

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of:

Modernizing the Suspension and
Debarment Rules

GN 19-309

REPLY COMMENTS OF
THE E-RATE MANAGEMENT
PROFESSIONALS ASSOCIATION

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INTRODUCTION

The E-Rate Management Professionals Association¹ (E-mpa) respectfully submits reply comments on the Suspension and Debarment NPRM.² After a thorough reading of the NPRM, E-mpa has concerns about the changes to the rules as proposed.

E-mpa is concerned that there is a lack of clarity in the types of events that can trigger the disciplinary process, a lack of differentiation between the seriousness of those events, and a lack of clarity as to who is subject to this process. Further, increasing the speed at which bad actors can be expunged from the program reduces the due process protections afforded all persons accused of serious program violations, as do the undefined procedures for challenging an adverse determination.

Irreparable harm will be caused to service providers and consultants who are suspended or debarred under the proposed rules; harm will also accrue to applicants, but to a lesser degree. E-mpa implores the Commission to weigh the integrity of the program against the harm caused to program participants by false findings and hasty judgments.

¹The E-Rate Management Professionals Association(E-mpa)® is an association of E-rate professionals and consultants whose mission is to promote excellence and ethics in E-Rate professional management and consulting through certification, education and professional resources.

²Modernizing Suspension and Debarment Rules, GN Docket No. 19-309, Notice of Proposed Rulemaking, 34 FCC Rcd 11348 (2019) (NPRM).

NECESSARY CLARIFICATIONS

E-mpa notes that various respondents, cited below, have commented that there are areas of the proposed rules which are unclear, and E-mpa agrees. There are four specific areas which are unclear and are addressed in the following sections:

CLARIFICATION OF TYPES OF TRIGGERING EVENTS

E-mpa strongly disagrees with the Commission's indication that a denial of funding should be grounds for denial of participation in the program, stating (in part), if a principal "had one or more public transactions... terminated within the preceding three years for cause or default."³

The term "cause or default" is ambiguous. All funding denials are, presumably, for cause. E-mpa urges the FCC to clarify the criteria for the types of denials that would result in the administrative reactions described in the body of the rulemaking. For example, denials for missed program deadlines and other ministerial errors should not provoke those responses. Since the E-Rate Modernization Order was implemented in FY 2015, there have been quite a few denials for funding requests related to category two budgets and ineligible items which should not be considered cause for disciplinary action.

E-mpa urges the Commission to clarify the types of denials that would be considered procedural and those which would be considered subject to disciplinary action. The Commission needs to provide clear and concise examples of procedural denials which would be exempt from any escalation or requirement to report.

³NPRM ¶¶ 48-49.

CLARIFICATION OF REPORTING REQUIREMENTS

The requirements to report a violation and/or denial of funding are unclear.

Who should report this? A service provider? An applicant? A consultant?⁴ Is a finding of fault required, pursuant to the spirit of the 4th Report and Order? Under the proposed rules, participants would be required to report violations even if they were not responsible. A simple funding denial would, under the rules as proposed, require the service provider, the applicant, and any consultants associated with either side (applicant or service provider) to report this violation. Further, will this reporting requirement be restricted to the FRN in question, or the entire Form 471?

E-mpa urges the Commission to clarify who is required to report a violation and the types of violations that must be reported.

CLARIFICATION OF TYPES OF DIFFERENT RESPONSE LEVELS

E-mpa agrees with commenters that suspension and debarment should only be invoked in cases of egregious actions or fraud.⁵ Not all violations merit the imposition of a suspension or debarment. Lesser penalties should be imposed as circumstances dictate.

E-mpa agrees with SHLB-SECA that a tiered response system should be implemented.⁶

⁴ immixGroup Comments at 3.

⁵SHLB-SECA Comments at 7-8; immixGroup Comments at 5; NCTA Comments at 7; Cellular South Comments at 3-4; CTIA/USTelecom Comments at 13-16.

⁶ SHLB-SECA Comments at 8-9.

INCORRECT ADVICE

E-mpa strongly supports SHLB/SECA's comments regarding not assessing penalties for providing incorrect advice. The proffering of incorrect advice should not result in debarment or suspension. E-Rate program participants are, for the most part, well-intentioned people who are working together to provide affordable, advanced technology opportunities for our nation's schools and libraries. Most program participants are doing their best to properly complete E-Rate forms and comply with all rules and requirements throughout the E-Rate filing process. However, due to the complexities inherent in the program, honest mistakes, misinterpretations, and miscommunication may occur. Perfection is not a workable standard for participation in the program. In E-mpa's opinion, the appeals process already provides the vehicle for program participants to work through these issues resulting in denial or approval by USAC or the FCC. If an applicant relied on incorrect advice from a USAC employee, consultant, state E-Rate coordinator or other outside party, the applicant should be given the opportunity to explain the issue and subsequently be granted (or denied) funding depending on the facts and circumstance presented. It is our opinion that there cannot be a penalty for incorrect advice absent of proof of fraud or malfeasance. USAC help desk, state E-rate coordinators, service providers, and E-Rate consultants are all doing their best to provide good advice. If an individual serving in any of these capacities is at risk of suspension or debarment, in our opinion, they would no longer be able to fulfill these positions.

CONSISTENCY ACROSS CONSTITUENT TYPES

In regards to the determination of actionable conduct, E-mpa recommends that the Commission adopt consistent rules regarding suspension/debarment of individuals only and not suspend or debar entire companies, applicants, or consulting firms. By issuing a suspension/debarment at the individual level, the Commission will direct the penalty to the person or person(s) who have committed the violation and not penalize innocent program participants just because they happen to work for the wrong company.

Traditionally both USAC and the FCC have avoided barring the applicants from the program as it is not only difficult but unreasonable to remove a school from participating in the program and penalize an entire community for the fraudulent acts of one or more individuals.

We strongly recommend that companies and consulting firms should be treated in the same manner as applicants in this regard. An innocent person working for a company who has some “bad actors” should not face financial hardship due to the actions of those whom he or she has no knowledge or control. This applies to a consulting firm as well. The consulting firms represent multiple applicants and service providers. To penalize a consulting firm for violations committed by an applicant or service provider that the consulting firm represents would also be unfair and create undue hardship on the consulting firm.

Suspension or debarment at the company/applicant/consulting firm level will always penalize and cause undue financial hardship on innocent parties. This would set a dangerous precedent where proponents of the program will be forced to take their talents elsewhere rather than risk losing their financial stability and reputation from bad actors outside of their control or knowledge.

Another issue that arises if a debarment or suspension is at the company level is that individuals can create more than one company. If their company is debarred or suspended, the individual “bad actor” could start a new company and be able to continue to participate in the program.

We certainly agree that there are situations where a debarment or suspension is appropriate. However, we recommend that the debarment or suspension be made at the individual level after a thorough assessment of the facts and circumstances of the case and proper due process has been provided to the accused individual.

CORPORATE ENTITIES VERSUS INDIVIDUALS

E-mpa comments that there are multiple ways in which a corporate entity can skirt the suspension/debarment rules which are not available to individuals, including dissolving a corporate entity and replacing it with another, or having multiple SPINs.

DUE PROCESS

CURRENT POLICY OF *DE FACTO* SUSPENSION

E-mpa strongly agrees with SHLB’s concerns pertaining to the “de facto suspension process,”⁷ referring to the phenomenon where all public work on a particular FRN, including correspondence, invoice processing, and application review, stops completely, with no notification, transparency or recourse. E-mpa agrees with SHLB, and echoes their calls to eliminate this procedure and replace it with the rules under discussion. E-mpa comments that a more formalized procedure, which includes transparency and notification, would serve the needs of all constituencies in the program.

⁷SHLB-SECA Comments at 2.

E-mpa shares the concerns of several commenters regarding due process for the application of penalties. The NCTA indicated concerns that parties must be able to challenge proposed actions and have the opportunity to submit exculpatory evidence,⁸ and INCOMPAS/NTCA and Cellular South submitted comments that the Commission must consider mitigating factors.⁹

E-mpa agrees with both. Any proposed rulemaking must give all affected parties the right to contest a finding before a penalty is imposed, which includes confronting the evidence assembled against them.

⁸NCTA Comments at 3-4.

⁹INCOMPAS/NTCA Comments at 17-18; Cellular South Comments at 6.

SUMMARY

E-mpa supports the efforts of the Commission to allow for the faster application of penalties in the cases of truly bad actors, but remains concerned that this additional “speed” will result in a reduction of due process, with a commensurate increase in the potential harm suffered by program participants. The current rules, in general, take action after an investigation is concluded, and “unfund” a compromised application, if necessary, returning the funds to the program. This approach provides the accused the opportunity to be heard before penalties are imposed. The current process does a good job of providing due process by allowing USAC or the FCC to review the facts and circumstances prior to assessing penalties on any party or parties. E-mpa remains concerned that the new rules, as proposed in the NPRM, will erode the safeguards built into the current process, resulting in innocent parties whose positive efforts are integral to the success of the program, suffering an irreparable loss of business and reputation. E-mpa urges the Commission to delay the implementation of the new rules until these concerns can be addressed.

Respectfully submitted:



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