Before the
Federal Communications Commission
Washington, D.C. 20554

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

To: The Commission

COMMENTS OF THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

Louis Peraertz
Vice President of Policy
4417 13th Street #317
Saint Cloud, FL 34769

Stephen E. Coran
David S. Keir
Lerman Senter PLLC
2001 L Street, NW, Suite 400
Washington, DC 20036
(202) 416-6744
Counsel to the Wireless Internet Service Providers Association

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Summary

In this proceeding, the Commission proposes generally to incorporate the Office of Management and Budget Guidelines ("OMB Guidelines") into its suspension and debarment rules for universal service programs. Although well-intended, certain of the proposed rules could lead to consequences that are far-reaching and disproportionate to the potential harm. The Wireless Internet Service Providers Association ("WISPA") offers a number of recommendations in the accompanying Comments.

First, WISPA agrees with the proposed definition of "covered transaction," but cautions that a finding of inappropriate use of Federal funding should not warrant automatic suspension of the ability to obtain FCC licenses for provision of service to the public.

Second, the Commission should not expand the OMB Guidelines' definition of "principal" so as to create the presumption that the enumerated professionals must generally be considered "principals" without having any identified capability to substantially influence activity that is part of a covered transaction. Absent a factual finding that such influence or control exists, no person should be presumed to have a "critical influence on, or substantive control over, a covered transaction."

Third, to expedite staff review for eligibility purposes, an applicants should disclose in initial short-form applications only whether the applicant or its principals are presently excluded or disqualified, with more detailed disclosures required during the long-form application review process that is limited to successful bidders.

Fourth, the Commission should reject its proposal to apply any revised rules to conduct occurring before such rules are effective. Requiring transactions that have already been implemented to be unwound would disrupt support recipients that have installed supported

infrastructure and continue to rely on the manufacturer for ongoing support. The Commission instead should limit retroactive application of revised rules only to cases of well-documented, egregious misconduct that poses a clear threat of immediate and lasting harm.

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The Wireless Internet Service Providers Association ("WISPA") hereby responds to the Commission's November 25, 2019 *Notice of Proposed Rulemaking* seeking public comment to inform the Commission's efforts to modernize its rules governing its suspension and debarment mechanisms to prevent waste, fraud and abuse in its critical support programs.[1] WISPA's comments focus on several discrete issues the *NPRM* raises concerning definitional, procedural and equitable matters impacting the proposed revisions to the Commission's Rules.

Introduction

As the Commission is aware, WISPA represents more than 500 providers of fixed wireless broadband service to millions of American consumers, largely in rural and underserved areas of the United States. Given the nature and location of the communities WISPA members typically serve, these providers must leverage the availability of cost-effective equipment and technology to bring advanced connectivity to areas where wireline options are largely unavailable, are too costly to deploy, or where consumers lack choice. As a result, a number of WISPA's members are participants in Universal Service Fund ("USF") programs, particularly

[1] *Modernizing Suspension and Debarment Rules,* Notice of Proposed Rulemaking, GN Docket No. 19-309, FCC 19-120 (rel. Nov. 25, 2019) (*"NPRM"*).

the Rural Broadband Experiment ("RBE") program and the Connect America Fund Phase II ("CAF II"). Many have existing contracts with equipment providers and distributors, installers, attorneys and consultants and therefore would be affected by the proposed rule changes.

WISPA appreciates the Commission's commitment to adopt rules that are consistent with the Office of Management and Budget Guidelines ("OMB Guidelines"). Nonetheless, applying the new rules retroactively to support recipients would unfairly require affected entities to disrupt transactions undertaken in good faith without corresponding public interest benefits. As a general rule, the Commission should reject this approach.

Discussion

I. THE COMMISSION SHOULD ADOPT ITS PROPOSED DEFINITION OF "COVERED TRANSACTIONS" AND SHOULD NOT EXPAND IT TO COVER ADDITIONAL FCC-RELATED ACTIVITIES

Central to the Commission's request for public input is its solicitation of comment on the scope of "Covered Transactions" that will be subject to the new regulations. The Commission proposes that all transactions under the USF and Telecommunications Relay Service ("TRS") support programs be considered Covered Transactions, along with transactions under the National Deaf-Blind Equipment Distribution Program.[2] The Commission observes that the OMB Guidelines focus primarily on transactions that "involve a transfer of Federal funds to a non-federal entity."[3] Accordingly, it proposes to exclude from the scope of this category under the new rules all other FCC-related transactions, "such as applications for Section 214

[2] *NPRM* at 10, ¶28.

[3] *Id.* at 11, ¶29.

authorizations, equipment authorizations, and broadcast and spectrum licenses issued by the Commission."[4]

WISPA agrees with this approach particularly because, as the Commission notes, these other types of transactions are governed by separate Commission rules that provide standards for initial grant, renewal and/or revocation of FCC licenses.[5] Applying in these circumstances the separate suspension and debarment regulations specifically geared toward the prevention of waste, fraud and abuse in connection with disbursement of Federal funds could complicate the functioning of the Commission's public interest mandate. For example, a finding of inappropriate use of Federal funding should not lead to automatic suspension of the ability to obtain access to spectrum licenses for provision of service to the public as such action would have direct impact on innocent consumers and potentially others (*e.g.*, subcontractors, vendors, spectrum lessees) not involved in any wrongdoing. Such circumstances could arise where a high-cost recipient leases Educational Broadband Service spectrum held by an educational institution that is subsequently found to be subject to suspension or debarment with respect to funding received through the E-rate program. The Commission should take care in adopting its rules so as not to mandate actions that can produce such adverse secondary effects.

II. THE COMMISSION SHOULD ADOPT THE DEFINITION OF "PRINCIPAL" CONTAINED IN THE OMB GUIDELINES WITHOUT ALTERATION

A second key definitional element is the scope of "Covered Persons." Under the rules, as proposed, a key determinant in whether a person may be considered subject to the regulations is whether that person falls within the scope of the term "principal." The Commission proposes to define this term broadly, to cover persons "even if they do not satisfy any of the three prongs in

[4] *Id.*

[5] *Id.*

the [OMB] Guidelines."[6] The Commission states that this broad interpretation is appropriate "to ensure that all persons who have substantial influence on or control over a covered transaction may be considered 'principals'" even without, *inter alia*, occupying a position "capable of substantially influence [sic] the development or outcome of an activity [in a transaction]."[7] In turn, as currently written, the proposed rule states: "Persons *who have a critical influence* on, or substantive control over, a covered transaction may include, but are not limited to: management and marketing agents, accountants, consultants, investment bankers, engineers, attorneys, and other professionals who are in a business relationship with participants in connection with a covered transaction under an FCC program."[8] Thus, as currently proposed, the regulation is circular and could easily be construed to create the presumption that the enumerated professionals must generally be considered "principals" even without having any identified capability to substantially influence activity that is part of a Covered Transaction.[9]

No person should be presumed to have a "critical influence on, or substantive control over, a covered transaction" without a factual finding that such influence or control exists. It is plainly the case that many attorneys, engineers, consultants, investment bankers, or other technical or professional advisors providing services to providers would have no such influence over a "covered transaction." Each inquiry under the rules should be decided on its own merits and should be fact-driven with the goal of determining in any specific instance of potential

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[6] *Id.* at 12, ¶33.

[7] *Id.* at 12, ¶32, *citing* 2 C.F.R. §180.995.

[8] *Id.* at 14, ¶35 & n.67, *quoting* Appendix A, Proposed Rule 16.100(8) (emphasis added).

[9] Indeed, the Commission's language in the *NPRM*, which states only that the enumerated persons "*may* have a critical influence on" covered transactions is different from the more assertive construction of the proposed rule, which states that "Persons who have a critical influence on" such transactions "may include, but are not limited to" the roles listed. *Compare NPRM* at 12, ¶33 (emphasis added) and Appendix A at 33 (Proposed Rule 16.100(8)).

wrongdoing the nature of a third party professional or technical consultant's involvement in the transaction and whether that person had a "material role."

Moreover, it is far from clear what additional conduct the Commission is seeking to reach via its vague expansion of the term "principal." The Commission's proposed language is insufficiently explained, and no substantive justification has been provided for concluding that the OMB Guidelines require additional layers of complexity to be adapted to the FCC context. It is far from evident how the Commission's new construction meaningfully augments the portion of the OMB Guidelines applicable to technical or professional consultants "capable of substantially influencing the development or outcome of an activity required to perform the covered transaction."[10] Accordingly, the Commission should adopt the definition from the OMB Guidelines without alteration.

III. THE COMMISSION SHOULD PROVIDE FOR STREAMLINED AND FLEXIBLE DISCLOSURE PROCEDURES AT THE APPLICATION STAGE

A. High-Cost Program Short-Form Applicants Should Be Required to Disclose Only Principals That Are Presently Excluded or Disqualified

The Commission discusses several options for establishing mandated disclosures in connection with competitive bidding for USF support, noting that "[p]rimary tier participants would at a minimum provide all required disclosures with their long-form applications."[11] It notes, however, that if it were to require all such disclosures "at the short-form stage," it "could slow the auction process."[12] WISPA agrees that this is a valid concern. For this reason, it believes that when initial applications are filed to participate in high-cost support programs, the Commission should adopt one of its alternative approaches, wherein applicants would disclose in

[10] *See* 2 C.F.R. § 180.995(b)(3).

[11] *NPRM* at 19, ¶55.

[12] *Id.*

their short-forms only "whether the applicant or any of its principals are presently excluded or disqualified."[13] Limiting the scope of the initial disclosures will expedite staff review of short-forms and simplify preparation for USF auctions. More detailed disclosures can occur in long-form application review, which is limited to successful bidders only.

B. In Cases of an Unfavorable Long-Form Disclosure, a Primary Tier Participant Should Have the Option to Take Corrective Action Prior to Suspension, Debarment or Other Disqualifying Action

The Commission also seeks comment on whether a primary tier participant that is required to make an unfavorable disclosure should be subject to an immediate suspension or debarment proceeding, or whether the rules "should include less drastic remedies."[14] Because the primary purpose of the rules is not to mete out punishment of applicants seeking support, but to protect the integrity of FCC support programs, the Commission should adopt rules that provide maximum incentives for parties seeking funding to take their own corrective action in response to unfavorable information. A primary tier participant should have the opportunity to address unfavorable disclosures relating to a lower tier participant by, for example, terminating relationship with that entity or individual, rather than suffering the penalty of losing the right to participate.[15] Wherever possible, the Commission should seek to avoid the expense and administrative burdens of initiating a suspension and/or debarment proceeding. Similarly, the Commission should avoid the reduction in competition for funding that would arise from mechanistically disqualifying applicants from participation due to problems with lower tier contractors, consultants or other professional service providers. No harmful impact will occur if

[13] *Id.* at 19, ¶57.

[14] *Id.* at 20, ¶60.

[15] *See id.* at 20, ¶62.

the applicant is permitted to remediate a concern in the first instance, and the public interest may be harmed if interested parties are too quickly eliminated as potential providers of new broadband or other capabilities to underserved areas. Accordingly, the Commission should permit corrective amendments in such circumstances.

IV. FCC BUREAUS SHOULD BE GIVEN DELEGATED AUTHORITY TO GRANT EXCEPTIONS TO THE EFFECT OF THE SUSPENSION AND DEBARMENT RULES TO PROMOTE THE PUBLIC INTEREST

As stated in the *NPRM*, the OMB Guidelines permit an agency head to grant an exception to the rules to allow a person who otherwise would be excluded from a covered transaction to participate.[16] The Commission seeks comment on whether it should "spell out factors for invoking such an 'exception'" or leave such determinations "solely to the discretion of the full Commission or the Chairman?"[17] It further suggests that one factor potentially justifying such an exception would be whether the provider "may be the sole source of services in the area, such that its exclusion could place consumers and/or beneficiaries at risk of losing service."[18] Given the importance of continuing to expand the availability of advanced telecommunications service in underserved areas,[19] the Commission should adopt this criterion for discretionary exceptions to the rules. There is a significant likelihood that recipients of CAF or Rural Digital Opportunity

[16] *See id.* at 20-21, ¶63.

[17] *Id.* at 20, ¶63.

[18] *Id.* at 21.

[19] *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2019 Broadband Deployment Report, 34 FCC Rcd 3857, 3860 (¶9)(2019), *quoting* WISPA Comments, GN Docket No. 18-238, at 6 (filed Sept. 27, 2018) ("We agree with WISPA that 'the Commission should continue to take affirmative steps toward . . . closing the "digital divide" that separates rural and other typically unserved or underserved areas from areas with substantially greater connectivity service and service options'").

Fund support,[20] for example, would be the "sole provider" of such services in a given eligibility area. Those services could also include Lifeline that the Commission has reformed so that it can effectively close the digital divide for low-income consumers. Under these circumstances, it is essential for decisionmakers to have the flexibility to balance the impact of strict enforcement of the suspension and debarment regulations against consumers' continuing need for access to supported services. Given the expertise that the Wireline Competition and Wireless Telecommunications Bureaus have in oversight of the relevant services and support programs, the Commission should not reserve this waiver authority to itself but should instead allow the Bureaus to grant exceptions on delegated authority in consultation with the Enforcement Bureau.

V. THE COMMISSION SHOULD NARROWLY CONSTRUE CERTAIN DEBARMENT FACTORS IN ORDER TO AVOID RESULTS THAT ARE INEQUITABLE OR CONTRARY TO THE PUBLIC INTEREST

The Commission seeks comment on the potential consideration of a number of factors in evaluating whether debarment is appropriate,[21] including whether there is willful or grossly negligent conduct or whether high-cost support has been used for non-supported expenses.[22] In weighing these factors, the Commission should make allowance for specific program rules that may raise the threshold at which conduct can be construed to be a willful violation or gross negligence. For example, the CAF II program does not have any accounting rules, with the result that cost allocation is determined solely by the statutory requirement that funds must be used "only for the provision, maintenance, and upgrading of facilities and services for which the

[20] *See* FCC News Release, "FCC Launches $20 Billion Rural Digital Opportunity Fund to Expand Rural Broadband Deployment; Represents FCC's Largest Investment Ever to Close Digital Divide," WC Docket Nos. 19-126 and 10-90 (rel. Jan. 30, 2020).

[21] *See NPRM* at 22, ¶67.

[22] *See id.* at 22, ¶68.

support is intended."[23] The implementing guidelines fashioned by the FCC and USAC under this general statutory mandate are just that – guidelines – and are not comprehensive standards that provide a roadmap for support recipients.[24] For this reason, there remains a significant margin for novel situations to occur, which may lead to inadvertent errors in categorizing expenses. This is especially the case when networks are being used to provide both supported services and non-supported services (*e.g.*, a fixed wireless tower, fiber trenching equipment, labor). When such accounting anomalies occur in the ordinary course, they should not be confused with gross negligence or a willful violation of program requirements to subject a provider to automatic penalties.

Input is also sought on the extent to which "a program participant may choose to continue with an excluded entity 'if the transactions were in existence when the agency excluded the person.'"[25] Where a service provider has an existing relationship with an equipment supplier, it should be permitted to maintain that relationship until the end of the contract, the natural equipment replacement cycle, or the mandated suspension or debarment period, whichever comes first or is otherwise appropriate. Replacing an existing contract could cause extreme hardship to service providers. The costs of purchasing alternative equipment from new supplier may be excessive in comparison to the existing relationship and could therefore adversely impact operating budgets and build-out timelines. In addition, newly acquired equipment may not be compatible with older supported equipment in the network, which could create significant engineering and integration issues. Moreover, equipment contracts are typically multi-year

[23] 47 U.S.C. 254(e).

[24] *See, e.g., Connect America Fund,* Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17859-86, ¶¶ 607-614 (2011).

[25] *NPRM* at 22, ¶70.

commitments that may also include service and technical support relationships, making them especially difficult and disruptive to replace outside of a planned upgrade cycle. Indeed, in some instances there may not even be a suitable alternative supplier from which to obtain a particular product or service. For all of these reasons, transactions with lower tier contractors and suppliers should be grandfathered as outlined above in order to avoid these harmful disruptions.

The Commission also proposes "in appropriate cases, to authorize the suspending or debarring officer to apply any revised suspension and debarment rules to conduct in Commission programs that occurred before the effective date of such rules where expeditious suspension or debarment would be in the public interest."[26] As a general rule, the Commission should reject this approach, and should consider such retroactive application of revised rules only in the event of well-documented, egregious misconduct that poses a clear threat of immediate and lasting harm. As noted above, unwinding transactions that have already been implemented would be especially disruptive to RBE and CAF recipients that have installed significant quantities of fixed network equipment and continue to rely on the manufacturer for ongoing technical support. There is also the potential for conflicting requirements given the likely impact of mandates to "rip and replace" certain equipment as a result of the Commission's expected actions in the Commission's open proceeding on National Security Threats to the Communications Supply Chain.[27] A service provider ought not be required to deal with overlapping or sequential obligations to replace facilities in response to ever-changing circumstances. Such an approach is unduly burdensome and economically inefficient.

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[26] *Id.* at 27, ¶87.

[27] *See, e.g., Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Report & Order, Further Notice of Proposed Rulemaking, and Order, WC Docket No. 18-89, 34 FCC Rcd 11423 (2019).

VI. SETTLEMENT AGREEMENTS AND ALTERNATIVE REMEDIES SHOULD BE PERMITTED

The Commission also asks whether "the debarring official should have authority to tailor debarments for particular circumstances or propose remedies in lieu of suspension and debarment?"[28] A grant of flexibility to officials responsible for adjudicating potential suspensions and debarment is a sound approach and should be adopted in order to allow the FCC to fashion appropriate remedies based on the facts of particular cases. As indicated above, the emphasis in such cases should not be solely on punitive actions but instead should focus on the appropriate steps to protect government support grants from being fraudulently obtained or squandered. With such flexibility, decisionmakers can consider specific circumstances that may be unique to individual cases, such as the absence or availability of alternative service providers or suppliers and the time frame that may be required for an alternative solution to become available. For these reasons, the Commission should explore conditioned settlements and other remedies short of suspension or debarment that can ensure federal funding is properly used without resort to the most preclusive outcomes.

Conclusion

For the foregoing reasons, WISPA urges the Commission to adopt final rules that take into consideration the concerns expressed herein. The Commission should modify its proposals in certain respects enumerated here to provide greater clarity regarding the scope of the term "principals," promote flexibility to service providers at the application stage, afford agency

[28] *NPRM* at 24, ¶75.

officials with appropriate discretion in remediating possible violations, and avoid results that are unduly punitive, inequitable or contrary to the public interest.

Respectfully submitted,

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

By: */s/ Louis Peraertz*
Louis Peraertz, Vice President of Policy

Stephen E. Coran
David S. Keir
Lerman Senter PLLC
2001 L Street, NW, Suite 400
Washington, DC 20036
(202) 416-6744
Counsel to the Wireless Internet Service Providers Association

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