VIA HAND DELIVERY
AND ELECTRONIC MAIL

Mr. Robert F. Meunier
Office of Grants and Debarment (3901-R)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Room 51206
Washington, D.C. 20460

Re: Proposed Rule: Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants);

Dear Mr. Meunier:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.
GENERAL COMMENTS

The Section believes that the proposed rule on nonprocurement debarment and suspension (“the Proposed Rule”), which has been written in plain language style and format, is presented in a very user-friendly style that is particularly well suited for non-lawyers. The format allows a reader to easily determine the bases for nonprocurement debarment and suspension, the effect and impact upon a person, the factors used to make the determination, and the procedures for such proceedings. This has been done without losing any of the precision in the standard regulation format.

The primary purpose of the Proposed Rule (67 Fed. Reg. 3267) is to resolve unnecessary technical differences between the procurement (Federal Acquisition Regulation) and nonprocurement (OMB-promulgated Common Rule) debarment and suspension systems. The Section believes that the Proposed Rule generally achieves this goal. Another significant goal is to make improvements in the existing Common Rule, consistent with the purpose of the debarment and suspension system. Some of these changes are excellent; however, as noted below, some of the proposed improvements introduce problems that the Section believes should be reconsidered and rectified.

Before discussing these problems, the Section would like to commend the drafters’ decision to maintain an important difference between the Federal Acquisition Regulation (“FAR”) system and the existing nonprocurement system: the ability under the nonprocurement system to propose a person (including an entity) for debarment, without automatic and immediate suspension.

Under the FAR, if an agency proposes a person for debarment, the person is automatically barred or excluded from receiving new contracts or having existing contracts extended if suspension has not been imposed already. See FAR 9.405(a). There are no standards for the decision to propose a person for debarment other than the agency’s reasonable belief that a basis for debarment exists. In contrast, in order to suspend a person, the agency must determine that not only does a basis for debarment exist, but also that immediate action is required to protect the government’s interest. See FAR 9.407-1(b)(1). Thus, the FAR suspension rule includes an immediacy requirement that is one of the rationales for not requiring prior notice of the suspension action. It also provides a defined standard to review the propriety of the agency decision and help provide due process safeguards. Unfortunately, there is

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1 The Proposed Rule also separates and moves the provisions dealing with a drug-free workplace. This revision makes no substantive changes and, hence, the Section offers no comments on the revision.
no comparable standard in the FAR for review of proposed debarments, even though the effect is exactly the same. Moreover, the automatic suspension coincident with proposing a person for debarment leaves the debarring official little flexibility when proposing a person for debarment. The Section has long believed that this is an inconsistent and inappropriate policy that should be changed.

The nonprocurement debarment regulations, based upon the government-wide Common Rule, have followed a different approach that is retained in the current revision. Under the existing and proposed nonprocurement regulations, a proposed debarment does not carry with it an automatic suspension. *See Proposed Rule, Section __.810.* Rather, in order to immediately exclude a person from nonprocurement programs, an agency must make a separate determination that the person must be suspended in order to avoid immediate harm to the public interest. *See Proposed Rule, Section __.700.* The Section believes this is a logical and fair procedure that allows the Government to take immediate action through suspension where warranted, while providing a well-accepted standard for judicial review for such actions. It also gives the agency the flexibility to decide, as is often the case, that such immediate action is not warranted or required. This is particularly useful where a basis for action has existed for years but has only been brought to the Government’s attention recently or where the Government has known about the basis but decided not to suspend the person. The Section urges that this approach be adopted for the FAR system as well.

The Proposed Rule also includes several changes and clarifications that will help eliminate confusion and streamline the system, while still affording protection to the Government. These include clarification of what information a respondent should submit to a debarring official when contesting a suspension or debarment, and specifically what will establish a genuine dispute concerning a material fact, as well as the inclusion of both aggravating and multiparty factors to be considered by the debarring official. Also of note is the setting of the dollar threshold for the prohibited lower-tiered procurement transactions at $25,000 (rather than defining it in terms of the small purchase threshold, which may change).

In addition to these general comments, the Section offers the following specific comments and recommendations.

**SPECIFIC COMMENTS**

**A. Elimination of the Certification Requirement**

The Proposed Rule eliminates the requirement for agencies and participants to obtain a written certification regarding debarment and suspension. The Section
believes this is an excellent change and urges that the certification requirement be eliminated in the FAR system as well.

In addition, because agencies retain certain enforcement discretion, the Section recommends that agencies be instructed that they cannot fashion their own individual certifications at any level. Without such guidance, there is a risk that certifications with varying wording would be used by different agencies, thus aggravating rather than solving the problems raised by certification.

B. Definition of “Conviction”

Section ___.925 of the Proposed Rule expands the definition of “conviction” to include “any other resolution, including probation before judgment and deferred prosecution.” The Section believes the proposed definition is overbroad and will chill the use of alternative means of resolving criminal matters that benefit both the government and participants. The Section recommends changes to the proposed definition that would address these concerns, while maintaining the drafters’ intent to achieve a measure of finality in temporary suspension situations.

The phrase “or any other resolution” appears to be unbounded by the other provisions of the proposed definition and would, therefore, apparently include situations in which no criminal wrongdoing has been established. Whereas the existing definition of conviction is limited to situations in which there has been a “judgment or conviction of a criminal offense,” Common Rule, Section ___.105(e), the proposed definition encompasses all resolutions – even those that are favorable to the defendant, such as decisions to not prosecute, successful motions to dismiss, and verdicts of not guilty. The Section presumes it was not the drafters’ intent to include such resolutions.

The proposed definition also provides that “probation before judgment” and “deferred prosecution” constitute convictions. The Section believes referencing these specific types of resolutions is inappropriate because not all instances of probation before judgment and deferred prosecution reflect criminal wrongdoing. Probation before judgment is used in a wide variety of circumstances and often includes no admission of guilt. The varying uses of probation before judgment across different state jurisdictions compounds this problem, because a “conviction” under state statutes is also a ground for suspension and debarment. See Proposed Rule, Sections ___.705(b); ___.800(a).

Deferred prosecution is likewise used in a wide variety of situations that do not necessarily imply criminal wrongdoing. The U.S. Attorneys’ Manual strongly encourages “innovative approaches” to deferred prosecution, and deferred prosecution
agreements are individually tailored to meet the needs of the situation. See U.S. Attorneys’ Manual at 9-22.000; Criminal Resource Manual at 712. Indeed, a deferred prosecution agreement might specifically disavow any admission of wrongdoing. See Criminal Resource Manual at 712(F). The definition in the Proposed Rule is also inconsistent with the federal Sentencing Guidelines, in which a diversionary disposition is treated as a “sentence” for criminal history purposes only where it results from a “finding or admission of guilt.” U.S. Sentencing Guidelines § 4A1.2(f). For these reasons, probation before judgment and deferred prosecution are not necessarily tantamount to convictions and are, therefore, inadequate bases upon which to predicate a suspension or debarment.

Furthermore, probation before judgment, deferred prosecution, and other alternative resolutions are important tools that facilitate the efficient resolution of criminal allegations. These tools often are employed prior to indictment to conserve resources of both the Government and alleged wrongdoer. The expanded definition of “conviction” in the Proposed Rule, however, will almost certainly have a chilling effect on corporate and individual willingness to voluntarily agree to such resolutions for fear of suspension and debarment. The Government, on the other hand, will lose a cost-effective tool that can secure many of the benefits of a conviction – e.g., restitution payments, institution of compliance programs, and deterrence – while using only a fraction of the prosecutorial and judicial resources. The loss of these flexible alternatives will impede the resolution of criminal proceedings to the detriment of both the Government and participants.

To address these concerns without significantly impacting the drafters’ desire to achieve finality in temporary suspension situations, the Section believes the final phrase of the proposed definition should be modified to expressly require a determination of guilt. This suggested change would limit a “conviction” to those situations in which criminal wrongdoing has been established and would encompass deferred prosecutions and other alternative resolutions only where they satisfy this requirement. This is consistent with the both the approach taken in the Sentencing Guidelines and the stated purpose of the expanded definition, which is to allow a debarring official to rely upon any “conviction” as automatically establishing a basis for debarment. Absent an admission or determination of guilt, resolutions not involving a plea should not be used as a per se basis for debarment.

Removing specific references to any particular resolutions, such as probation before judgment and deferred prosecution, will also avoid the implication that all such resolutions reflect criminal wrongdoing. The Section recommends substitution of the following definition of “conviction”:
§___.925 Conviction

Conviction means a judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere, or other resolution reflecting a determination of guilt of a criminal offense.

C. Prohibitions on Employment of Suspended or Debarred Persons

The Proposed Rule attempts to address one of the most difficult issues in debarment and suspension: the proper restrictions that should be placed on individuals who are suspended or debarred. Specifically, the issue is whether the Government will restrict what these individuals may do to the point that they may not be employed in their chosen field.

The Proposed Rule states in Section __.310 that a participant in a nonprocurement program does not have to stop using as a principal a person who has been suspended or debarred, if the participant had been using the services of that person before the person’s exclusion; however, the participant is not required to continue to use that person’s services as a principal. Id. The participant may not begin to use the services of an excluded person as a principal under a covered transaction unless an exception is granted. Id. The Proposed Rule makes clear that the participant is responsible for determining whether any principal of the organization is excluded. Thus, while the certification requirement has been eliminated, but the burden is still upon the participant to determine that no excluded person is involved as a principal.

Given this language, the critical issue is the expanded or clarified definition of a principal. The Proposed Rule follows the existing Common Rule for much of this definition, but adds important and potentially far-reaching language in Section __.995(b). The proposed section indicates that a person is a principal if the person is:

(a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the participant or paid with Federal funds, who—

(1) Is in a position to handle Federal funds;
(2) Is in a position to influence or control the use of those funds; or,

(3) Occupies a technical or professional position capable of influencing the development or outcome of an activity that affects a covered transaction.

Section __.995(b) (emphasis added)

Section __.995(b)(3) is new and is written in extremely broad language. Given a literal reading, the language would encompass nearly anyone who worked on a production line, was part of a design team, or provided any part of a service required under the contract. Furthermore, it could indirectly reach any support individual who could somehow influence the development or outcome of the service or product to be provided. Moreover, the language does not just focus on the covered activity, but also any activity that “affects” a covered transaction. Read broadly, this means just about anyone in an organization. In many industries, this would mean that a person who is suspended or debarred would find it very difficult, if not impossible, to find work in their given field. This appears to be extremely harsh and excessive, especially in the case of suspensions where there has been no final adjudication of the underlying issues or the need to protect the Government.

The Section believes that the Government could achieve the same protection by more narrowly tailoring this section. The Section recommends the following changes to Section __.995(b)(3) (changes in bold):

3) Occupies a technical or professional position capable of directly and substantially influencing the development or outcome of an activity required under a covered transaction.

Additionally, the Section notes that, in implementing the basic regulation, each individual agency may add positions unique to the industries covered by the agency. Although this helps reduce any confusion as to which positions the prohibition affects, it may cause considerable confusion among companies that perform similar services under the nonprocurement programs of several federal agencies. Accordingly, the Section recommends that the agencies be required to include these expanded definitions in any covered transactions so as to provide express notice to participants of their obligations with regard to this requirement.
D. Defining the Scope of the Debarment in Proposed Section ___625

Section ___625 of the Proposed Rule describes the “scope of a suspension or debarment” as automatically including “all of your divisions and other organizational elements.” Subsection (b) also provides the debarring official with discretion to extend the action to “any affiliate of a participant.” These provisions are identical to the existing provisions in the Common Rule and provide broad discretion to the debarring official in covering a broad range of organizational and affiliated entities. Nonetheless, in our experience, there often arises a question as to whether the suspension or debarment of an organization immediately covers wholly owned subsidiaries. It is generally accepted that a suspension or debarment of a company does not extend to wholly owned subsidiaries unless the debarring official provides separate notice to that company under an affiliate theory. This is not readily apparent to those who are not experienced in the area, and this revision presents an opportunity to clarify this often-raised issue. Accordingly, the Section recommends that Section ___625 be modified to clarify that wholly owned subsidiaries are separate corporations and will not be automatically affected as “other organizational elements.”

We also note that the regulations designate two provisions as “Section ___625,” the one discussed above and the one that immediately precedes it. The earlier provision addresses the question, “Do Federal agencies coordinate suspension and debarment actions?” Renumbering these sections would eliminate this discrepancy.

E. Definition of “Person”

Section ___985 of the Proposed Rule defines “person” to include a “unit of government.” This continues the same definition found in the existing Common Rule. We surmise that debarring such governmental entities is relatively rare, if not highly exceptional. Attendant to such action, of course, would be the concern about punishing the citizens represented by that unit of government based upon the actions of supervisors or officials.

Comparing debarment to liability under the False Claims Act, one can readily see that imposing such liability on municipal government units is highly controversial. There is a split among the Circuits as to whether units of municipal government can bear liability under the False Claims Act. One circuit has held that governmental entities can bear False Claims Act liability. U.S. ex rel. Chandler v. Cook County, 2002 U.S. App. LEXIS 847 (7th Cir., January 22, 2002), mandate stayed, 2002 U.S.App. LEXIS 2587 (7th Cir., February 15, 2002). Two other circuits have taken the opposite position. U.S. ex rel. Garibaldi v. Orleans Parish School Board, 244 F.3d 486 (5th Cir. 2001); U.S. ex rel. Dunleavy v. Delaware County, ___ F.3d ___, 2002

If the Proposed Rule is to continue the Government’s ability to debar such units of government, the Section believes that the Proposed Rule should include mitigating considerations that reflect the unique status and obligations of governmental units. For instance, the Proposed Rule should direct the debarring official to seek suspension or debarment of the culpable government officials as employees, before taking action against a local governmental entity.

Where actions against individuals alone would not adequately protect the Government’s interests, the debarring official should be required to consider the following, in addition to the factors listed in §__860, when deciding whether to take action against a governmental entity:

1. Can the Government be adequately protected by measures less severe than suspension or debarment of the entity, such as implementation of specific oversight and monitoring procedures through an administrative settlement agreement?
2. Does the harm to the health and welfare of the citizens served by the governmental unit outweigh the need for debarment or suspension?
3. Can the suspension or debarment be tailored to minimize the impact on citizens served by the entity?

**F. Notification of Suspension or Debarment by E-Mail**

The Proposed Rule modifies the existing Common Rule regarding the method of transmission of a notice of suspension or debarment to a respondent. This change would authorize notice through facsimile and e-mail.

The Section agrees that a facsimile copy is an appropriate means of communicating such an important notice. A facsimile number is normally obtained from government records or some other published source or from correspondence from the person or company. Sending a facsimile to such a telephone number has a high degree of probability that it will reach someone in the organization that will bring it to the attention of the senior official to whom it is addressed.

With regard to e-mail, the Section is concerned that current e-mail practices and procedures, which are continuing to evolve, do not provide the same level of
certainty that the notice will reach the intended recipient in a timely manner. For this reason, the Section recommends that, if e-mail notice is provided, the agency also be required to obtain adequate assurance of its timely receipt. Such assurance could be obtained through any of the following methods: (i) providing a duplicate copy of the notice via regular mail; (ii) requiring as part of the underlying agreement that the person provide an “official” e-mail address for receipt of such notices; or (iii) obtaining electronic evidence of receipt by the named recipient.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Norman R. Thorpe
Chair, Section of Public Contract Law

cc: Mary Ellen Coster Williams
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