FOREWORD

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In the 15 years since the publication of the last edition of this Guide, the practice of suspension and debarment has evolved dramatically. No longer are suspension and debarment relatively infrequent and specialized administrative actions pursued primarily by the Department of Defense (DOD) and a few select civilian agencies. In recent years, federal agencies across the executive branch have made a concerted effort to develop more robust, standardized, and well-coordinated suspension and debarment programs. Simultaneously, suspension and debarment activity has become the focus of both greater government oversight and increased inter-agency coordination. The result has been an unprecedented surge in suspension and debarment activity, both under the Federal Acquisition Regulation (FAR) for federal procurement programs and under the Nonprocurement Common Rule (NCR) for other federal transactions.

The practice of suspension and debarment has developed rapidly to keep pace with this surge in activity. Today’s suspension and debarment practitioners must contend with the fallout from mandatory disclosure submissions, an increased focus on individual respondents, and the possibility of complex parallel civil or criminal proceedings. New practices and tools also have emerged, including respondents’ early voluntary engagement with debarring officials, agencies’ use of informal show-cause letters and requests for information, and the resolution of actions through negotiated administrative agreements. These developments reflect the maturation of suspension and debarment processes and the increasing diversity of issues that can arise in these types of actions.
This fourth edition of the Practitioner’s Guide to Suspension and Debarment aims to capture and address these important trends and changes in the practice of suspension and debarment. The Guide is designed to serve as a practical guide for legal practitioners in both government agencies and private practice, and the working group that prepared the Guide represents a cross-section of the suspension and debarment bar, including agency officials, attorneys in private practice, and other consultants and experts.²

The Guide is not merely a description of the current state of the law, but rather a practical guide that reflects insights and wisdom gained from the collective experience of the contributors. And unlike prior editions of the Guide, we have expanded this edition to provide guidance on actions brought under the NCR, as well as to cover the unique considerations when dealing with individuals proposed for suspension or debarment.

Consistent with the objective of providing practical guidance to legal practitioners, the Guide is organized in a series of chapters that address, in corresponding order, the issues that a legal practitioner might confront in the course of handling a suspension and debarment matter. While we welcome your reading of the entire manuscript cover-to-cover, the Guide is designed to enable practitioners to refer to the Table of Contents to quickly identify the particular chapter or section that will be most relevant to a particular issue.

Chapter 1 of the Guide provides an introductory overview of suspension and debarment. This chapter includes a high-level discussion of notable trends in the practice of suspension and debarment.

² As noted on the Acknowledgments page, each member of the working group participated in his or her individual capacity, and the views expressed in this Guide are not attributable to their respective organizations.
debarment, as well as a discussion of key considerations that legal practitioners should consider when handling these types of matters.

Chapter 2 traces the evolution of the suspension and debarment process since 1884, including landmark judicial decisions delineating necessary procedural safeguards and various reform efforts that ultimately resulted in the current regulatory requirements designed to ensure fairness and uniformity. Chapter 2 also summarizes a number of recent trends that have emerged since the publication of the previous edition of this Guide.

Chapter 3 discusses the nature and application of the suspension and debarment remedy, including that these actions are intended to protect the government’s interest in doing business with responsible contractors, not to exact punishment on such entities. Chapter 3 also outlines the regulatory bases for suspension and debarment, as set forth in the FAR and NCR, as well as various statutory provisions that have expanded the available bases and mandate suspension and debarment in certain circumstances.

Chapter 4 explores the procedural aspects of suspension and debarment actions under both the FAR and NCR regimes, from initial notice and other procedural requirements to presentation of matters in opposition and consideration of mitigating factors. This analysis includes an examination of the often-difficult question of the application of mitigating factors to individual respondents.

Chapter 5 then addresses agency specific structures and procedures. The chapter begins with a discussion of the variations in structure and staffing of suspension and debarment offices across the executive branch agencies. It then provides an overview of agency-specific practices and procedures from a selection of agencies that historically have particularly active or unique suspension and debarment programs.
Chapter 6 examines administrative agreements, in which a contractor and responsible agency negotiate a bilateral agreement to resolve a present responsibility matter. Administrative agreements typically entail continuing compliance requirements and outside oversight, and this chapter outlines standard criteria and requirements, as well as considerations that may be relevant when negotiating administrative agreements.

Chapter 7 discusses the terms, scope, and effect of a decision to impose suspension and debarment. The chapter begins by addressing the impact of suspension and debarment on an entity’s ability to pursue federal awards. It also analyzes the circumstances in which a related entity may be subject to exclusion under principles of affiliation and imputation, and it concludes with an analysis of the often substantial collateral effects of suspension and debarment.

Chapter 8 details the rise in parallel proceedings, including simultaneous actions seeking to impose criminal or civil liability or contract remedies, and explores common strategic and practical challenges confronting contractors grappling with such proceedings. Chapter 8 also identifies key practical considerations practitioners should consider when evaluating options for pursuing and resolving parallel proceedings.

Chapter 9 discusses legal challenges to agency suspension and debarment actions, including the substantive, procedural, and strategic considerations that contractors should assess when weighing a challenge to a suspension or debarment order. The chapter identifies potential bases for such a legal challenge, and analyzes notable federal court decisions addressing the merits of each of those bases.

Finally, although this Guide focuses primarily on suspension and debarment activity at the federal level, Chapter 10 delves into the realm of state suspension and debarment actions. The chapter begins with a historical overview of the various versions of Model Procurement
Codes developed by the American Bar Association to be used in state suspension and debarment actions and analyzes various procedural and substantive provisions of these Model Codes.

Chapter 10 also provides an overview of common features of state-specific debarment statutes and regulations, including provisions governing reciprocity, reporting, and certifications.