitely and unfairly penalize innocent applicants as well as other service providers with which those applicants may have contracted”). In contrast to the USF rules and USAC’s propensity to withhold payments without notice, the TRS rules ostensibly provide a process for notification and response. *See* 47 C.F.R. § 64.604(c)(5)(L). In practice, however, notices can be late or not specific enough to permit an adequate response.

specific, and very limited, meaning that does not require any intent – is inappropriate in the suspension or debarment context. Rather, suspension and debarment should be imposed only where a respondent is found to have committed serious misconduct that makes clear that the respondent lacks the integrity or character to participate in a federal program going forward.³⁶

The FCC’s rules are complex and frequently open to reasonable disagreements over interpretation. A participant attempting in good faith to comply with these rules may nonetheless engage in conduct that later is determined to be a violation.³⁷ Although an entity can undertake a number of efforts to arrive at the “correct” interpretation of the FCC’s rules, even mechanisms such as formal declaratory rulings and informal staff guidance could not provide sufficient protection under most circumstances. The FCC does not quickly provide clarification in response to requests for formal declaratory rulings and the agency expressly disclaims any legal effect for informal staff guidance.³⁸ Accordingly, entities with extensive involvement in activities regulated by the FCC may find themselves in violation of the agency’s rules despite reasonable compliance efforts. These situations can be addressed under the FCC’s existing enforcement rules and procedures, where punishment is a legitimate purpose and where the statute requires consideration of both mitigating and aggravating factors.³⁹

³⁶ See 2 C.F.R. § 180.125(a)-(b).

³⁷ Compare *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998) (“If a contractor submits a claim based on a plausible but erroneous contract interpretation, the contractor will not be liable, absent some specific evidence of knowledge that the claim is false or [evidence] of intent to deceive.”).

³⁸ See, e.g., *AMOR Family Broad. Grp. v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990).

³⁹ See 47 U.S.C. § 503(b)(2)(E) (requiring the FCC to consider “the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require”).

By contrast, the list of conduct warranting suspension or debarment in the Guidelines identifies serious actions such as fraud, embezzlement, theft, forgery, and a general category for “any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility.”⁴⁰ As noted above, these types of violations go to heart of a service provider’s “character” and qualifications to hold a FCC license or authorization and require the FCC to meet a high bar to exclude a service provider from an affected funding program. Yet the FCC’s proposed additional factors would permit the agency to suspend parties for even minor or easily-remedied violations that could and should be redressed with refunds, fines, voluntary contributions, or consent decrees with compliance plans. These situations could include innocent errors in billing systems resulting in misbilled claims for universal service support, computational errors in cost allocation factors underlying a cost-of-service study, inadvertent errors in reporting broadband locations for High Cost support, or unplanned service outages. There is no evidence that these situations implicate the “present responsibility” of the provider. The FCC therefore should not expand the circumstances under which the Guidelines would apply.

The FCC similarly should not include “habitual” nonpayment or underpayment of agency regulatory fees or contributions to affected funding programs as a basis for suspension or

⁴⁰ 2 C.F.R. § 180.800(a). The Guidelines also allow debarment for “unsatisfactory performance of one or more public agreements.” 2 C.F.R. § 180.800(b)(2). The NPRM proposes to define “public agreement” broadly, “encompassing contracts between USF applicants and their selected service providers and/or consultants.” NPRM at para. 68. This potentially sweeps in disputes between, for example, an E-Rate beneficiary and its service provider as to whether the service met its contractual terms – disputes that may have no clear answer as to what constitutes “unsatisfactory performance.” This goes far beyond the Guidelines and should not be adopted.

debarment.⁴¹ For entities with complicated contribution or regulatory fee obligations, it is essential that they understand how or when they may face the possible penalty of suspension or debarment due to a failure to make required payments. But the NPRM fails to provide any guidance or structure as to how a program participant might fall into a category of “habitual” nonpayment or underpayment. The FCC’s proposal also is in tension with the Guidelines, which permit debarment for failure to pay a “substantial debt” or a number of outstanding debts, but only if the debts are uncontested or all “legal or administrative remedies have been exhausted.”⁴² Even once legal and administrative remedies are exhausted, the severe sanction of program exclusion should not be imposed for good-faith disputes over required regulatory payments, but instead should be reserved only for egregious failures to comply with established payment obligations, failures that may implicate a party’s “present responsibility” to participate in an affected funding program.

IV. THE FCC SHOULD DESIGNATE THE MANAGING DIRECTOR AS THE SUSPENDING AND DEBARRING OFFICIAL

The Joint Association Commenters agree with the FCC that suspension and debarment determinations should be made by a single Suspending and Debarring Official (“SDO”) operating as a neutral and objective decision maker.⁴³ Specifically, the Joint Association Commenters recommend that the FCC establish an Acquisition Integrity Office within the Office of Managing Director (“OMD”) and designate the Managing Director as the FCC’s SDO. The Managing Director already possesses broad delegated authority to oversee USAC USF audits –

⁴¹ NPRM at para. 67.

⁴² 2 C.F.R. § 180.800(c)(3).

⁴³ NPRM at paras. 79-80.

as well as the financial management aspects of the TRS program and its administrator – and address the collection, suspension, or compromise of FCC claims against alleged violators.⁴⁴ Appointing the Managing Director as the SDO also would be consistent with OMD’s duty to “[f]ormulate and administer all management and administrative policies, programs, and directives for the Commission.”⁴⁵ Alternatively, the FCC could designate an appropriate official in the Office of General Counsel (“OGC”) as the FCC’s SDO. OGC possesses delegated authority to handle adjudicatory matters on behalf of the agency and, like OMD, perform administrative functions related to the collection, suspension, or compromise of FCC claims against alleged violators.⁴⁶ Appointing an SDO within OGC also would be consistent with OGC’s duty to “make recommendations to the Commission ... as to the disposition of cases” under FCC review.⁴⁷

By contrast, the SDO function should not be placed within the substantive bureaus overseeing the affected funding programs, such as the Wireline Competition Bureau (“WCB”) or Consumer and Governmental Affairs Bureau (“CGB”), or in the investigative bureaus like OIG and EB.⁴⁸ As the FCC highlights in the NPRM, the official who conducts suspension and

⁴⁴ See 47 C.F.R. § 0.213(f), (l). OMD also manages the process to determine the amount of improper payments in the programs, along with the development of corrective actions.

⁴⁵ 47 C.F.R. § 0.11(a)(2). This approach is not unlike that taken by leading federal agencies under the NCR, including the Environmental Protection Agency and the Department of Interior.

⁴⁶ See 47 C.F.R. § 0.251(c), (i).

⁴⁷ See 47 C.F.R. § 0.41(m).

⁴⁸ See Letter from Robert F. Meunier, Owner, Debarment Consulting Services, LLC, to FCC Commissioners, GN Docket No. 19-309, 6 (Dec. 19, 2019) (recommending against placing the SDO function in an agency’s “Office of Inspector General or Criminal Investigations Division (or its equivalent)”) (“Meunier Comments”).

debarment proceedings on behalf of the agency must be neutral.⁴⁹ The FCC must separate the suspension and debarment function (designed to protect future government expenditures) from the enforcement and program administration function (designed to investigate wrongdoers and collect improperly-disbursed funds).⁵⁰ This can best be assured by fully separating the SDO function from the enforcement and program administration function by housing the SDO in OMD rather than in WCB, CGB, OIG, or EB. Otherwise, the FCC risks compromising the fairness of the suspension and debarment process as well as the Constitutional due process protections afforded service providers and other affected funding program participants.

V. THE FCC MUST CONSIDER MITIGATING FACTORS IN SUSPENSION AND DEBARMENT PROCEEDINGS AND ENCOURAGE SELF-GOVERNANCE

Regardless of which FCC bureau or office handles suspension and debarment determinations, the SDO should consider mitigating factors and encourage service provider self-governance when rendering its decisions.⁵¹ The NCR is clear that the existence of a cause for debarment does not necessarily require that an entity be debarred.⁵² The NCR provides a non-exhaustive list of mitigating factors in suspension and debarment proceedings, including

⁴⁹ See NPRM at para. 80 (citing Michael Asimow, Administrative Conference of the United States, Evidentiary Hearings Outside the Administrative Procedure Act, 23 (Nov. 10, 2016), available at <https://www.acus.gov/report/evidentiaryhearings-outside-administrative-procedure-act-final-report>)).

⁵⁰ See *Int'l Relief and Dev., Inc. v. U. S. Agency for Int'l Dev.*, 2015 WL 11254376 (D.D.C. 2015) (granting preliminary injunction in action brought where grantee alleged suspension decisions were the result of political pressure, and not a reasoned decision by an independent SDO and where the SDO had an organizational conflict of interest); see also Meunier Comments at 5 (“[S]eparation of functions between investigative/advocacy function and the decision-making function [is] highly desirable.”).

⁵¹ See NPRM at para. 69 (noting that the Guidelines list numerous mitigating factors that may influence SDO decisions).

⁵² 2 C.F.R. § 180.860(p).

considerations of whether an entity cooperated fully with the government’s investigation or took appropriate disciplinary action against the individuals responsible for the alleged misconduct.⁵³ Thus, in the event that the SDO proposes a formal suspension or debarment, the FCC should take into account mitigating factors demonstrating service provider efforts to comply with program rules and address potential deficiencies before excluding the provider from an affected funding program.

In addition to adopting the NCR mitigating factors, the FCC’s rules should provide for a procedure to protect a self-reporting service provider from suspension action for a period of time after the provider notifies the FCC of a potential issue.⁵⁴ As the Interagency Suspension and Debarment Committee (“ISDC”) noted in its 2019 Annual Report, self-disclosure (referred to as “proactive engagements” by the ISDC) “allows both sides to focus on corrective measures taken by the company to address misconduct, along with efforts by the company to improve internal controls, enhance compliance programs, and to promote a culture of ethics.”⁵⁵ Similarly, service providers that implemented ethics and compliance policies in advance of any detected problems and that act promptly and responsibly to address problems should be given credit for such actions. This is a hallmark of the NCR rules encouraging codes of business ethics and conduct.⁵⁶ The FCC therefore should encourage parties to self-police by mitigating its suspension or debarment actions when such codes are in effect and updated promptly.

⁵³ *Id.*

⁵⁴ *Cf.* 47 C.F.R. § 1.80 (allowing for downward adjustment of fines in the enforcement context when the alleged violator voluntarily disclosed the relevant action to the FCC).

⁵⁵ Letter from David M. Sims, Chair, Lori Y. Vassar, Vice Chair, Monica Aquino-Thieman, Vice Chair, ISDC, to Ron Johnson, Chairman, Comm. On Homeland Security and Gov’t Affairs, 4 (Oct. 30, 2019) (“2019 ISDC Annual Report”).

⁵⁶ *See, e.g.*, 2 C.F.R. § 180.860(p) (pre-existing standards of conduct as a mitigating factor).

VI. THE FCC SHOULD CONSIDER ALTERNATIVE MEASURES BEFORE INITIATING SUSPENSION OR DEBARMENT PROCEEDINGS

The FCC asks in the NPRM whether the SDO should be empowered to “tailor” decisions to provide for alternative remedies to suspension or debarment.⁵⁷ The Joint Association Commenters submit that the answer is a definite yes. Suspension or debarment is not an action to be taken lightly, nor should it be the first option the FCC considers. The ISDC “encourage[s] its members to take into consideration, as appropriate, alternative tools to promote contractor and participant responsibility.”⁵⁸ Encouraging use of these alternative remedies would enable the FCC suspension and debarment process to be flexible and responsive to the needs of the affected funding programs, without punishing participants for past conduct or initiating potentially drastic action based on minor or inadvertent violations.

The ISDC reports that use of alternative measures is growing among member agencies. During FY 2018, for example, “agencies reported greater reliance on the administrative remedies [identified in the report] as alternatives to immediate and/or continued imposition of suspension and debarment.”⁵⁹ The ISDC reported that eight member agencies reported instances of proactive engagements, sixteen reported using pre-notice letters, and fourteen reported entering into administrative agreements (“AAs”) in FY 2018.⁶⁰

Following these recommendations and experiences, the FCC should make use of pre-notice letters whenever possible. The FCC’s rules should permit the SDO to issue pre-notice

⁵⁷ NPRM at para. 75.

⁵⁸ Letter from David M. Sims, Chair, Lori Y. Vassar, Vice Chair, ISDC, to Jason Chaffetz, Chairman, Comm. on Oversight & Gov’t Reform, 2 (Jan. 12, 2017).

⁵⁹ 2019 ISDC Annual Report at 4.

⁶⁰ *Id.* at 4-5.

letters (*i.e.*, “show cause” or “request for information” letters) prior to commencing formal suspension or debarment procedures, and should state that such letters are preferred. The ISDC 2019 Annual Report states that “[u]se of these letters helps agencies better assess the risk to Government programs and determine what measures are necessary to protect the Government’s interest without immediately imposing an exclusion action.”⁶¹ Consequently, pre-notice letters can quickly spur service provider compliance without having to engage in full suspension or debarment proceedings.

Moreover, the FCC should incorporate into the rules the use of AAs whenever possible to resolve suspension or debarment actions.⁶² Similar to FCC consent decrees, the emphasis in AAs should be placed on verifiable actions taken in a prescribed timeframe that will foster future compliance and protect the affected funding program. In addition, AAs also can include the use of an ethics and compliance officer to ensure future compliance. AAs are especially appropriate in instances where service providers self-report an issue to the FCC. Because it is not focused on punishment, an AA could potentially be negotiated and implemented even prior to resolution of enforcement proceedings. The FCC therefore should establish a preference for adopting AAs in response to self-reporting.

⁶¹ *Id.* at 4.

⁶² *See* Meunier Comments at 7 (stating that AAs “are an extremely important vehicle in addressing government concerns without having to ultimately rely on suspension or debarment to protect the public AAs bridge the gap between present risk and future risk to the public better than any alternative remedy available to the government, including suspension and debarment”).

VII. THE FCC SHOULD ESTABLISH CLEAR TIMEFRAMES AND DUE PROCESS PROTECTIONS FOR SUSPENSION AND DEBARMENT PROCEEDINGS

Establishing clear timeframes and due process protections for suspension and debarment proceedings would help the FCC ensure that “implementation of any new rules be efficient and fair.”⁶³ Timeframes for SDO decisions should be set in the regulations, as delay itself can threaten a service provider’s ability to operate. The FCC also should dedicate sufficient staff to expeditiously examine potential suspension and debarment actions, prepare the administrative record, meet with respondents, and administer AAs to ensure that decisions do not languish due to resource constraints. The Administrative Procedure Act (“APA”) requires an agency to provide entities with notice and an opportunity to respond to all allegations based on the entire administrative record underlying an action.⁶⁴ The FCC therefore should ensure that the suspension and debarment rules provide for timely SDO decisions based on a complete record and, if necessary, allow for expeditious judicial review.

The FCC should establish clear timeframes for the SDO to issue a decision regarding a proposed suspension or debarment for “fact-based” actions (*i.e.*, not based on a prior conviction or civil judgment), similar to the process used by the FCC’s Administrative Law Judge (“ALJ”) in proceedings designated for hearing.⁶⁵ As with a decision issued by a FCC ALJ, the decision of the SDO regarding a proposed suspension or debarment should contain specific findings of fact and law as well as the SDO’s reasoning for such findings to provide a clear record in the event of an appeal.⁶⁶ Once the SDO issues a decision, the affected service provider must be

⁶³ NPRM at para. 76.

⁶⁴ *Friedler v. GSA*, 271 F. Supp. 3d 40, 61 (D.D.C. 2017).

⁶⁵ *See* 47 C.F.R. § 1.267.

⁶⁶ 47 C.F.R. § 1.267(b).

allowed to seek judicial review.⁶⁷ Courts apply a standard of review for suspension or debarment decisions similar to other APA reviews of agency action. Thus, a court “must consider the entire administrative record” and determine “whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment.”⁶⁸ A party challenging an SDO’s decision generally need not pursue an administrative appeal unless the agency regulations mandate that such an appeal is required. For example, the Environmental Protection Agency’s regulations provide that a party may request reconsideration by the SDO or appeal a suspension or debarment decision administratively within the agency; but because these intra-agency reviews are optional, the decision not to pursue them will not prevent judicial review under the APA.⁶⁹ The Joint Association Commenters submit that the FCC should adopt similar options for the review of the agency’s suspension and debarment determinations.

While establishing clear decision timeframes and review procedures would help keep suspension and debarment proceedings from languishing, these protections mean little if the SDO intends to base its decisions on an incomplete record, such as the allegations contained in a NAL. A SDO may suspend or debar an entity for a series of causes set out in the NCR. These causes may be grouped into two categories: (1) wrongful conduct that results in indictment, conviction, or civil judgment (“offense-based” or “judgment-based” actions); and (2) other conduct that casts serious doubt on a person or entity’s present responsibility (“fact-based”

⁶⁷ NPRM at para. 78 (seeking input on the appropriate mechanisms for review of any suspending or debaring action on appeal). *See* Meunier Comments at 7 (noting that agency suspension and debarment actions are subject to judicial review and relief).

⁶⁸ *Burke v. Env’tl Protection Agency*, 127 F. Supp. 2d 235, 238 (D.D.C. 2001) (internal citations omitted).

⁶⁹ *Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993); 2 C.F.R. §§ 1532.765, 1532.890.

actions). The Communications Act prohibits the fact of a NAL from being used in any way to a party's detriment.⁷⁰ Furthermore, the FCC has previously described a NAL as akin to a complaint in a civil court matter, which the Guidelines do not list as a basis for suspension or debarment.⁷¹ A NAL is merely an allegation of wrongdoing to which the alleged violator will have an opportunity to respond. Timelines for contesting NALs are long and judicial review is not available, if at all, until the end of the proceeding, which regularly takes years to complete. Therefore, a NAL, in and of itself, does not sufficiently serve as the basis for a suspension or debarment action and, in this context, Section 504(c) bars this as an "offense-based" cause for suspension or debarment.⁷² A NAL could only be considered a "fact-based" action for potential suspension or debarment and, even then, only in appropriate circumstances. In particular, any disputed material facts in the NAL must be the subject of a timely fact-finding hearing before the SDO can make a decision.⁷³ The FCC therefore should not permit a suspension or debarment

⁷⁰ 47 U.S.C. § 504(c) ("In any case where the Commission issues a notice of apparent liability . . . that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued. . .").

⁷¹ *See FCC Proposes Nearly \$13 Million Fine for Illegal Spoofed Robocalls, Robocaller Launched 'Neighbor Spoofing' Campaigns Which Specifically Targeted Communities in Six States with the Intent to Cause Harm*, FCC Press Release (Jan. 30, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-362195A1.pdf> (stating that a NAL "contains only allegations that advise a party on how it has apparently violated the law and may set forth a proposed monetary penalty Neither the allegations nor the proposed sanctions in the NAL are final Commission actions. The party will be given an opportunity to respond and the Commission will consider the party's submission of evidence and legal arguments before acting further to resolve the matter").

⁷² *See* Letter from Patrick R. Halley, Senior Vice President, Policy & Advocacy, USTelecom, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 19-309, 1 (Nov. 15, 2019) (expressing concern that basing a suspension or debarment on a NAL would violate the due process protections contained in Section 504(c)).

⁷³ As one example of an appropriate hearing timeline, in *Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1270-72 (D.C. Cir. 1972), the D.C. Circuit addressed the due process

based solely on contested facts of a NAL, which would deny a service provider due process and violate the Communications Act.

VIII. THE FCC SHOULD ADDRESS CONTINUITY OF SERVICE CONCERNS IN SUSPENSION AND DEBARMENT PROCEEDINGS

The Joint Association Commenters support the FCC's proposal to consider the absence of an alternative service provider as a mitigating factor in suspension and debarment proceedings.⁷⁴ In markets with a single provider, it is important not to cut off critical services, and even when there are multiple providers, requiring termination of service and a change of provider is frequently highly disruptive to the individual or entity receiving the service. As those affected may include critical institutions, such as health care providers, schools, or, in the case of High Cost support, government and public safety entities, the public interest requires balancing suspension or debarment concerns with consideration of the potential harmful consequences on these entities. The Communications Act charges the FCC with ensuring that all people in the United States have access to rapid, efficient, nationwide communications service with adequate facilities at reasonable charges.⁷⁵ Any FCC withholding of otherwise obligated funds therefore must be justified with a specific, immediate need or on-going threat to taxpayers.

The SDO must balance the purported benefit of a suspension or debarment with the likely harms that will result to third parties who are served by the provider. As a practical matter, many suspensions or debarments risk harm to innocent third parties that are the intended recipients of FCC programs. As examples, suspension or debarment of a service provider in the E-Rate

considerations applicable to a suspension. The court stated that due process requires that an agency hold a post-decision hearing within thirty days of issuing a suspension notice.

⁷⁴ NPRM at para. 74.

⁷⁵ 47 U.S.C. § 151.

program might deprive a school or library of supported service, suspension or debarment of a recipient of Connect America Fund support may halt deployment of broadband services to unserved communities or the ongoing provision of services in rural communities where support is critical to continuity, and other suspensions or debarments may cause “unintended consequences” for the public.⁷⁶ Rural health clinics rely on supported facilities for critical health care delivery through telemedicine, which cannot be disrupted without threatening health and safety. The same is true of services to governments or to PSAPs. The potential for these harms should be accounted for in determining whether to suspend or debar an entity from an affected funding program.⁷⁷

One way for the FCC to avoid continuity of service concerns is to restrict the proposed limited denial of participation (“LDP”) process to new awards of funds in the affected programs.⁷⁸ Under the NCR, the decision to suspend or debar is made by an agency SDO and the decision as to the continuation of existing participation in a government program is separately made by the awarding agency in consultation with agency legal counsel.⁷⁹ A LDP determination (which the FCC proposes would be issued by the bureau responsible for administering the relevant funding program, not the SDO) should incorporate the due process protections described above for SDO decisions. In addition, the FCC would be better served to place the LDP authority with the SDO in the first place, rather than the substantive bureau. Most

⁷⁶ See NPRM at para. 18 (asking whether the unintended costs of the proposed suspension and debarment rules could outweigh their benefits).

⁷⁷ This concern is another reason why the FCC should favor pre-decision alternatives, such as AAs, to address concerns about protecting the public trust.

⁷⁸ NPRM at paras. 64-65.

⁷⁹ See 2 C.F.R. § 180.135.

importantly, if an LDP process is adopted, its effect should be limited to future (new) awards or options; it should not cover existing contracts or customers (*e.g.*, a LDP determination would apply to new Lifeline subscribers, but would not deny funding for existing eligible Lifeline subscribers; a LDP determination would apply to new E-Rate awards, but would not affect awards already given, *etc.*). Also, a LDP should have a limited duration – shorter than a suspension period – and automatically terminate, unless the SDO commences a suspension or debarment action.

IX. THE FCC SHOULD ADOPT TARGETED SAFE HARBORS FOR SUSPENSION AND DEBARMENT

In addition to applying the mitigating factors described above to protect service providers that make good-faith efforts to comply with agency rules, the FCC should adopt targeted safe harbors and other exceptions for suspension and debarment to provide participating parties with predictability, encourage voluntary compliance, and protect the public from unnecessary service terminations. These issues should not be left to the discretion of the SDO to decide on a case-by-case basis.

First, innocent purchasers of service providers should not face suspension or debarment for prior, unknown conduct. At times, violations are discovered by a subsequent purchaser after a transfer of control has occurred. Innocent purchasers should not be subject to possible exclusion due to an entity's prior wrongdoing, as long as they are bringing the entity into compliance. Successor entities still bear responsibility for any recoupment or forfeitures due to their predecessors' conduct, so this measure would in no way prevent or inhibit the FCC's ability to recover improperly-distributed funds. A rule that permitted suspension or debarment of an innocent purchaser, however, could discourage or unnecessarily complicate corporate

transactions and actually harm the FCC's ability to eliminate bad actors from the affected funding programs.

Second, the FCC should adopt its proposal to allow service providers to determine that another party is not excluded from program participation in any of the three ways set forth in the Guidelines: (1) checking SAM Exclusions; (2) collecting a certification; or (3) adding a clause or condition to the contract.⁸⁰ Given the reach of the proposed suspension and debarment rules to cover subcontractors, the FCC should provide an express safe harbor for entities that check SAM Exclusions to ensure that they do not do business with an excluded person. To ensure predictability, the contracting party should be expressly obligated to perform only a one-time check. Entities that perform a SAM Exclusions check should not be subject to suspension or debarment if the contracting party later is excluded or disqualified from an affected funding program. Any continuing obligation to monitor SAM Exclusions would be unworkable and unreasonable, imposing continuous monitoring requirements on affected funding program participants.

X. CONCLUSION

With improvements such as those described above, the FCC's proposed suspension and debarment rules could serve the public interest by better protecting the affected funding programs from waste, fraud, and abuse. The Joint Association Commenters therefore

⁸⁰ NPRM at para. 61. *See* proposed 47 C.F.R. § 16.300 (citing 2 CFR § 180.300).

recommend revising the proposed rules to ensure the FCC's suspension and debarment rules are effective, without sacrificing service provider due process protections.

Respectfully Submitted,



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