

# IS IT TIME FOR A SINGLE FEDERAL SUSPENSION AND DEBARMENT RULE?

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*As part of the Reagan administration’s initiatives to curb fraud, waste, and abuse, the President’s Council for Integrity and Efficiency created an interagency task force to study the feasibility and desirability of a comprehensive debarment and suspension system*

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*encompassing the full range of Federal activities. The task force concluded, in its 1982 report, that such a system was both desirable and feasible.*<sup>1</sup>

## I. INTRODUCTION

In the early 1980s, the federal government improved the way in which executive branch agencies address waste, fraud, abuse, and poor performance in government-funded transactions by standardizing executive branch discretionary suspension and debarment procedures (sometimes referred to as “blacklisting”) in two separate rulemakings—one governing federal procurement transactions under the Federal Acquisition Regulation<sup>2</sup> (FAR),<sup>3</sup> and the second governing federal assistance, loans, and benefits under a jointly issued regulation called the Non-procurement Common Rule (NCR).<sup>4</sup> The Office of Management and Budget (OMB) coordinated both initiatives.<sup>5</sup> These rules were the direct result of several decades of criticism by the legal and business communities and the Administrative Conference of the United States regarding the federal suspension and debarment process.<sup>6</sup> Following several court decisions that began to lay a constitutional foundation for a fundamentally fair debarment process,<sup>7</sup> congressional oversight committees and the inspectors general community weighed in to bring about today’s regulatory scheme.<sup>8</sup>

1. Nonprocurement Debarment and Suspension, 53 Fed. Reg. 19,161, 19,161 (May 26, 1988); *see also* Guidelines for Nonprocurement Debarment and Suspension, 51 Fed. Reg. 6372, 6372 (Feb. 21, 1986) (specifying that the President’s Council on Integrity and Efficiency Interagency Task Force released its findings in November 1982). The federal government spends over \$1 trillion in contracts and grants annually (in fiscal year 2012, \$517 billion in contracts and \$536 billion in grants). *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-739, SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENT OVERSIGHT COULD BE IMPROVED 1 (2011).

2. FAR 9.4 (outlining federal suspension and debarment policy and procedures.) The FAR is promulgated by the General Services Administration (GSA), the U.S. Department of Defense (DoD), and NASA under the authority of the Office of Federal Procurement Policy Act of 1974, Pub. L. No. 93-400, 88 Stat. 796 (1974). *See* Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42,102, 42,142 (Sept. 19, 1983) (to be codified at FAR ch. 1).

3. FAR 2.101(b) (defining acquisition as the means of acquiring supplies or services, including construction, by contract with appropriated funds by and for the use of the federal government); *see* 41 U.S.C. § 111 (2012); RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT 449–50 (3d ed. 2007).

4. 2 C.F.R. pt. 180. A nonprocurement transaction is any program or activity “involving Federal financial and nonfinancial assistance and benefits.” Exec. Order No. 12,689, § 1(b), 54 Fed. Reg. 34,131 (Aug. 18, 1989). *See* 2 C.F.R. § 180.970(a).

5. Exec. Order No. 12,689, § 3(a), 54 Fed. Reg. at 34,131.

6. *See* S. REP. NO. 88-24, at 60–63 (1963) (CONF. REP.); Paul H. Gantt & Irving R. M. Panzer, *Debarment and Suspension of Bidders on Government Contracts and the Administrative Conference of the United States*, 5 B.C. L. REV. 89, 89–90 (1963); Arthur S. Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27, 27–28 (1955).

7. *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Horne Brothers, Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972); *Old Dominion Dairy Prods. Inc. v. Sec’y of Def.*, 631 F.2d 953 (D.C. Cir. 1980).

8. Guidelines for Nonprocurement Debarment and Suspension, 51 Fed. Reg. 6372, 6372 (Feb. 21, 1986); *Government-wide Debarment and Suspension Procedures: Hearing Before the S. Comm. on Gov’t Affairs, Subcomm. on Oversight of Gov’t Mgmt.*, 97th Cong. 2–3 (1981).

In recent years, many in the private bar have called for additional improvements to these rules.<sup>9</sup> Among the concerns raised are that, while the FAR and the NCR contain many of the same procedural and substantive requirements for initiating action and issuing decisions, amendments to each rule have resulted in materially different treatment being accorded to recipients of a proposed debarment notice; opposing positions with regard to the treatment of tax deficiencies as a basis for debarment; differences related to denial of fact-finding if an action is based on a federal versus state or local criminal proceeding; the use of show cause notices among the agencies; options of resolving matters under administrative agreements; varying practices related to application of the sanction below the contract or assistance recipient level; effect of the sanctions on individuals; and differences on the bases triggering mandatory disclosure as a cause for debarment.<sup>10</sup> While the two rules were always written in language common to their own universe, the fact that they both are designed to achieve the same ends and require reciprocity for recognition and enforcement of each other's sanctions causes one to wonder why there are two rules in the first place.<sup>11</sup>

In this Article, the authors provide historical information about the current dual rule suspension and debarment system as context for understanding why the government has been unable or unwilling to address some of the incongruent debarment provisions and variant practices that perplex legal practitioners and the business community. The authors also explore the feasibility of, and potential path toward, creating a Uniform Suspension and Debarment Rule (USDR).

The purpose of this Article is not to contest or support the cause of creating a USDR, but rather to highlight important issues that need to be addressed in any attempt to standardize and improve suspension and debarment practices in the executive branch. If creating a single debarment rule will advance that goal, all the better. But a single rule is not *required* to achieve uniformity. Nevertheless, a USDR would guarantee a degree of

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9. See Statement of Christopher Shays, Chairman, Comm'n on Wartime Contracting (Feb. 28, 2011), at 2; see also David Robbins, *As Suspension and Debarment Grows the National Discourse, We Should Not Lose Sight of Broader Procurement Fraud Remedies*, 48 *PROCUREMENT LAW* 1, 24 (2012); Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 *PUB. CONT. L.J.* 547, 552 (2009) (advocating that agencies should use pre-exclusion notices and pre-exclusion hearings to better protect contractors' due process rights); Dietrich Knauth, *Debarments Rise, but Pressure for Reform Strong*, *LAW360* (May 23, 2014, 3:12 PM), <http://www.law360.com/governmentcontracts/articles/540650/debarments-rise-but-pressure-for-reform-remains-strong> [<https://perma.cc/6ZJ6-7CFN>].

10. See discussion *infra* Part IV.

11. See Federal Acquisition and Streamlining Act, Pub. L. No. 103-355, 108 Stat. 3243, 3243 (1994). While rulemaking is the province of the federal agencies and not the private bar, in a follow-on article the authors plan to share a proposed draft of a unified suspension and debarment rule as a means to begin a dialogue for agencies to consider as an alternative to the status quo.

uniformity and eliminate much of the confusion and inconsistencies that currently exists and deserves serious consideration.

Part II of this Article examines the historical perspective of suspension and debarment underlying the government-wide administrative exclusionary system under the FAR for contracts, and under the NCR for assistance, loans, and benefits.<sup>12</sup> Part III addresses the importance of resolving conceptual issues in the procurement versus assistance arenas before attempting to harmonize the rules or promulgating a USDR.<sup>13</sup> Parts IV and V highlight the major areas of importance and obstacles to resolving technical differences between subpart 9.4 of the FAR and the NCR. This step in the decision-making process is offered on the premise that reaching conceptual agreement first about the legitimate goals, procedures, and desired outcomes of the suspension and debarment process, while acknowledging the practical realities of the procurement and assistance universes, will lay a proper foundation for finally resolving technical differences between the two rules. If that occurs, it may not matter as much whether the final product is packaged as a single rule that speaks a language common to both communities or in separate rules expressed in the vernacular of each.<sup>14</sup>

## II. HISTORICAL PERSPECTIVE

During the 1980s, the executive branch of the U.S. government developed a somewhat uniform system for suspending and debaring individuals and entities that threaten the integrity and effectiveness of federally funded activities.<sup>15</sup> That system, encompassing the full range of federal procurement and assistance, loans, and benefit transactions, was codified under two rules—one

12. See 2 C.F.R. § 180.970(a); FAR 9.403; Exec. Order No. 12,689, § 2, 54 Fed. Reg. 34,131, 34,131 (Aug. 18, 1989); 41 U.S.C. § 111 (2012); FAR 2.101; NASH, *supra* note 3, at 236.

13. Jeffrey C. Walker, Note, *Enforcing Grants and Cooperative Agreements as Contracts Under the Tucker Act*, 26 PUB. CONT. L.J. 683, 684, 689 (1997).

14.

[A]ny debarment, suspension, proposed debarment or other governmentwide exclusion initiated under the Federal Acquisition Regulation (FAR) on or after August 25, 1995 shall be recognized by and effective for Executive Branch agencies and participants as an exclusion under this regulation. Similarly, any debarment, suspension or other governmentwide exclusion initiated under this regulation on or after August 25, 1995 shall be recognized by and effective for those agencies as a debarment or suspension under the FAR.

Nonprocurement Debarment and Suspension, 60 Fed. Reg. 33,037, 33,041 (June 26, 1995) (codified at FAR pts. 9, 22, 28, 44, and 52). The same language was used in revising FAR 9.401. See Federal Acquisition Regulation; Debarment, Suspension, and Ineligibility (Ethics), 60 Fed. Reg. 33,064, 33,064 (noting that “[t]he concept of reciprocity for procurement and non-procurement suspension and debarment actions is not new” and had been worked on by the Interagency Suspension and Debarment Committee (ISDC) since 1989); Exec. Order No. 12,549, § 4, 3 C.F.R. § 189 (1987) (establishing the ISDC).

15. See Office of Federal Procurement Policy; Government-wide Debarment, Suspension, and Ineligibility, 47 Fed. Reg. 28,854, 28,854 (July 1, 1982); Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42,102, 42,142 (Sept. 19, 1983) (to be codified at FAR ch. 1); FAR 9.4.

under subpart 9.4 of the FAR for those involved in procurement activities<sup>16</sup> and one under the NCR, currently at title 2, part 180, of the Code of Federal Regulations (CFR) for those engaged in federal grants, loans, and other forms of assistance.<sup>17</sup> While these two regulatory schemes originally were promulgated and operated in a nearly identical manner, over the years they have become disparate in several important ways, due largely to congressional and presidential directives focused only on federal procurement activities.<sup>18</sup>

One should note that the exercise of suspension and debarment authority did not *originate* with the promulgation of the FAR and the NCR.<sup>19</sup> Nor was it solely the creation of the executive branch of government.<sup>20</sup> All three branches of government contributed to a body of law and regulatory practice that resulted in the codification of the FAR and the NCR over the century preceding their publication in the CFR.<sup>21</sup> The first overt expression of debarment power is traceable to an Act of Congress in 1884<sup>22</sup> in response to procurement fraud during the U.S. Civil War.<sup>23</sup> Using its authority to

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16. See Establishing the Federal Acquisition Regulation, 48 Fed. Reg. at 42,142; FAR 9.4.

17. The Nonprocurement Common Rule (NCR) has been widely adopted by federal agencies, including the Department of Education, Department of Agriculture, and Department of Health and Human Services. For full list of adopting agencies, see *Debarment Regulations*, ISDC, <https://isdc.sites.usa.gov/debarment-regulations/> [<https://perma.cc/L37D-STEW>] (last visited Feb. 19, 2017).

18. See Joseph D. West et al., *Suspension & Debarment*, BRIEFING PAPERS, Aug. 2006, at 1, 4–6, 8, 11.

19. The policies behind current suspension and debarment practices have a long history dating back to the Civil War era. From 1860 to 1863, the federal budget grew dramatically due to spending associated with the Civil War. See *Am. Civil Liberties Union v. Holder*, 673 F.3d 245, 246–47 (4th Cir. 2011) (“Sadly, some unscrupulous people viewed the growing federal budget as a font to be plundered. Congress held hearings and learned that federal treasure had been spent on decrepit horses and mules, weapons that would not fire, rancid rations, and phantom supplies.”).

20. See generally Federal Acquisition and Streamlining Act, Pub. L. No. 103–355, 108 Stat. 3243 (1994); 148 CONG. REC. E1439 (daily ed. July 29, 2002) (introducing House Bill 5292); SUSPEND Act, H.R. 3345, 113th Cong. (2014).

21. See, e.g., Federal Acquisition and Streamlining Act, 108 Stat. 3243; see Exec. Order No. 12,549, § 4, 3 C.F.R. § 189 (1987) (establishing the ISDC); Exec. Order No. 12,689, § 3(b)–(c), 54 Fed. Reg. 34,131, 34,131 (Aug. 18, 1989) (directing that exclusions pursuant to the FAR and the NCR be given reciprocal effect); Guidance for Executive Order 13,673, “Fair Pay and Safe Workplaces,” 81 Fed. Reg. 58,653, 58,653 (Aug. 25, 2016) (instructing Contracting Officers to consider a contractor’s compliance with certain federal and state labor laws as part of the determination of contractor “responsibility”). See also, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127, 130–31 (1940); *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964); *Horne Brothers, Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972); *Old Dominion Dairy Prods., Inc. v. Sec’y of Def.*, 631 F.2d 953, 966 (D.C. Cir. 1980); *Robinson v. Cheney*, 876 F.2d 152, 163 (D.C. Cir. 1989); *Silverman v. U.S. Dep’t of Def.*, 817 F. Supp. 846, 848–89 (S.D. Cal. 1993); *Order, Incharge Shipping Servs. Holdings, Ltd. v. United States (Fed. Cl. Jan. 2, 2014)* (No. 13–953).

22. See Harbors and Rivers Act of 1884, ch. 229, 23 Stat. 133 (authorizing the James River in Virginia for development and making the first appropriation for improving the Black Warrior River); Armed Services Procurement Act of 1947, Pub. L. No. 80–413, § 2, 62 Stat. 21 (codified as amended at 10 U.S.C. §§ 2301–2314 (2012)).

23. After enacting the False Claims Act (FCA) in 1863 to address mounting concerns about fraud committed in connection with executive branch procurements, Congress in 1884 required that military supply contracts be awarded to the “lowest responsible bidder.” Act of March 2,

legislate, Congress set the original cornerstone and standard that executive branch agencies may do business only with “responsible” contractors.<sup>24</sup> This standard would remain applicable to the contract-specific award decisions made by Contracting Officers and ultimately spawned the wider standard of “present responsibility” applied by suspending and debarment officials (SDO) to contractors and assistance participants in today’s discretionary suspension and debarment system.<sup>25</sup> During the 1930s, Congress extended the use of the debarment sanction to advance certain socioeconomic policies that became important to the federal government at the time of the Great Depression.<sup>26</sup> Through their oversight functions, both the Senate and the House of Representatives, from time to time, have induced the executive branch to make greater use of its suspension and debarment powers as a means to better manage federal contracts and assistance.<sup>27</sup> Using a combination of its legislative and oversight powers, Congress has played a major part in the historic evolution of the debarment process and continues to do so today.

Beginning in the 1960s and extending through the 1990s, the judicial branch added its signature to the development of today’s debarment and suspension system by introducing due process and fundamental fairness requirements in recognition of a constitutional “liberty interest” in the reputation of a suspended or debarred contractor.<sup>28</sup> Therefore, although executive

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1863, ch. 67, 12 Stat. 696, 696–99 (codified as amended at 31 U.S.C. §§ 3729–3733) (also called the Lincoln Law); Act of July 5, 1884, ch. 217, 23 Stat. 107.

24. FAR 9.402(a) (outlining the responsibility policy for procurements); 2 C.F.R. § 180.125(a) (nonprocurement matters).

25. See FAR 9.402-407

26. See Advertising—Debarment of Bidders, 7 Comp. Gen. 547 (1928). The U.S. Comptroller General noted in an opinion letter that “the interests of the United States” may necessitate debarment in some instances. However, debarment must be reasonable, be supported by facts and evidence on record, and should last for a definite period. *Id.* at 547–48. In 1933, Congress for the first time expressly authorized statutory debarments in the Buy American Act (BAA), Pub. L. No. 72-428, 47 Stat. 1489, 1521 (1933). See Buy American Act, 41 U.S.C. § 10b (1925–1926 & Supp. VII 1933) (codified as amended at 41 U.S.C. §§ 8301–8303 (2012)). Additionally, during the 1930s, Congress, as a matter of public policy to revitalize the economy and address labor issues, extended authority of federal agencies to use suspension and debarment to help shape socioeconomic conditions. See Davis Bacon Act, 40 U.S.C. § 276(a) (1925–1926 & Supp. V 1931) (codified as amended at 40 U.S.C. §§ 3141–3142 (2012)); Walsh Healey Act, 41 U.S.C. § 37 (1934 & Supp. II 1936) (codified as amended at 41 U.S.C. § 6504 (2012)).

27. See Drug-Free Workplace Act, 41 U.S.C. § 701(b) (2012); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); Clean Air Act of 1955, Pub. L. No. 84-159, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. § 1857 (2012)); Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977) (codified as amended at 33 U.S.C. § 1251 (2012)); See also *Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanction?: Hearing Before the H. Comm. on Oversight & Gov’t Reform, Subcomm. on Tech., Info. Policy, Intergovernmental Relations & Procurement Reform*, 112th Cong. 2 (2011); *Rewarding Bad Actors: Why Do Poor Performing Contractors Continue to Get Government Business?: Hearing Before the H. Comm. On Oversight & Gov’t Reform*, 111th Cong. (2010).

28. In 1940, the U.S. Supreme Court determined that government contracting was a privilege rather than a property right, and the government enjoyed unrestricted power to determine with whom it wished to conduct business. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940); see also *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964); *Horne Bros., Inc. v. Laird*, 463

branch agencies often tout suspension and debarment as *inherently* within the authority of the executive branch of government, all three branches have contributed to the content of subpart 9.4 of the FAR and the NCR,<sup>29</sup> and all three continue to play a significant role in the process today.

In addition, the American Bar Association and government accountability organizations, such as the Project on Government Oversight,<sup>30</sup> play an active and significant role in providing testimony during oversight hearings and commenting on legislation and suspension and debarment regulatory initiatives. While the ultimate decision about any changes to existing rules, including development of a USDR, likely will be made by the federal agencies under the leadership of the Office of Management and Budget,<sup>31</sup> any effort to change existing rules will, undoubtedly, receive scrutiny by, and input from, all these sectors.

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F.2d 1268, 1271 (D.C. Cir. 1972); *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 966 (D.C. Cir. 1980).

29. Congress continued to codify the government's suspension and debarment authority by enacting the Armed Services Procurement Act of 1947, the Federal Property and Administration Services Act of 1949, and the Reorganization Act of 1949. Armed Services Procurement Act of 1947, Pub. L. No. 80-413, § 2, 62 Stat. 21, 21 (1948) (codified as amended at 10 U.S.C. §§ 2301-2314 (2012)); Federal Property and Administration Act of 1949, Pub. L. No. 81-152, § 303, 63 Stat. 377, 395 (1949); Reorganization Act of 1949, Pub. L. No. 81-109, 63 Stat. 203 (1949). The Armed Services Procurement Act, followed by the Federal Property and Administrative Services Act, effectively became the basis for the Armed Services Procurement Regulations (ASPR), 32 C.F.R. pt. 401 (1951), and the Federal Procurement Regulations, 24 Fed. Reg. 1933, 1933 (Mar. 17, 1959). These regulations established similar debarment procedures for both military and civilian agencies. In the 1950s, there was a further expansion of the scope of debarment with an agency-by-agency application of debarment and a system of excluding contractors from federal acquisition opportunities. In the 1960s, there was a general increase in nonprocurement activities, and in Executive Order 10,934, President John F. Kennedy established the Administrative Conference of the United States to bring uniformity to executive branch administrative procedures. *See* Exec. Order No. 10,934, 26 Fed. Reg. 3231, 3231-33 (Apr. 15, 1961); John F. Kennedy, *Special Message to the Congress on the Regulatory Agencies, April 13, 1961*, in 1961 PUB. PAPERS 267. In the following decades, concerns were expressed that the existing regulations afforded insufficient procedural safeguards and provided a lack of uniformity in application of the regulations. *See, e.g.*, S. REP. NO. 88-24, *supra* note 6, at 265 (highlighting problems with suspension and debarment process). In 1964, the U.S. Court of Appeals for the District of Columbia held that specific statutory authority to debar was not required, but debarment must satisfy minimal due process safeguards. *See Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964) (holding that debarment must, at a minimum, be preceded by notice of the grounds for debarment, an opportunity to rebut those grounds, and an administrative record consisting of the agency's findings and conclusion); *see also* Federal Acquisition and Streamlining Act, Pub. L. No. 103-355, 108 Stat. 3243 (1994).

30. *See* COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 160 (2011) [hereinafter CWC FINAL REPORT]. The Project on Government Oversight (POGO), founded in 1981, is an independent non-profit government watchdog group that investigates and seeks to expose corruption, abuses of power, mismanagement, conflict of interest, and other misconduct. PROJECT ON GOV'T OVERSIGHT, <http://www.pogo.org/> [https://perma.cc/P7XH-LDSG] (last visited Feb. 19, 2017).

31. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-479, FEDERAL PROCUREMENT: ADDITIONAL DATE REPORTING COULD IMPROVE THE SUSPENSION AND DEBARMENT PROCESS 17 (2005) [hereinafter GAO 2005 REPORT].

While a USDR will guarantee uniformity in the exercise of discretionary debarment and suspension powers, it does not follow that a single rule is *necessary* to achieve that end. Before one can meaningfully discuss the merits of developing a single suspension and debarment rule, the attributes of a single rule versus dual rules within a *single system* should be distinguished.<sup>32</sup> For if the governing legal principles and practical application of the suspension and debarment processes are made uniform in content and practice, it does not matter whether those policies and practices are accomplished under two rules or under a single rule. Standardization still could be achieved while embracing the appropriate range of discretion inherent and necessary to individual agency SDOs.

To date, however, the dual rule approach has enabled the executive branch to implement congressional or other demands independently in ways that are not translated uniformly into the FAR and the NCR or in the everyday practice under those rules.<sup>33</sup> Two examples of this problem can be found in the inconsistent treatment of tax deficiency as a cause for debarment and implementation of the mandatory disclosure policies under the FAR and the NCR.<sup>34</sup> When the FAR and the NCR initially were promulgated, all agencies recognized tax fraud, just like any other form of fraud, as a basis for debarment.<sup>35</sup> Tax delinquency generally was not regarded as a basis for debarment unless it was the result of fraud.<sup>36</sup> In promulgating the NCR, President Ronald Reagan was concerned about the policy of extending federal grants and other assistance to individuals and entities delinquent on repayment of student and other federal loans.<sup>37</sup> Accordingly, a cause for debarment was proposed for inclusion in the NCR for outstanding

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32. See generally Guidelines for Nonprocurement Debarment and Suspension, 51 Fed. Reg. 6372, 6372-74 (Feb. 21, 1986); see also Steven D. Gordon, *Suspension and Debarment from Federal Programs*, 23 PUB. CONT. L.J. 573, 579 (1994).

33. See AM. BAR ASS'N, SECTION OF PUB. CONT. LAW, REPORT ON THE STUDY OF THE FEDERAL DEBARMENT AND SUSPENSION PROCESSES 4 (2008) [hereinafter ABA-PCL 2008 REPORT].

34. The FAR explicitly includes federal tax delinquencies as a basis for debarment. Compare FAR 9.406-2(b)(1)(v) (stating that delinquent federal taxes in an amount exceeding \$3,500 is cause for debarment) with 2 C.F.R. § 180.800(c)(3) (stating that cause for debarment is "a willful violation of a . . . provision or requirement applicable to a public agreement or transaction[.] . . . but not including sums owed the [federal] government under the Internal Revenue Code"); Carl L. Vacketta & Seamus Curley, *An Effective Compliance Program: A Necessity for Government Contractors Under IDIQ Contracts and Beyond*, 37 PUB. CONT. L.J. 593, 598 (2008) (commenting that the mandatory disclosure regulation was having a substantial impact on government contractors' compliance obligation and corporate ethical cultures). FAR 52.203-13(d) and 52.203-14(d) apply to contracts with a value of more than \$5 million and with a performance period of 120 days or greater. See FAR 52.203-13-.203-14; see also Federal Acquisition Regulation; FAR Case 2006-007, Contractor Code of Business Ethics and Conduct, 72 Fed. Reg. 65,873 (Nov. 23, 2007). Contracts for commercial items procured pursuant to FAR part 12 and contracts that will be performed entirely outside the United States are exempt from the rule. *Id.*

35. See Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42,102, 42,142 (Sept. 19, 1983); Nonprocurement Debarment and Suspension, 53 Fed. Reg. 19,161, 19,162, 19,167 (May 26, 1988).

36. See Nonprocurement Debarment and Suspension, 53 Fed. Reg. at 19,162, 19,167-68.

37. *Id.*

debts to the government.<sup>38</sup> However, President Reagan also was contemplating curtailing the power of the Internal Revenue Service (IRS) under a plan to redefine the role and reach of the federal government and thus opposed using debarment as a vehicle to collect federal taxes.<sup>39</sup> Therefore, when promulgating the final NCR, the causes for debarment included outstanding debts to the government, but *specifically excluded delinquent taxes due the IRS from that category* on the basis that aiding in collection of unpaid taxes was an inappropriate use of debarment authority.<sup>40</sup>

Almost twenty years later to the day, in response to concerns raised by the Senate Permanent Subcommittee on Investigations over uncollected taxes from federal contractors, the FAR was amended to authorize debarment of contractors for an outstanding tax delinquency in excess of \$3,000 (currently \$3,500).<sup>41</sup> Thus, subpart 9.4 of the FAR and the NCR are completely contradictory today with regard to whether tax deficiency is a basis for debarment.<sup>42</sup> The only distinction is whether the debt is due by a contractor or an assistance participant.<sup>43</sup> Presumably, the threat, if any, posed by either a contractor or an assistance participant to the federal government should be identical. If an entity is reasonably likely to receive funding through both sources, which one of the rules should apply? To make it even more confusing, if an entity is debarred for a qualifying tax deficiency under the FAR, that debarment must be recognized and enforced regarding federal funds expended under a grant,<sup>44</sup> loan, or other form of assistance even though the granting agency does not recognize tax deficiency as a basis for debarment under the NCR.<sup>45</sup> This inconsistency between the two rules has been in place now for over eight years.

With regard to the federal government's Mandatory Disclosure Policy, Congress and the U.S. Department of Justice (DoJ) Office of Inspector General were concerned that the former DoJ and DoD policy of according positive treatment for voluntary disclosure of misconduct by contractors in making prosecutorial and debarment decisions was no longer effective.<sup>46</sup>

38. *Id.*

39. *Id.*; Ronald Reagan, *Address to the Nation on Tax Reform, May 28, 1985*, in 1985 PUB. PAPERS 677.

40. 2 C.F.R. § 180.800(c)(3); Nonprocurement Debarment and Suspension, 53 Fed. Reg. at 19,162–68 (Preamble).

41. See Federal Acquisition Regulation; FAR Case 2006-011, Representations and Certifications—Tax Delinquencies, 73 Fed. Reg. 21,791, 21,791 (Apr. 22, 2008) (to be codified at FAR pts. 4, 9, 52); FAR 9.406-2(b)(1)(v).

42. Compare FAR 9.406-2(b)(1)(v) with 2 C.F.R. § 180.800(c)(3).

43. Compare Nonprocurement Debarment and Suspension, 53 Fed. Reg. at 19,163, with FAR 9.403.

44. See Federal Acquisition and Streamlining Act, Pub. L. No. 103-355, § 2455, 108 Stat. 3243, 3327 (1994).

45. *Id.* § 2455.

46. See Sandeep Kathuria, *Best Practices for Compliance with the New Government Contractor Compliance and Ethics Rules Under the Federal Acquisition Regulation*, 38 PUB. CONT. L.J. 803, 823–26 (2009) (detailing U.S. Department of Justice (DoJ) opposition to voluntary disclosure). For more information on this policy, see U.S. DEP'T OF DEF., INSPECTOR GEN., THE

Accordingly, the DoJ led an effort to discontinue the Voluntary Disclosure Program in favor of implementing rules *mandating* early disclosure.<sup>47</sup> The FAR was amended to include a Mandatory Disclosure Rule<sup>48</sup> (MDR), and failure to make a timely disclosure was added to the causes for procurement debarment.<sup>49</sup> The federal assistance policies were amended by including a Mandatory Disclosure Policy (MDP) under its Super Circular at title 2, subpart 200.113, of the CFR, in which federal assistance policy states that failure to timely disclose certain misconduct may result in suspension or debarment.<sup>50</sup> However, the NCR, which is the regulatory vehicle for authorizing assistance, loans, and benefit debarment, never was amended to include violation of the MDP as a cause for debarment.<sup>51</sup> Furthermore, failure to timely disclose misconduct as a trigger for suspension or debarment is based on different sets of criteria for contractors and assistance participants.<sup>52</sup> The potential offenses subject to MDR and the MDP differ in several respects. The MDR contains at least some guidance in applying the rules whereas the MDP offers almost none.<sup>53</sup> These are but two examples of how maintaining separate suspension and debarment rules for procurement and non-procurement transactions have contributed to incongruent debarment practices under the FAR and the NCR.

While these variances might have been avoided by better coordination between the FAR Council<sup>54</sup> and the Interagency Suspension and Debarment Committee (ISDC),<sup>55</sup> or between OMB's Office of Federal Procurement Policy and Office of Federal Financial Management, there has been a joint representative to the FAR Council and ISDC in the past, and yet the two

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Department of Defense Voluntary Disclosure Program: A Description of the Process (2000). The Voluntary Disclosure Program offered incentive for entities to voluntarily discover, promptly disclose, expeditiously correct, and prevent recurrence of wrongdoing.

47. See Kathuria, *supra* note 46, at 823–26; Federal Acquisition Regulation; Federal Acquisition Circular 2005–28; Introduction, 73 Fed. Reg. 67,064 (Nov. 12, 2008) (to be codified at FAR pts. 2, 3, 9, 42 and 52).

48. FAR 52.203-13(c).

49. FAR 9.406-2(b)(1)(vi).

50. 2 C.F.R. § 200.113.

51. *But see id.* § 180.345.

52. See FAR 2.101, 3.1004, 9.406-3, 9.407-3, 42.1501, 52.203; 2 C.F.R. § 200.113.

53. Compare FAR 52.203-13(c) with 2 C.F.R. § 200.113.

54. The FAR Council is the body lawfully authorized to issue government-wide standardized regulations for procurement regulatory activities in the federal government. See Office of Federal Procurement Policy Act, 41 U.S.C. § 421 (Supp. III vol. 3 2007) (codified as amended at 41 U.S.C. § 1302-03 (2012)).

55. Exec. Order No. 12,549, § 4, 3 C.F.R. § 189 (1987) (establishing the ISDC to monitor implementation of Executive Order 12,549 and participate in a government-wide system for debarment and suspension from programs and activities involving federal financial and nonfinancial assistance and benefits). The ISDC is an interagency forum that coordinates “policy, practices, and information sharing” among “federal agencies’ suspension and debarment officials” (SDOs) and “develops recommendations for the Office of Management and Budget” (OMB) for the implementation of the government-wide system of suspension and debarment. GAO 2005 REPORT, *supra* note 31; see *About the ISDC*, INTERAGENCY SUSPENSION & DEBARMENT COMM., <http://isdcsites.usa.gov/about-us/> [<https://perma.cc/4EHB-TNM3>] (last visited Feb. 19, 2017).

rules continued to evolve in different directions. A USDR almost certainly would have precluded such an outcome.

When the FAR and the NCR were being developed, the inspectors general community and several agencies within the government briefly considered the possibility of creating a USDR.<sup>56</sup> In 1981, a FAR Project subcommittee<sup>57</sup> was proposed to study the feasibility of bringing federal assistance under the authority of what would become FAR subpart 9.4. That effort, however, was short-lived either because of uncertain authority to combine the regulatory authorities of assistance and procurement, or because of the complexity of addressing differences among the language, administration, and management concepts of assistance versus procurement.<sup>58</sup> Although there was a certain attraction for having the assistance debarment community board the moving FAR Project train, the fact is that neither community was prepared to succumb to a uniform suspension and debarment rule.<sup>59</sup> Such an effort almost certainly would have delayed the FAR Project, which had been in development for some time.<sup>60</sup>

The nonprocurement community needed to sort out its own differences in language and procedures before it could expect the procurement community to absorb those unfamiliar and complex relationships under a single and uniform rule. One must recall the FAR Project already was consolidating both the DoD and civilian agencies' procurement rules into a single rule.<sup>61</sup> At the time, some agencies were reluctant to warmly embrace the marriage of the procurement rule, having once enjoyed relative independence in their procurement

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56. See Guidelines for Nonprocurement Debarment and Suspension, 51 Fed. Reg. 6372, 6372 (Feb. 21, 1986) (specifying that the President's Council on Integrity and Efficiency Inter-agency Task Force released its findings in November 1982); see also Federal Acquisition Regulation; Debarment, Suspension, and Ineligibility (Ethics), 60 Fed. Reg. 33,064, 33,064 (June 26, 1995) (to be codified at FAR pts. 9, 22, 28, 44, and 52) (stating that the ISDC had worked on a unified rule in 1989 and "[t]he concept of reciprocity for procurement and nonprocurement suspension and debarment actions is not new").

57. *Government-wide Debarment and Suspension Procedures: Hearing Before the S. Comm. on Gov't Affairs, Subcomm. on Oversight of Gov't Mgmt.*, 97th Cong. 2, 73, 85 (1981) (testimony of Inez S. Reid, Inspector Gen., Envtl. Prot. Agency) (recommending that debarment and suspension procedures be extended to include contracts under grants).

58. *Id.* at 73–75.

59. *Id.* at 73 (estimating that only half the executive branch agencies drafted suspension and debarment regulations).

60. See Invitation for Public Comment on Proposed OFPP Policy Letter, 46 Fed. Reg. 37,832 (July 22, 1981). The proposed draft, Office of Federal Procurement Policy (OFPP) Policy Letter 81-3, was entitled "Policy Guidance Concerning Government-wide Debarment, Ineligibility, and Suspension." *Id.* at 37,833; see Office of Federal Procurement Policy; Government-wide Debarment, Suspension, and Ineligibility, 47 Fed. Reg. 28,854, 28,854 (July 1, 1982). The OFPP published amendments to OFPP Policy Letter 81-3 several months later. Debarment and Suspension of Contractors; Invitation for Public Comment, 46 Fed. Reg. 45,456 (Sept. 11, 1981).

61. See *Government-wide Debarment and Suspension Procedures: Hearing Before the S. Comm. on Gov't Affairs, Subcomm. on Oversight of Gov't Mgmt.*, 97th Cong. at 5 (opening statement of Senator Carl Levin) (identifying a need for the government to consolidate civilian and defense agency lists of debarred and suspended contractors).

practices.<sup>62</sup> Congress was pushing the executive branch to adopt uniform procurement practices as a means to address confusion, duplication, and inconsistent policies and practices that frustrated the private sector.<sup>63</sup> One could say that the federal agency procurement community already was having to endure one *shotgun marriage* of its own, let alone having to wrap a single nuptial band around all the various assistance mechanisms of the government under a single suspension and debarment rule. It was simply too great a task to be achieved at the time. Accordingly, the idea of creating a single debarment and suspension rule for federal procurement and assistance was dismissed by mutual consent of the reluctant brides and grooms-to-be in both communities.<sup>64</sup> However, it is clear that in 1988 when the initial NCR was published, OMB viewed the dual rule approach to suspension and debarment as the “first step toward a comprehensive system, including both procurement and nonprocurement.”<sup>65</sup> OMB and the NCR drafting committee carefully crafted the preamble language to allow for the possibility of operating under two rules at least for a while and left the issue of ultimately merging the two rules for future debate.

### III. RESOLVE CONCEPTUAL ISSUES FIRST

There are essentially two major ways the federal government spends tax dollars. The government can procure goods and services for its own use through contracts, or it can fund activities through a wide range of complicated and special vehicles to enable or assist others to achieve positive social goals. While it is all still federal money and deserving of the same protections against waste, fraud, and various forms of abuse, the disbursement, oversight, and practical systems involved in managing federal dollars within these two funding universes can be quite different. There are fundamental differences in the relationships between the federal government and those who receive the funds under contract, versus those who receive money through grants, loans, cooperative agreements, and other mechanisms. In the case of federal contracts, the government generally is dealing with acquiring commercial and other services and goods as a consumer.<sup>66</sup> In the case of nonprocurement assistance, loans, and benefit transactions, the government is acting to enable or induce a wide range of activities to achieve

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62. *Id.* at 161 (testimony of Robert F. Trimble, Acting Deputy Under Sec’y of Def. for Acquisition Pol’y).

63. See Federal Acquisition and Streamlining Act, Pub. L. No. 103-355, 108 Stat. 3243, 3243 (1994).

64. See *Government-wide Debarment and Suspension Procedures: Hearing Before the S. Comm. on Gov’t Affairs, Subcomm. on Oversight of Gov’t Mgmt.*, 97th Cong. at 161 (testimony of Robert F. Trimble, Acting Deputy Under Sec’y of Def. for Acquisition Pol’y) (stating that on national security grounds, DoD remained opposed to a government-wide system of suspension and debarment).

65. Nonprocurement Debarment and Suspension, 53 Fed. Reg. 19,161, 19,162 (May 26, 1988).

66. 31 U.S.C. § 6303 (2012).

social and other ends.<sup>67</sup> Some of these are collaborative in nature and involve separate sovereigns at the state, local, or international level.<sup>68</sup> They may involve entities with primary authority for addressing certain needs or require joint funding with the federal government to achieve a successful outcome.<sup>69</sup> Those differences reflect conceptual and intergovernmental or political issues and involve technical language that do not easily translate across the procurement-assistance divide.

These differences and complexities were quite evident when building the suspension and debarment rules for assistance, loans, and benefits under the NCR. In fact, the very name of the rule, “Nonprocurement Common Rule,” was selected as a result of the inability to capture with precision the full range of transactions covered by the rule under a single standard term.<sup>70</sup> The differences in technical terminology used within the federal procurement and nonprocurement communities have evolved over many years and reflect conceptual and quite practical differences between those universes.<sup>71</sup> Merging the two debarment rules into a USDR will involve addressing not only the internal procedures used by federal agencies in reaching suspension and debarment decisions, but all the internal and external mechanisms, procedures, relationships, and terminologies used to enforce a suspension or debarment decision. One cannot fully appreciate the enormity of that task until having been tasked to do so. Therefore, any path toward creating a USDR must begin by addressing significant differences between the current debarment rules from a *conceptual* perspective first.<sup>72</sup> If the procurement and assistance communities can agree conceptually that the two rules not only seek to achieve the same ends, but also do so in the same or substantially similar way, a USDR is more readily attainable. If the conceptual, political, and other differences underpinning key provisions of the rules cannot be harmonized in a reasonably understandable manner, any effort to reconcile the technical language differences under a USDR is likely to be unsuccessful after the expenditure of a lot of time and effort.

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67. *Id.* § 6304.

68. *Id.* § 6305.

69. *Id.*

70. See Guidelines for Nonprocurement Debarment and Suspension, 51 Fed. Reg. 6372, 6372 (Feb. 21, 1986) (proposing regulations for a common system or a “common rule” of nonprocurement rules); Guidelines for Nonprocurement Debarment and Suspension, 52 Fed. Reg. 20,360 (May 29, 1987). OMB issued guidelines for adoption of what came to be known as the nonprocurement common rule (NCR). A major area of debate related to whether the government-wide exclusion should apply only to first-tier awards and federally approved sub-awards or be extended to include all awards, including awards of the lower sub-tier. *Id.*

71. Brian Young, *Ready for Primetime? The Interagency Suspension and Debarment Committee, the Nonprocurement Common Rule, and Lead Agency Coordination*, 4 WM. & MARY POL’Y REV. 110 (2012) (discussing the historical development of suspension and debarment in the procurement and nonprocurement communities).

72. The idea here is that if the procurement and assistance communities can agree conceptually that FAR subpart 9.4 serves the exact same purpose as 2 C.F.R. part 180 and functions primarily in the same way, reconciling the rules into a single rule or system will be readily attainable.

This is precisely what occurred in past attempts to reconcile “technical” differences between subpart 9.4 of the FAR and the NCR.<sup>73</sup> Failure to fully consider and reach agreement on fundamental and philosophical differences between procurement and assistance concepts prevented the agencies from meeting President George H. W. Bush’s objectives and directives under Executive Order 12,689 to achieve reciprocity.<sup>74</sup> Reciprocity is the term used in debarment practice to refer to the policy of granting full faith and credit by all agencies to the suspension or debarment decisions of any one agency.<sup>75</sup> It applies not only to how agencies enforce debarment and suspension decisions within their own funding community, but by other agencies across the procurement/nonprocurement divide.<sup>76</sup> In 1989, President Bush, recognizing the importance of reciprocity to the efficiency of managing federal tax dollars, ordered that reciprocity attach to suspension and debarment decisions issued under the FAR and the NCR.<sup>77</sup> The problem was that Executive Order 12,689 conditioned reciprocity upon the ability of the agencies to reconcile so-called “technical” differences between the rules.<sup>78</sup>

In 1989, both the FAR and the NCR communities still were getting used to their own consolidated debarment rules, and fear and suspicion about the implications of reciprocity between procurement and nonprocurement officials invoked retrenchment and unwillingness to compromise.<sup>79</sup> Even referring to the differences between the rules to be reconciled as being “technical” in nature suggested a lack of appreciation that some of the differences between the rules were occasioned by more than mere administrative discomfort or bureaucratic inertia.<sup>80</sup> While some reluctance was based on such considerations, several differences were more substantive and practical. For example, federal assistance for natural disaster relief or awards made to nation states or international organizations were deemed too politically sensitive in 1989 to be subject to the automatic application of the debarment

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73. See Nonprocurement Debarment and Suspension, 59 Fed. Reg. 65,606, 65,608 (Dec. 20, 1994). The ISDC was tasked in 1989 to make recommendations to establish reciprocity mandated in Executive Order 12,689. *Id.* The ISDC’s recommended changes ultimately were limited to only the *very few technical differences* that agencies deemed necessary to establish reciprocity between the FAR and the NCR. *Id.*

74. *Id.*

75. See Exec. Order No. 12,549, 3 C.F.R. § 189 (1987).

76. *Id.*

77. *Id.*; see also Exec. Order No. 12,689, § 2(a), 54 Fed. Reg. 34,131, 34,131 (Aug. 18, 1989) (“[T]he debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity under regulations issued pursuant to Executive Order No. 12549, shall have governmentwide effect.”).

78. Exec. Order No. 12,549, 3 C.F.R. § 189 (1987); see also Exec. Order No. 12,689, § 3(b)–(c), 54 Fed. Reg. at 34,131 (specifically proposing that regulations amending the NCR and the FAR would be published within six months of the differences being reconciled with the final regulations to be published simultaneously within twelve months).

79. Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?*, 44 CATH. U. L. REV. 363, 375–76 (1995).

80. *Id.* at 377–78.

and suspension sanctions.<sup>81</sup> That created the need for categorical exemptions from the sanctions under the NCR<sup>82</sup> that were not considerations under the FAR. In addition, misconduct under federal assistance programs often occurred at lower-tier levels by contractors to assistance recipients that were not in privity with the federal government.<sup>83</sup> Federal assistance managers needed to have suspension and debarment sanctions apply directly to those entities to adequately protect taxpayers' investments in those activities.<sup>84</sup> Under the FAR at the time, without privity between the subcontractor and the federal government, it was sufficient for the sanctions to apply only to the prime contractor level or any subcontractors subject to federal agency consent.<sup>85</sup> Such concerns were fundamentally important to each funding universe and resulted in the FAR and the NCR reflecting a different scope of coverage below the first-tier award.<sup>86</sup> Such considerations, although "technical" in their appearance under the rules, were driven by substantively important principals that would not yield for the sake of achieving reciprocity.

Suffice it to say that five years after the President issued Executive Order 12,689, Congress, out of frustration with the executive branch's inability to reconcile "technical differences" and achieve reciprocity, imposed reciprocity between the FAR and the NCR for executive branch suspension and debarment decisions by statute under section 2455 of the Federal Acquisition Streamlining Act of 1994 (FASA).<sup>87</sup> Thus, reciprocity was ultimately ordered on executive branch agencies by congressional intervention without regard to the technical differences contained in the rules.<sup>88</sup> Instead of the executive branch agencies deciding for themselves how best to balance the issues and achieve reciprocity, Congress had to force discipline upon them by statute as it has done, or threatens to do, from time to time.<sup>89</sup> Statutory dictates to debarring officials are nearly universally disliked by executive branch agencies

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81. 2 C.F.R. § 180.215(d).

82. *Id.* § 180.215 (noting examples of transactions not covered by the NCR are awards to a foreign government or public international organization; personal entitlements, such as Social Security income; and federal employment, among others).

83. See Guidelines for Nonprocurement Debarment and Suspension, 52 Fed. Reg. 20,360 (May 29, 1987).

84. See *id.*

85. *Id.*

86. Nonprocurement Debarment and Suspension, 60 Fed. Reg. 33,037, 33,040 (June 26, 1995); 2 C.F.R. §§ 180.330, 180.355.

87. Federal Acquisition and Streamlining Act, Pub. L. No. 103-355, § 2455, 108 Stat. 3243, 3327 (1994).

88. See *id.* at 3327 (1994) (noting that although the original bill did not include suspension and debarment provisions, Senator Tom Harkin introduced an amendment equivalent to Executive Order 12,689 that required the implementation of government-wide reciprocity for suspension or debarment actions taken pursuant to the FAR or the NCR). See 140 CONG. REC. S6590 (daily ed. June 8, 1994) (statement of Senator Carl Levin); see also Shannon, *supra* note 79, at 378. SUSPEND Act, H.R. 3345, 113th Cong. (2014).

89. See *supra* note 14.

and the private bar alike.<sup>90</sup> Accordingly, the authors of this Article highly recommend that the executive branch community of agencies, through OMB, look for opportunities to have a constructive dialogue internally and with the key stakeholders on some of the central concepts applicable to these two rules before attempting to reconcile technical differences or create a USDR. Resolving the outstanding differences between subpart 9.4 of the FAR and the NCR represents a final hurdle to a more effective, comprehensible, and robust government-wide suspension and debarment system.

#### IV. SEVEN BIG-TICKET ITEMS

Seven important factors merit consideration to overcome the final hurdle to reconciliation: (1) the use of standard or specialized terminology, (2) lower-tier coverage, (3) effect of action, (4) rulemaking format, (5) treatment of individuals, (6) definition of conviction, and (7) denial of fact-finding in the suspension setting. Additionally, four lesser factors for consideration include: (1) pre-notice engagement, (2) definition of *present responsibility*, (3) review and appeals, and (4) the use of administrative agreements. If these differences can be bridged, there essentially remain no material impediments to a USDR. An approach to the possible resolution of the seven key differences are discussed below.

Some of these items are already within reach, while others offer a more significant challenge. If these seven issues can be addressed between the FAR Council and the ISDC by consent or compromise, the current federal suspension and debarment system will be materially and noticeably improved, and the issue of whether those improvements are embodied in one or two rules will become largely an academic exercise. The following seven items are addressed in order of historical impact, with the first three being critical to achieving an acceptable level of technical harmony within a unified system.

##### A. Terminology

One of the main obstacles to developing a USDR during the 1980s was the fact that the government's relationship with the contractor community and its assistance relationship with the rest of the world (including the contractor community) were different in so many ways that finding terminology that could be universally applied in each setting was almost impossible.<sup>91</sup>

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90. See generally ABA-PCL 2008 REPORT, *supra* note 33.

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[T]he ISDC recommended against issuing a single consolidated rule, or adopting uniform application of the rule as impractical and confusing. This decision was based on the ISDC's view that the procurement and nonprocurement communities have sufficiently different relationships with participants, distinct methods to procure services or to provide benefits or support, varying options for dealing with waste, fraud, abuse, and poor performance, and very different types of exposure to risk.

Terms used in the procurement environment had a very particular meaning in that arena, as did terms used in the nonprocurement and assistance arena.<sup>92</sup> Sometimes the same term for a transaction was used in both environments but with very different meanings peculiar to the setting in which it was being used.<sup>93</sup> While some terms used in each setting might suitably be replaced with another more encompassing term, at some point, as the rules address matters at a more granular level, reverting to use of terms of art that are special and precise to each discipline becomes desirable, if not outright necessary.

Creating a USDR from the current procurement and assistance debarment regulations will entail building a new vocabulary, at least within parts of the rule, that applies standard terms and phrases for general topics, but retain subsets of special, unique, or nuanced terms required to describe certain processes and relationships or enforce the restrictions in the language common to those who must perform such functions. At that level, precision is critical, and using terms that are familiar and technically accurate have both practical and legal implications. This is not to say that a USDR could not be so constructed, but the task is more difficult to implement than one might otherwise expect. During the early years of creating the government-wide debarment program, there were so many uncertainties and insecurities for those tasked with developing the system that the procurement and assistance communities were not inclined to make a serious effort toward establishing a single rule.<sup>94</sup> Standardizing the language of procurement and assistance was simply too daunting a task for the perceived value to be derived from the effort at the time.<sup>95</sup> The focus was on unifying

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Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 67 Fed. Reg. 3266, 3268 (Jan. 23, 2002).

92. See 2 C.F.R. §§ 180.860, 180.705 (voluntary exclusions); Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 67 Fed. Reg. at 3268. Voluntary exclusions do not appear in the FAR. Voluntary exclusions allow a contractor to accept exclusion in conjunction with an administrative agreement. *Id.*

93. Compare FAR 9.406-1(a) (listing ten mitigating factors debarment officials are to consider before debarment) with 2 C.F.R. § 180.860 (listing nineteen mitigating factors).

94. See *Government-wide Debarment and Suspension Procedures: Hearing Before the S. Comm. on Gov't Affairs, Subcomm. on Oversight of Gov't Mgmt.*, 97th Cong. 23 (1981) (testimony of Harvey Volzer, Att'y, Off. of Special Projects, Gen. Serv. Admin.).

95. See *Government-wide Debarment and Suspension Procedures: Hearing Before the S. Comm. on Gov't Affairs, Subcomm. on Oversight of Gov't Mgmt.*, 97th Cong. at 184 (testimony of Robert F. Trimble, Acting Deputy Sec'y of Def. for Acquisition Pol'y) ("I am opposed to centralized debarment authority or mandatory government-wide debarment based on the determination of a single agency. . . . [O]ur national security simply will not permit [DoD] to automatically debar or suspend based on decisions of other [f]ederal agencies.").

and disciplining each community within its own ranks.<sup>96</sup> The opportunity for creating a USDR was deferred to a future generation.<sup>97</sup>

### B. Lower-Tier Coverage

Both the FAR and the NCR currently contain provisions for lower-tier application of suspension or debarment (and proposed debarment under the FAR) to levels below the prime contractor or assistance recipient.<sup>98</sup> These lower-tier transactions have been addressed both under the FAR and the NCR over time in such a manner that the nonprocurement community compromised in its lower-tier reach to accommodate the procurement interests<sup>99</sup> to build momentum for a USDR. Later, due to congressional concerns about misconduct by subcontractors operating under the FAR, the procurement community relaxed its privity position of earlier years and effectively expanded its debarment and suspension coverage to lower tiers.<sup>100</sup> The result was the treatment of suspension and debarment sanctions at lower tiers essentially became reversed, with the NCR clipping mandatory coverage at a higher tier, and the FAR eventually extending coverage to lower tiers.<sup>101</sup> With accountability for executive management of taxpayer money being the new order of the day on Capitol Hill<sup>102</sup> and the technical ability to enforce sanctions through the Internet, it appears that this issue may be easier to resolve now than it was in the mid-1980s.

Under the NCR, all transactions of an assistance nature are subject to enforcement of the suspension or debarment sanction regardless of how many times the assistance transaction is divided or transferred to lower tiers (called

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96. This forced reciprocity was commonly described at the time as the *two shotgun weddings*. See Exec. Order No. 12,689, § 3(b), 54 Fed. Reg. 34,131, 34,131 (Aug. 18, 1989); Federal Acquisition and Streamlining Act, Pub. L. No. 103-355, § 2455, 108 Stat. 3243, 3327 (1994). As part of the final movement of the Federal Acquisition Streamlining Act of 1994 and after five years of failure by the executive branch to bring about reciprocity, Congress inserted § 2455, conferring reciprocity between the FAR and the NCR without resolving the technical differences. See *id.*

97. Federal Acquisition Regulation; Debarment, Suspension, and Ineligibility (Ethics), 60 Fed. Reg. 33,064, 33,064 (June 26, 1995) (to be codified at FAR pts. 9, 22, 28, 44, and 52); see *supra* note 65 and accompanying text.

98. FAR 9.405-2(b) (“Contractors shall not enter into any subcontract in excess of \$35,000, other than a subcontract for a commercially available off-the-shelf item, with a contractor that has been debarred, suspended or proposed for debarment. . . .”); 2 C.F.R. §§ 180.330, 180.355.

99. Nonprocurement Debarment and Suspension, 60 Fed. Reg. 33,037, 33,040 (June 26, 1995). Contractors debarred or suspended under the FAR would generally not be prohibited from acquiring subcontracts a lower-tier levels. This has changed over time with the FAR placing further restrictions on suspended and debarred contractors at all tiers. See Frederic M. Levy, *A Guide to Prohibitions on Subcontracting with Suspended or Debarred Parties*, 96 Fed. Cont. Rep. (BNA) 657, 659 (2011).

100. See Levy, *supra* note 99.

101. *Id.* (noting the FAR and the NCR lower-tier exclusionary effect “appear to be moving in different directions”).

102. *Id.* at 657 (noting the congressional trend of emphasizing the use of suspension and debarment to protect government interests).

pass-through awards).<sup>103</sup> Prime contracts issued by assistance recipients under nonprocurement transactions are always subject to enforcement of the debarment or suspension sanction if the contract is expected to equal or exceed \$25,000 or is subject to the federal awarding agency's consent or approval.<sup>104</sup> Subcontracts to the prime contract under the NCR are covered by the sanctions only if the agency issuing the assistance retains the option to approve the subcontract, or if the agency elects lower-tier coverage below the prime contract in its implementing rule and the subcontract is expected to equal or exceed the \$25,000 threshold.<sup>105</sup> Under the FAR, there are no pass-through awards.<sup>106</sup> There are only contracts and subcontracts, to which debarment, suspension, and proposed debarment ineligibility apply.<sup>107</sup> Under the FAR, the prohibitions on awards extend to all prime contracts, subcontracts subject to agency consent, and subcontracts in excess of \$35,000.<sup>108</sup>

Both rules allow the awarding agency to permit transaction-specific waivers called "exceptions" and recognize categorical exemptions,<sup>109</sup> although only the NCR specifically highlights exempt transactions.<sup>110</sup> Under the FAR, while certain areas are exempt from mandatory coverage at lower tiers,<sup>111</sup> the debarment rule places contractors on notice that for a contractor or subcontractor making such an award,<sup>112</sup> even though not prohibited, the contractor and subcontractor may be subjected to scrutiny by an agency about its own present responsibility.<sup>113</sup> Thus, there is a not-so-subtle nudge

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103. 2 C.F.R. §§ 180.330, 180.355. Whereas the FAR technically only restricts subcontracting with excluded parties at the first tier, the NCR has a pass-down provision that restricts transaction with excluded parties at all tiers of a covered transaction. *Id.*

104. *Id.*

105. *Id.*

106. See generally FAR 9.405-2.

107. *Id.* (outlining restrictions placed on prime contractors from subcontracting with suspended, debarred, or proposed for debarment entities).

108. FAR 9.405-2(b).

109. FAR 9.406-1(c) ("A contractor's debarment or proposed debarment, shall be effective throughout the executive branch of the [g]overnment, unless the agency . . . states in writing the compelling reasons justifying continued business dealings between that agency and the contractor."); 2 C.F.R. § 180.135(a) ("A [f]ederal agency head or designee may grant an exception permitting an excluded person to participate in a particular covered transaction.")

110. 2 C.F.R. § 180.215 (noting that examples of transaction not covered by the NCR are awards to a foreign government or public international organization; personal entitlements, such as Social Security income; and federal employment, among others).

111. FAR 9.405-2(b) (exempting restrictions when entering subcontracts for commercially available off-the-shelf items).

112. FAR 9.405-2(b)(1)-(4) (requiring prime contractors to notify the contracting officer of plans to subcontract (must be in excess of \$35,000 and for other than commercially available off-the-shelf items) with a suspended, debarred, or proposed for debarment entity prior to entering into the subcontract, regardless of tier).

113. FAR 9.104-4(a) ("Determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility."); see also Nonprocurement Debarment and Suspension, 60 Fed. Reg. 33,037, 33,040 (June 26, 1995) (stating lower-tier transactions generally are covered by the exclusionary effect under the NCR, making suspended or debarred contractors ineligible for subcontracts at the lower tiers).

under subpart 9.4 of the FAR to all contractors and subcontractors to avoid using a listed entity even if the sanction does not specifically apply to that transaction under the rule.<sup>114</sup>

Lower-tier application of the suspension and debarment sanctions is one of the most difficult areas to address from a government-wide perspective. Lower-tier application of the suspension and debarment sanctions was probably the single-most divisive issue in the ISDC's prior unsuccessful attempts to reconcile technical differences between the rules because each community sought to preserve its own approach to addressing risk and vulnerability within its own universe.<sup>115</sup>

In the early- to mid-1980s, when the rules originally were issued, there were sound reasons to justify limitations on lower-tier application of the sanctions under the FAR<sup>116</sup> and the NCR. Recall that at that time, there were no desktop computers, mobile phones, or similar devices allowing for easy access to checking the suspended and debarred parties list. The list was a hardbound copy printed by the Government Printing Office and circulated to paid subscribers using the U.S. Post Office for manual delivery.<sup>117</sup> In most cases, the list was outdated upon receipt by the subscriber. This is one of the principal reasons for contractors having to certify that they had not been debarred, suspended, or proposed for debarment prior to award.<sup>118</sup>

On the nonprocurement side, significant sums of federal money are awarded to a vast array of state and local governments, foreign entities, exempt organizations, educational institutions, and other organizations, each of which spends and manages federal dollars according to its own procurement systems.<sup>119</sup> Arguably, a significant amount of the misconduct involving

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114. See Levy, *supra* at note 99 (noting some companies that rely heavily on government contracts do not work with listed entities as a matter of policy because of the potential risk).

115. See *supra* note 101. But see ABA-PCL 2008 REPORT, *supra* note 33, at 5 (recommending that "differences between the [FAR and the NCR] processes can be accommodated reasonably in a single set of debarment and suspension regulations").

116. See Shannon, *supra* note 79, at 383 (suggesting that where responsible agencies are several echelons removed from the actual contractual transaction relationship, it requires greater ability for the agency to impact lower-tier transactions to fulfill the agency's oversight responsibilities).

117. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-429, FEDERAL CONTRACTING: EFFORT TO CONSOLIDATE GOVERNMENTWIDE ACQUISITION DATA SYSTEMS SHOULD BE REASSESSED 2-3 (2012).

118. FAR 52.209-5. Prior to passage of the National Defense Authorization Act for Fiscal Year 2010 (2010 NDAA), the protections against the federal government doing business with debarred or suspended contractors extended only to first-tier subcontractors. See H.R. REP. NO. 111-288 (2009) (CONF. REP.). With the intent of protecting the government from unscrupulous contractors, Congress included section 815 in the 2010 NDAA to change the definition of "procurement activities" in the Federal Acquisition and Streamlining Act to include contractors at any tier, subject to the exception for commercial items and commercially available off-the-shelf items. *Id.*

119. Certain states, including Pennsylvania, Maryland, Massachusetts, and New Jersey, may debar a contractor because the contractor was debarred by the Federal Government pursuant to FAR 9.4.

federal assistance occurs below the award recipient's level.<sup>120</sup> For this reason, many of the agencies responsible for development of the NCR favored application of sanctions at lower tiers—an idea fully supported by the inspectors general community.<sup>121</sup>

Since the FAR and the NCR were first promulgated, all sectors of society have advanced tremendously in communications technology. Today, there is full access to the Internet through a variety of personal computers and other mobile devices that simply were not part of the business landscape in 1980s. These advancements have revolutionized the manner and speed in which current information is transmitted and received. Today, anyone can access the current list of suspended, debarred, and ineligible entities through the System of Award Management (SAM).<sup>122</sup> The principal practical communications concerns that once hindered enforcement of the suspension and debarment sanctions by Contracting Officers, award officials, and private businesses long since have disappeared.<sup>123</sup> The authors believe that the FAR Council and the ISDC should take a fresh look at the factors affecting lower-tier enforcement of the debarment and suspension sanctions in both its procurement and nonprocurement functions. Once OMB determines the desired range of federal protection to be accorded tax-supported activities,

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Notwithstanding any other provision of this section, any contractor debarred or suspended by any agency of the United States shall by reason of such debarment or suspension be simultaneously debarred or suspended under this section, with respect to non-federally aided contracts; the secretary or the commissioner may determine in writing that special circumstances exist which justify contracting with the affected contractor.

MASS. GEN. LAWS ch. 165, § 29F(c)(2) (2012).

A person may be debarred from entering into a contract with the State if the person, an officer, partner, controlling stockholder or principal of that person or any other person substantially involved in that person's contracting activities has been debarred from federal contracts under the Federal Acquisition Regulations, as provided in 48 C.F.R. Chapter 1.

MD. CODE, STATE FIN. & PROC. § 16-203(c) (2014); see 62 PA. CONS. STAT. § 531(b)(9) (2002) ("Debarment by any agency or department of the [f]ederal [g]overnment or by any other state."); N.J. ADMIN. CODE § 17:19-4.1 (2017).

120. Other states do not automatically debar a contractor that is debarred by the federal government, but will consider a federal debarment in determining the contractor's *responsibility* before awarding a state contract. State of Md., Bd. of Pub. Works Advisory, *Suspension & Debarment* (Aug. 31, 2005) ("A bidder who appears on the federal list is not automatically barred from State contracts but that federal (or other jurisdiction) debarment must be factored into the contractor responsibility determination."); *Best Practices Determining Vendor Responsibility*, N.Y. STATE PROCUREMENT BULL., Apr. 2009, at 3. New York vendor responsibility determination for state procurements considers whether the vendor, any principal, owner, officer, major stockholder, affiliate, or any person involved the bidding, contracting, or leasing process has been the subject of a federal, state, or local government suspension or debarment. *Id.*

121. The Council on the Inspector Generals for Integrity and Efficiency is an independent entity established within the executive branch to address integrity, economy, and effectiveness issues across executive branch agencies. See COUNCIL INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, <https://www.ignet.gov/> [<https://perma.cc/YMU2-HEBN>] (last visited Feb. 19, 2017).

122. See SYS. AWARD MGMT., <http://www.sam.gov/> [<https://perma.cc/4JQQ-Y7VS>] (last visited Feb. 19, 2017).

123. The System of Award Management (SAM) is instantly available to anyone with an Internet connection.

it can use today's technology to achieve the goal. While OMB may decide there remain sound reasons for excluding certain transactions from lower-tier suspension and debarment coverage, the issue of lower-tier application of sanctions no longer should be controlled by the technical communication restrictions of the past.

### C. Effect of a Notice of Proposed Debarment

One of the most obvious differences between the FAR and the NCR is the treatment accorded the issuance of a notice of proposed debarment.<sup>124</sup> While the two rules from the beginning treated the matter in a slightly different manner, the major difference in the rules as they appear today occurred during a relatively short period between 1987 and issuance of the NCR as a final rule in 1988.<sup>125</sup> In response to a GAO report critical of the FAR for allowing notices of proposed debarment to have a temporary preclusive effect on the awards of the proposing agency only,<sup>126</sup> the FAR eventually was amended in 1989 to extend the individual agency sanction to all agencies.<sup>127</sup> The effect of that decision was to blur the distinction between issuing a suspension and considering debarment under the FAR.

The GAO's incomplete understanding of the differences between suspension and debarment resulted in a misdiagnosis of the "problem" and a "fix" to a rule that was not broken.<sup>128</sup> In doing so, the change to the FAR with regard to the effect of proposed debarment brought the FAR and the NCR almost instantly out of harmony with one another on a very significant provision of the two rules.<sup>129</sup> The GAO should not have focused its inquiry on why notices of proposed debarment under the FAR had only an agency-specific preclusive effect on future awards pending a final decision, but instead on why the agency proposing debarment did not issue a suspension

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124. See FAR 9.406-3(c); 2 C.F.R. § 180.805. Contractors are advised that debarment is being considered through issuance of a "Notice of Proposal to Debar." The notification is to be issued "immediately" under FAR 9.407-3(c) and "promptly" under 2 C.F.R. § 180.715.

125. See FAR 9.406-3 and 2 C.F.R. § 180.805 (debarment procedures). The standard of proof to debar is a preponderance of the evidence. See FAR 9.407-1(b)(1); 2 C.F.R. § 180.725 (suspension procedures). A suspension, which is intended as an interim exclusion pending agency investigation, requires only a showing of adequate evidence.

126. U.S. GEN. ACCOUNTING OFF., GAO/NSIAD-87-37BR, PROCUREMENT: SUSPENSION, AND DEBARMENT PROCEDURES 3 (1987).

127. Federal Acquisition Regulation; Debarment, Suspension, and Ineligibility (Ethics), 59 Fed. Reg. 65,623 (Dec. 20, 1994) (amending the FAR); see also Nonprocurement Debarment and Suspension, 59 Fed. Reg. 65,607 (Dec. 20, 1994) (NCR revisions).

128. PROCUREMENT: SUSPENSION, AND DEBARMENT PROCEDURES, *supra* note 126, at 2-3.

129. A proposal to debar issued under the FAR carries with it an immediate ineligibility to participate in government contract and assistance activities, and the name of the proposed entity is entered on the same SAM excluded parties list as those suspended or debarred. See FAR 9.405(a). However, if the same entity is merely proposed for debarment under the NCR without the SDO having to invoke the suspension option, the entity is not rendered ineligible and the name is not entered into the SAM excluded parties list unless or until a final decision in the matter is reached. 2 C.F.R. § 180.705.

pending resolution of the debarment matter.<sup>130</sup> The nonprocurement community rejected the GAO reasoning behind the recommendation to change the treatment accorded notices of proposed debarment under the FAR and deliberately elected not to change the effect of proposals to debar under the NCR.<sup>131</sup> The nonprocurement community has maintained that position throughout every rulemaking change, including the most comprehensive rewrite of the rule in 2003.<sup>132</sup> Under the NCR, a mere *proposal* to debar has no preclusive effect upon award to the entity being proposed for debarment *unless there is an immediate need* that makes rendering the entity ineligible for award pending a decision on the proposed debarment.<sup>133</sup> If so, presuming that adequate evidence in support of a potential cause for debarment exists, an SDO initiating the notice of proposed debarment under the NCR<sup>134</sup> simply would add a suspension to the notice, thus rendering the notice a *Notice of Suspension and Proposed Debarment*.

The evidentiary standards for suspension under the FAR and the NCR are and always have been identical.<sup>135</sup> In the authors' experiences, issuing a notice of proposed debarment under the NCR has worked smoothly and without incident since its original promulgation.<sup>136</sup> There is nothing that would suggest the experience would be different in a procurement setting if the same treatment were accorded to notices of proposed debarment issued under the FAR. Eventually, agencies operating under the FAR found their own way of rebalancing the equities and adjusting for the potential harsh results with a notice of proposed debarment in appropriate cases. Agencies did so by making greater use of *show cause*<sup>137</sup> notices in place of proposals to

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130. See FAR 9.406-3(c); 2 C.F.R. § 180.760 (noting suspensions are to be for only a "temporary period"); *id.* § 180.810 ("[D]ebarring official does not issue a decision until the respondent has had an opportunity to contest the proposed debarment.").

131. See 2 C.F.R. § 180.700.

132. Nonprocurement Debarment and Suspension, 53 Fed. Reg. 19,161,19,168; see Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 68 Fed. Reg. 66,534, 66,535 (Nov. 26, 2003). The ISDC was asked to recommend revisions of the NCR into plain language and "other improvements" consistent with suspension and debarment purposes. *Id.* at 66,535.

133. In this instance the agency using the NCR would issue a suspension notice, pursuant to 2 C.F.R. § 180.710, along with the proposed debarment notice, pursuant to 2 C.F.R. § 180.805.

134. 2 C.F.R. § 180.805.

135. FAR 9.407-1(b)(1); 2 C.F.R. § 180.715. If not fully understood, one too quickly may conclude that somehow as a matter of process the different treatment accorded a notice of proposed debarment under the FAR and the NCR results in a denial of due process. As a practical matter, agencies have found ways when imitating actions under the FAR to blunt the FAR's apparent harshness of the treatment accorded a notice of proposed debarment, which is precisely the reason why this provision invites further scrutiny and reassessment of whether it needs to be changed.

136. See 2 C.F.R. § 180.810. One main difference between the FAR and the NCR is that, while a notice of proposed debarment under the FAR immediately excludes a contractor from procurement activities with the government, a notice of proposed debarment under the NCR does not. Only after a participant is debarred does the exclusion takes effect under the NCR.

137. See Shannon, *supra* note 79, at 425. The GSA proposed an additional procedural safeguard in the suspension and debarment process by requiring the GSA to issue a show cause notice before initiating a suspension or debarment action. A show cause notice, otherwise known as

debar, but this took the process outside the official rules; therefore, most respondents and their counsel, except respondents and counsel familiar with the unofficial practices of individual agencies, had no visibility or awareness of that process. In addition, the private bar and business communities cannot depend on uniform exercise of the show cause option by all SDOs because show cause letters are issued purely as a matter of discretion.<sup>138</sup> Practices are inconsistent not only among SDOs, but even by a single SDO. This situation led to a proposal by the General Services Administration (GSA) in 2004 to amend the GSA Acquisition Manual (GSAM) to require that, at least for actions initiated by GSA, all debarment actions commence with a show cause notice.<sup>139</sup> However, the proposed change to the GSAM never was promulgated as a final rule.<sup>140</sup> Perhaps GSA realized that attempting to regularize the use of show cause notices within GSA only would create more disparity between GSA and other procurement agency SDOs or would highlight the discomfort by SDOs with the treatment of notices of proposals to debar under the FAR.

In contrast, the nonprocurement community never has experienced such a dilemma under the NCR.<sup>141</sup> The ability to issue a notice of proposed debarment to initiate an inquiry into a matter of concern with the option to add a

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a shock-and-alarm notice, is a pre-suspension notification that informs a contractor that it is being considered for suspension and debarment. See PRESIDENT'S BLUE RIBBON COMM'N ON DEF. MGMT., A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT 107 (1986) ("What distinguishes the 'shock and alarm' technique is that it does not carry with it the formal and immediate sanction of suspension. It provides the contractor an opportunity to put its own house in order before suspension becomes imperative."); Memorandum from Don Yockey, Under Sec'y of Def., to the Sec'ys of the Military Dep'ts; Gen. Counsel, Dep't of Def.; Dir., Def. Logistics Agency (Sept. 28, 1992), at 1, *reprinted in* COMM. ON DEBARMENT & SUSPENSION, AM. BAR ASS'N, SECTION OF PUB. CONTRACT LAW, THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT (3d ed. 2002) (App'x C) ("When appropriate prior to suspension, I want companies to be informed that we have extremely serious concerns with their conduct, that their suspension is imminent and that they may contact the suspension official, or . . . designee, if they have any information to offer on their behalf.").

138. See General Services Acquisition Regulation; Debarment, Suspension, and Ineligibility, 69 Fed. Reg. 34,248 (June 18, 2004).

139. See *General Services Administration Acquisition Manual (GSAM)*, ACQUISITION.GOV, <https://www.acquisition.gov/?q=browsegsam> [<https://perma.cc/DK4F-9RUU>] (last visited Feb. 19, 2017). GSA proposed amending GSAR 509.406-3 to require that the SDO provide those being considered for suspension or debarment with a show cause notice before issuing a notice of proposed debarment or suspension. See also General Services Acquisition Regulation; Debarment, Suspension, and Ineligibility, 69 Fed. Reg. at 34,248.

140. See General Services Acquisition Regulation; Debarment, Suspension, and Ineligibility, 69 Fed. Reg. at 34,248; see also Letter from Robert F. Meunier, Suspension & Debarring Official, Env'tl. Prot. Agency, to Gen. Servs. Admin. (Aug. 10, 2004) (arguing that requiring prenotification of contractors by GSA before suspension was "actually necessitated by the fact that the [exclusionary] effect of proposed debarment under the FAR caused the very problem GSA now seeks to correct").

141. An NCR notice of suspension takes immediate effect. See 2 C.F.R. § 180.710. An agency may initially suspend a contractor without notice, although notice and an opportunity to respond must be provided shortly thereafter. An NCR proposed debarment becomes exclusionary only after the SDO makes a final determination having provided the contractor an opportunity to rebut the allegations. See *id.* § 180.760.

suspension if necessary<sup>142</sup> keeps proposals to debar under the NCR focused on the purpose of proposing debarment and consistent in practice across the board. Most importantly, it allows the process to be fully protective and responsive to the public's interests without creating a real or apparent unfairness and unequal treatment in the government's use of its various suspension and debarment tools. Applying suspension and proposed debarment options, either separately or in conjunction with one another, maintains clarity between the two actions for both the SDO and the entity potentially facing those sanctions. In this regard, the advantages of the NCR are overwhelming with no disadvantage to the government or the taxpayer. Regardless of whether a USDR is ever developed, changing the FAR to give the same effect to a notice of proposed debarment as that provided under the NCR would significantly benefit all involved in the process.

#### D. Rulemaking Format

As noted earlier in this Article, the FAR and the NCR originally were prepared in a manner that were the same or similar in content and format.<sup>143</sup> However, during the Clinton administration under Vice President Al Gore's Reinventing Government initiative, the NCR underwent an amendment and was required to be rewritten in a plain language, question-and-answer format as a means to foster greater comprehension of government rules by the general public.<sup>144</sup> Accordingly, in 1999, the NCR was re-proposed in that style.<sup>145</sup> In that non-traditional rulemaking format, the NCR uses questions rather than titles to identify subject matter.<sup>146</sup> It uses answers to those questions to identify regulatory content. While the NCR format was praised by some commenters, including the American Bar Association, during the rulemaking process,<sup>147</sup> the plain language format did make comparisons between the NCR and the FAR more difficult.<sup>148</sup> The plain language format also repositioned information and re-packaged content to be organized according to the intended user of that information.<sup>149</sup> In addition, the question-and-answer format reduces the government's ability to address regulatory matters in a concise and efficient way and removes the option of co-locating information related to a given subject matter under a simple heading.<sup>150</sup> Longer

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142. *Id.* § 180.700.

143. *See* West, *supra* note 18, at 3.

144. *See* Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 68 Fed. Reg. 66,533–66,646 (Nov. 26, 2003). On April 12, 1999, OMB asked the ISDC to review the NCR and to revise the current rule in a plain language format. *Id.* at 66,535.

145. *See id.* at 66,535.

146. *See generally* 2 C.F.R. pt. 180.

147. *See* Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 68 Fed. Reg. at 66,536.

148. *See id.* (noting the potential difficulties associated with using the question-and-answer format).

149. *See id.*

150. *See id.* at 66,544–646.

titles and narrow questions mean more text, more regulatory volume, and content repetition, even if it is easier to understand by the general public. Regardless of whether the government chooses to maintain separate rules or issue a USDR, the wisdom that led to reissuing the NCR in its present format should be reconsidered. While there are benefits, such as simplifying terminology, to be realized from a plain language approach to rule writing, the difficulty in making comparisons and locating information between the two rules and the inefficiency of having to write longer rules to capture pertinent information are questionable tradeoffs. Therefore, any effort to reconcile the rules should include an OMB reevaluation of the benefits of using a plain language approach in the suspension and debarment setting.

### E. *Treatment of Individuals*

Under subpart 9.4 of the FAR, the treatment of individuals whose names appear in the SAM database as having been suspended, debarred, or proposed for debarment differs from the treatment of such individuals under the NCR.<sup>151</sup> Under the FAR, listed individuals are precluded from serving as an “agent,” “representative,” or “surety,” in addition to being precluded from receiving a federal contract or covered subcontract.<sup>152</sup> Under the NCR, individuals are precluded from serving in the capacity as a “principal,” which includes serving as an agent or surety, as well as in positions of ownership and management or in rendering certain professional and technical advice in connection with nonprocurement covered transactions.<sup>153</sup> The variable treatment of a debarred or suspended individual between the two rules invites some awkward and impractical outcomes for those companies whose work may derive from both federal and state or local government sources. Presumably the issues of concern to the government with respect to listed individuals would be the same regardless of whether they work under a contract directly with the government or indirectly under a grant, cooperative agreement, loan, or other funding vehicle. The basis for the treatment of debarred, suspended, or excluded individuals under the NCR evolved from the realization that individuals can impact federally funded activities adversely in capacities well beyond that of acting as an agent, surety, or representative.<sup>154</sup> For example, from the authors’ experience in some EPA-funded activities, individuals performing certain professional and technical work associated with engineering design, accounting and professional services, construction, and laboratory analyses can

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151. See FAR 9.406-2(b)(2); FAR 9.405(a); 2 C.F.R. § 180.810.

152. See FAR 9.405(a), (c) (“Contractors debarred, suspended, or proposed for debarment are also excluded from conducting business with the [g]overnment as agents or representatives of other contractors. . . . Contractors debarred, suspended, or proposed for debarment are excluded from acting as individual sureties.”).

153. See 2 C.F.R. §§ 180.320, 180.800(c)(2) (providing for debarment of an entity for “[k]nowingly doing business with an ineligible person”); 2 C.F.R. § 180.800(c)(3) (stating that a participant may be debarred for failing to pay debts to “any [f]ederal agency or instrumentality,” except for debts arising under the Internal Revenue Code).

154. See FAR 9.405(a), (c).

threaten the integrity and performance of the project. Therefore, individuals debarred, suspended, or excluded from government procurement and assistance activities are ineligible to perform those services on behalf of a nonprocurement award recipient or participant.<sup>155</sup> This is another area of the rules that should be examined for possible reconciliation.

#### *F. Definition of Conviction*

Under the NCR, resolution of a criminal matter by a court under terms that would withhold, delay, condition, or refrain from issuing a judgment are treated as the “functional equivalent” of a conviction and therefore stand on equal footing as a formal judgment issued by the court when establishing a cause for debarment without having to engage in an independent fact finding.<sup>156</sup> Under the FAR, a conviction must be established by entry of a formal judgment by the court and does not recognize diversionary practices and alternatives to judgments and sentences that courts occasionally employ in the criminal process.<sup>157</sup> While not all such alternative dispositions qualify for treatment as a conviction under the NCR, those that satisfy certain criteria and reliability are accorded equal treatment to that of a judgment for the purposes of making business decisions.<sup>158</sup> The two rules or a USDR should have a definition of “conviction” that strikes the correct balance between the technical and practical realities of making business decisions on the basis of court ordered or approved dispositions of criminal matters. It is worth noting that when the NCR was amended to broaden the definition of the term “conviction,” the amendment originally was proposed to include a wider range of dispositions.<sup>159</sup> After having considered comments of the ABA’s Public Contract Law Section, the NCR drafting committee scaled back the definition to recognize only those alternate dispositions that involved the participation of the court.<sup>160</sup> Therefore, this would seem to be an appro-

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155. FAR 9.401.

156. See 2 C.F.R. §§ 180.705, 180.830, 180.920 (noting the definition of conviction includes a guilty plea or a guilty verdict is returned but judgment is withheld, delayed, or diverted pursuant to an alternative sentence or disposition). See also Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 68 Fed. Reg. 66,534, 66,540–41 (Nov. 26, 2003).

157. FAR 9.406-2(a), (b), (c) (stating contractors may be debarred for (1) a conviction or civil judgment for fraud or the commission of a criminal offense, (2) a serious violation of the terms of a government contract, subcontract, or transaction (established by a preponderance of evidence), or (3) any other cause so serious or compelling in nature that it affects an entity’s present responsibility); Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 68 Fed. Reg. at 66,540 (noting Federal Rule of Criminal Procedure 32 states that a criminal conviction is final upon entry of final order of judgment).

158. See Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 68 Fed. Reg. at 66,540–41.

159. See Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants); Proposed Rule, 67 Fed. Reg. 3265, 3269 (Jan. 23, 2002).

160. See ABA-PCL 2008 REPORT, *supra* note 33.

priate place for the government to begin any inquiry about reconciling the definition of the term “conviction” under the FAR and the NCR.

### G. Denial of Fact-Finding

Under the FAR, fact-finding in the context of a suspension proceeding may be denied based on the advice from an Assistant Attorney General of the United States that the fact-finding proceeding will adversely impact pending or contemplated legal proceedings.<sup>161</sup> Under the NCR, the SDO may deny fact-finding based on the advice of any prosecuting office of the DoJ, including a U.S. Attorney’s Office.<sup>162</sup> In addition, the NCR accords the same status to prosecutors at the state and local levels in recognition of the fact that a federal suspension or debarment action may be premised on criminal and legal proceedings underway at the state or local level.<sup>163</sup> These positions should be harmonized and philosophically aligned between the fact-finding provisions and the causes for suspension provisions in the FAR and then reconciled to the same approach under both rules or incorporated in a USDR.

## V. SECONDARY ISSUES

In addition to the seven big-ticket items above, the FAR Council and ISDC should consider several subordinate matters once they reach accord on the key concepts above. These items could be incorporated easily under each of two rules or within a USDR as appropriate.

### A. Pre-Notice Engagement

Debarment practice under both the FAR and the NCR always has recognized the inherent authority of SDOs to engage in discussions with potential respondents or their counsel under a variety of circumstances.<sup>164</sup> The SDO or another government official may initiate these forms of unofficial engagement.<sup>165</sup> When initiated by the government, the process usually begins with a written communication called a “show cause”<sup>166</sup> or “pre-notice investigation”

161. FAR 9.407-3(b)(2); 2 C.F.R. § 180.735. Contractors are entitled to a hearing only where (1) material facts are in dispute, (2) the action was not based on an indictment, conviction, or civil judgment, and (3) substantial interest of the government in pending or contemplated legal proceedings will not be prejudiced by a hearing. *Id.*

162. Compare 2 C.F.R. § 180.735(a)(4) with FAR 9.407-3(b)(2).

163. Compare 2 C.F.R. § 180.735(a)(4) with FAR 9.407-3(b)(2).

164. FAR 9.406-3(b)(2)(i); FAR 9.407-3(b)(2)(i); 2 C.F.R. § 180.815 (affording the opportunity to contractors and their counsel to meet with SDOs).

165. See FAR 9.406-3(b)(1) (stating contractors and their counsel also may contact chief program officers of agencies’ suspension and debarment programs that are usually one level below the SDO).

166. General Services Acquisition Regulation; Debarment, Suspension, and Ineligibility, 69 Fed. Reg. 34,248, 34,248 (June 18, 2004); see *Regulations in Brief*, 46 GOV’T CONTRACTOR ¶ 252, June 23, 2004; see also *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 243–44 (1988) (finding no due process violation for suspension without a hearing). Due to the immediate

letter or similar term reflective of the fact that the matter is preliminary to issuance of an official notice under the suspension or debarment rules. Pre-notice engagement also may occur at the initiation of a potential respondent or counsel.<sup>167</sup> In such cases, there is no special term used in practice, but pre-notice engagement usually begins with a telephone call or letter requesting the SDO to meet with the respondent or counsel regarding a matter of potential concern to the entity and the government. Pre-notice engagements initiated by the government are believed to be used more often under the FAR than the NCR because of the preclusive effect that attaches to a Notice of Proposed Debarment under the FAR. ISDC data reported to Congress in the ISDC/OMB 2016 Section 873 Report confirms increased use of show cause letters by the agencies.<sup>168</sup>

In recent years, subpart 9.4 of the FAR has been amended to make tangential reference to the use of show cause letters.<sup>169</sup> However, the FAR does not elaborate or provide guidance to SDOs on their use.<sup>170</sup> Because there is no downside to issuing a proposed debarment notice under the NCR to inquire into a matter of concern, the NCR does not reference show cause letters.<sup>171</sup> Show cause letters may be used more infrequently under the NCR than under the FAR. Small businesses and attorneys who seldom practice in this arena on a regular basis often are unaware of these informal options due to their relative obscurity under both rules. Federal agencies should decide whether giving more prominence to pre-notice engagement is desirable under the FAR and the NCR or in any USDR that may be developed. Potential concerns of government accountability groups, the inspector general community, or Congress that executive agency suspension and debarment decision-making may become invisible to the public through use of the informal pre-notice engagement process are overcome by the fact that such

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exclusionary effect of a proposed debarment, some agencies have started to issue *show cause* notices, which inform the contractor that it is being considered for suspension or proposed debarment, without the immediate exclusion.

167. See *Am. Floor Consultants & Installation, Inc. v. United States*, 70 Fed. Cl. 235–36, 238–39 (2006) (dismissing contractor’s challenge to an exclusion based on a no-prosecution agreement). A contractor may attempt to reach a coordinated settlement with a criminal or civil matter before DoJ, which is also the basis of an agency’s consideration for suspension and debarment. Since DoJ is primarily responsible for civil or criminal prosecution, a contractor’s coordination with the relevant agency’s SDO before, during, and after resolution of the underlying case is imperative.

168. See Letter from David M. Sims, Chair, Interagency Suspension & Debarment Comm., to Hon. Jason Chaffetz, Chairman, Comm. on Oversight & Government Reform, U.S. House of Representatives (2015), at 6 [hereinafter ISDC 2015 Letter].

169. See FAR 49.402-3(e)(1). If the Contracting Officer believes that a contractor has violated the terms and conditions of the contract, he or she on behalf of the acquisition agency may issue a show cause letter to the contractor. *Id.*

170. See General Services Acquisition Regulation; Debarment, Suspension, and Ineligibility, 69 Fed. Reg. 34,248, 34,248 (June 18, 2004). After an attempt to amend the FAR to require agencies to issue show cause notices, “except in those cases where the government would be harmed by waiting any period of time,” issuance of a show cause notice is completely within the discretion of individual agencies. *Id.*

171. See generally 2 C.F.R. pt. 180.

engagements already are being captured and reported in the annual Section 873 Report.<sup>172</sup> Increased attention to pre-notice engagement in each rule or a USDR will serve to bring some measure of discipline, predictability, and visibility to the process and will offer useful guidance to SDOs in choosing the most appropriate vehicle to address matters of business interest in the context of publicly funded activities.

### B. Definition of Present Responsibility

Under the FAR, a Contracting Officer must make an affirmative finding that a potential contractor is *responsible* before making an award.<sup>173</sup> The same is true for awarding officials issuing grants and cooperative agreements.<sup>174</sup> The term *responsibility* is defined under the FAR as it relates to a potential contractor's financial and other capacity to perform services or provide goods to the government on the particular contract and to its suitability from an integrity standpoint.<sup>175</sup> There is no similar definition for the concept of *present responsibility*, which is the standard an SDO applies to suspension or debarment decisions, though there is some overlap in these two standards.<sup>176</sup> Failure to recognize when a matter should be handled by the Contracting Officer or award official as a matter of *responsibility*, and when it should be handled by the debarring official as a matter of *present responsibility*, can result in a Contracting Officers or award officials engaging in *de facto*<sup>177</sup> debarment if they withhold or cause others to withhold multiple awards based on the same concern. Given the fact that debarment may be imposed only if the contractor/participant is not presently responsible and

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172. See ISDC 2015 Letter, *supra* note 168.

173. See FAR 9.104-1. A contractor must have adequate financial resources to perform; be able to comply with required delivery or performance schedule; have satisfactory performance record; have necessary organization, experience, accounting and operational controls, and technical skills; have necessary production, construction, and technical equipment and facilities; and be otherwise qualified and eligible to receive an award under applicable laws and regulations. *Id.*

174. See 2 C.F.R. § 180.125.

175. See FAR 9.104-1.

176. Present responsibility is an inquiry that focuses on the perceived ability of a contractor to contract with the government in a responsible manner on a going-forward basis. See KATE M. MANUEL, CONG. RESEARCH SERV., R40633, RESPONSIBILITY DETERMINATIONS UNDER THE FEDERAL ACQUISITION REGULATION: LEGAL STANDARDS AND PROCEDURES 3 (2013). The SDO asks: despite the contractor's prior misconduct or impropriety, is the contractor presently responsible? Can the contractor be trusted to perform in accordance with contract requirements, governing law, and overall, to conduct itself ethically? *Id.*

177. See generally Lisa A. Everhart, *Graylisting of Federal Contractors: Transco Security, Inc. of Ohio v. Freeman and Procedural Due Process Under Suspension Procedures*, 31 CATH. UNIV. L. REV. 731 (1982); *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 969 (D.C. Cir. 1980) (holding a contractor has a due process right to notice of the suspension or proposed debarment and at least a minimal opportunity to respond before exclusion from government contracts); *Leslie & Elliott Co. v. Garrett*, 732 F. Supp. 191, 194-95 (D.D.C. 1990) (holding a *de facto* debarment against the Navy for finding a low bidder nonresponsible on two contracts with Navy representative making statements that the Navy did not want to do business with the contractor); *Shermco Indus., Inc. v. Sec'y of the Air Force*, 584 F. Supp. 76 (N.D. Tex. 1984) (finding a *de facto* suspension where the Air Force made several nonresponsibility determination on the same basis against a single contractor).

not merely because a cause for debarment exists as a matter of past conduct,<sup>178</sup> there should be some definition in both the FAR and the NCR or in a USDR that defines that standard. While the term is subjective and can involve drawing inferences from past misconduct, it is important that SDOs and respondents alike be able to differentiate those decisions that support withholding an individual award from those that deprive a contractor or participant from the full range of federal funding on a continuous basis. Having to present matters in opposition to a proposed debarment or write a decision after such a presentation has been made can be a bit like journeying to a destination that you will decide once you have arrived. If you do not know where you are going, any road will take you there. While drafting a definition for the present responsibility standard can be challenging, doing so will improve the overall suspension and debarment system so that SDOs do not fall into the practice of rendering decisions that are essentially punitive for past misconduct rather than protective of legitimate business interests.<sup>179</sup> Leaving the term undefined without any guidance in the rules or through

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178. FAR 9.406-2.

179. A proposed uniform definition of *present responsibility* might focus on outcome, rather than input, such as

a presently responsible contractor or participant is one that has in place an articulated system, program or method by which to govern, control and address to its own ability to fulfill its obligations under a government-funded transaction to competently perform the work required in compliance with federal laws, regulations, policies and requirements and to do so with integrity.

With such a definition, or something like it, the rule would at least allow one to integrate the so-called “mitigating factors” into the decision process in a way that provides greater focus on the goal to be achieved while allowing the SDO the same full range of discretion in evaluating and weighing relevant facts and circumstances necessary to reaching what is inherently a subjective evaluation. See FAR 9.406-1(a) (listing ten debarment mitigating factors). The NCR includes not only those mitigating factors, but also a list of aggravating factors that may increase the need to suspend or debar. Another useful definition to include would be that of *immediate need*. This is the second prong required under both rules to support a suspension (the first being adequate evidence to support a cause for action). But only the term *adequate evidence* ever has been defined in the rules. *Immediate need* is, like *present responsibility*, ultimately a conclusion to be reached. But, like the term *presently responsible*, it is of central importance to the decision process and capable of description in a manner that can add focus and depth to the matter at hand without having to identify each constituent element that will impact the final decision. For example, the proposed definition could echo the guidance provided in preamble to the 2003 NCR addressing the subject:

Immediate need is a conclusion to be reached by an SDO in addition to having adequate evidence of a cause for action in order to issue or sustain a suspension action. In making such a decision, the SDO shall consider whether the contractor/participant is rationally within range (both from a standpoint of time and skillset) of obtaining or participating in a government-funded transaction that may be impacted by the concerns at issue. To the degree that the matter involves or impacts a serious threat to health, safety and environment, the SDO shall consider such potential impact in reaching his or her evaluation in addition to any impact potential for fraud, waste, abuse, poor performance, non-compliance, financial or other serious concern that may be present.

Cf. Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants), 68 Fed. Reg. 66,543 (Nov. 26, 2003).

supplemental policy places the standard at risk of having to be defined by the courts, which may not be to the liking of executive branch agencies.

### C. Review and Appeals

Under both the FAR and the NCR, any agency SDO can review and modify or reverse a determination.<sup>180</sup> Under the NCR, agencies are permitted to add an internal administrative appeal process if they so choose.<sup>181</sup> In most cases, agencies have not added any option for administrative appeal within the agency once the SDO decides a matter.<sup>182</sup> Agencies that have done so, such as the EPA, limit the appeals to decisions based on errors of material fact or law.<sup>183</sup> Limited options for internal appeal offer some recourse to a disappointed respondent to obtain some form of relief that may otherwise have to be resolved in the courts.<sup>184</sup> Limited rights of appeal do not have to be de novo hearings, but could be limited to the specific issue as a matter of record.<sup>185</sup> They also can be granted purely at the discretion of the review official and need not become a procedural burden to the agency.<sup>186</sup> If the decision is to be challenged, respondents or counsel must seek redress through the courts pursuant to the Administrative Procedures Act.<sup>187</sup> Having received at least one level of review on a significant challenge

180. See FAR 9.406-4(b)-(c); 2 C.F.R. §§ 180.720, 180.725.

181. See *Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993); *Supreme Court Finds No Right to Require Exhaustion of Permissive Administrative Appeals Prior to APA Review of Debarment Sanctions*, 35 GOV'T CONTRACTOR ¶ 426, July 14, 1993; *Gleichman v. U.S. Dep't of Agric.*, 896 F. Supp. 43, 44 (D. Me. 1995) (holding a contractor is not required to exhaust a federal agency's appeal process under the Administrative Procedures Act unless the governing statute or regulation under which the suspension or debarment was taken explicitly requires such exhaustion).

182. Given the increased litigation and judicial scrutiny and the exercise of discretion by SDOs in recent years, it seems that some process for internal limited appeal within the agency above the SDO is appropriate. The authors do not believe that such a process should be formal nor should it involve a third-party review by OMB, GAO, or any other body. But a simple review one step above the SDO in some situations might be appropriate—particularly if the review is sought based on a misapplication of law or misconstruction of a regulation. The Environmental Protection Agency (EPA) has done this for years, and the discretionary appeal/review has been granted infrequently. But in some of those cases, the outcome for all was better than having to test the matter before the judiciary. Given that suspension and debarment should be the decision of the executive branch, the discretion exercised should be subject to an internal quick and limited review to ensure discretion is exercised appropriately before inviting either the judicial or legislative branches into that process.

183. See 2 C.F.R. § 1532.765(a)(2) (providing that suspended contractors may appeal their suspension to the Director of the Office of Grants and Debarment (OGD), but that the OGD Director would only reverse the suspension “based on a clear error of fact or law”); 2 C.F.R. § 1532.890(a)(2) (providing that debarred contractors may appeal their debarment to the OGD Director, but that the OGD Director would only reverse the suspension “based on a clear error of fact or law”).

184. 40 C.F.R. § 32.355 (1999).

185. *Id.*

186. *Id.*

187. 5 U.S.C. § 706 (2012) (stating a federal agency suspension or debarment decision is subjected to review in federal district court under the Administrative Procedure Act and the scope of review is differential, requiring the agency to act “arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law”); see *id.* § 706(2)(A); *IMCO, Inc. v. United States*, 97

is likely to benefit the agency should the respondent seek further relief in the courts. This is not an issue of major significance under existing rules, but if there is to be a USDR, agencies wishing to provide internal appeals may have to do so in a collateral agency-specific supplemental regulation or by policy. Even at agencies with internal review or appellate procedures, reversals of SDO decisions are rare.<sup>188</sup> But to avoid appearances of different levels of due process among the agencies, the FAR Council and ISDC should consider a standard approach to appeals.

#### D. Administrative Agreements

Over the years, agency SDOs have come to recognize the value of resolving concerns about a contractor's or assistance participant's present responsibility through administrative agreements (AA).<sup>189</sup> Administrative agreements vary in content between agencies and from one agreement to another within agencies. Generally, however, AAs tend to incorporate some of the remedial and mitigating factors contained in the FAR and the NCR.<sup>190</sup> Furthermore, the AA is usually effective for a period of three years and normally requires the entity to take certain actions, such as providing

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F.3d 1422, 1425 (Fed. Cir. 1996); *Bid Protest Gave CoFC Authority to Review Propriety of Proposed but Not Actual Debarment*, 38 GOV'T CONTRACTOR ¶ 521, Oct. 30, 1996.

188. An agency suspension or debarment decision is reviewable in federal district court under the Administrative Procedure Act. *See* 5 U.S.C. § 706; *See, e.g.,* WEDJ/Tree C's, Inc. v. U.S. Dep't of Def., No. 4: CV-05-2427, 2006 WL 2077021, at \*1, \*5 (M.D. Pa. July 24, 2006); *Debarment Memo That Considered but Rejected Mitigating Evidence Was Not Arbitrary*, *District Court Holds*, 48 GOV'T CONTRACTOR ¶ 290, Aug. 16, 2006 (noting that it is not the role of the court under the APA "to sit in the shoes of the [debarment official] and judge the facts differently"); 5 U.S.C. § 706(2)(A); *IMCO*, 97 F.3d at 1425.

189. One of the requirements of the Consolidated Appropriations Act is the inclusion of Administrative Agreements (AA) in the database of information available to contracting and award officials, specifically referring to AAs that are entered to resolve suspension and debarment matters. At one time, the thought of posting AAs anywhere brought a negative response from the contractor community. However, it would be difficult to justify keeping such information from award officials given the overwhelming support for such by the public, government watchdog groups, and members of Congress. *See* Bob Wagman, *Suspension and Debarment—What Have They Done Now?*, GOV'T CONTS. LEGAL F. (Jan. 18, 2012), <https://www.governmentcontractslegalforum.com/2012/01/articles/suspension-debarment/suspension-and-debarment-what-have-they-done-now/> [<https://perma.cc/HPL5-4QXR>]. However, it is also important to note that the mere presence of an AA along with other information such as criminal convictions runs the risk that a government award official will not appreciate that the AA was entered to protect the government's interest and should resolve the issue of contract-by-contract or award-by-award redetermination of recipient responsibility for any concern about integrity. Should award officials not appreciate that fact by reading more than the background section to the AA, it is conceivable that they may withhold award. When award officials withhold awards serially from a contractor, it can result in de facto debarment. *See* *Leslie & Elliott Co. v. Garrett*, 732 F. Supp. 191, 194–95 (D.D.C. 1990) (finding de facto debarment where the representative of the Navy found a low bidder nonresponsible on two contracts and made statements evidencing that the Navy did not want to do business with the contractor). The FAR and the NCR should include a clear statement of caution in that regard, and every AA, and the SAM itself, should make clear that a contractor or participant that is under such an AA has been adjudged to be eligible. In short, the AA is the medicine to an otherwise unaddressed integrity issue raised by the existence of a criminal conviction in the database.

190. *See* West, *supra* note 18, at 9.

training, maintaining, or implementing various monitoring, compliance, and ethics programs, as well as excluding certain individuals from government contracting.<sup>191</sup> AAs also may include the appointment of a monitor to oversee compliance with the agreement and report its findings to the government on a regular basis at the contractor's or participant's expense.<sup>192</sup>

It always has been, and should always remain, the option of an agency SDO to offer such terms of resolution where the government is comfortable continuing to do business with, or extend assistance to, an entity under special terms of conditions without having to resort to suspension or debarment as a final outcome.<sup>193</sup> Suspension and debarment will exclude an entity from involvement in federal contracts and assistance activities for a period of time but seldom acts as a "remedy" for the conditions giving rise to the sanction. The entity either dissolves or is recreated and emerges under another form, or it serves the time of its exclusion and re-enters the contractor/participant pool in a condition unknown to the government. In contrast, using an AA to induce or compel the entity to enhance its self-governance system and adopt effective ethics and compliance programs places the entity under a form of administrative probation subject to oversight and can bring about a change in culture and practice that will benefit both the contractor/participant and the taxpayer over the longer term.

In many cases, AAs can offer more flexible options to address matters of concern about a contractor's or assistance participant's "present responsibility." The overwhelming majority of matters addressed through AAs over the years have been successful.<sup>194</sup> Such an important and powerful tool in the SDO's management arsenal deserves a prominent profile in the FAR and the NCR or in any USDR. Giving prominence to AAs as a potential suspension and debarment alternative that can result in continuity of contracting and assistance eligibility is particularly important to small entities and individuals who may be handling their own debarment and suspension presentation without the benefit of counsel. AAs no longer are regarded as a "slap on the wrist" without meaningful impact as once they were.<sup>195</sup> Although they are not listed under SAM, AAs are made available to the public by many of the agencies on their websites and through the Federal Awards Performance Integrity and Information System (FAPIS).<sup>196</sup> They are also subject to disclosure under the Freedom of Information Act and are reported to Congress in the ISDC's annual Section 873 Report.<sup>197</sup> Importantly, the

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191. Nathaniel E. Castellano, *Suspensions, Debarments, and Sanctions: A Comparative Guide to United States and World Bank Exclusion Mechanisms*, 45 PUB. CONT. L.J. 403, 416 (2016).

192. *Id.*

193. *Id.* at 415.

194. See Kara Sacilotto & Craig Smith, *Suspension and Debarment: Trends and Perspectives*, 48 PROCUREMENT LAW. 1, 3 (2012).

195. *Id.*

196. See FED. AWARDEE PERFORMANCE & INTEGRITY INFO. SYS., <https://www.fapiis.gov/fapiis/index.action> [<https://perma.cc/C8ER-47JG>] (last visited Feb. 19, 2017).

197. ISDC 2015 Letter, *supra* note 168.

contractor/participant bears the costs for monitoring or overseeing compliance (when necessary), not the government or taxpayers.<sup>198</sup> Failure to comply materially with the terms of an administrative agreement always have been cited as a cause for suspension/debarment under the NCR<sup>199</sup> and often can serve as a greater deterrence to future misconduct than being punished for the original infraction for which debarment was being considered.

## VI. CONCLUSION

Creating a USDR would be a highly desirable achievement and likely would resolve any remaining material inconsistencies under the FAR and the NCR. Such an outcome would fulfill the original recommendations of the inspectors general community as captured in their 1982 President's Council on Integrity and Efficiency Suspension and Debarment Task Force Report.<sup>200</sup> However, whether achieved under a single rule or through a coordinated re-publication of existing rules, reconciling the differences between subpart 9.4 of the FAR and the NCR is important to finally achieving a fully effective suspension and debarment system for executive branch agencies of the federal government. The issues highlighted in this Article suggest some possible areas around which to open a new dialogue. Central to standardizing and improving federal suspension and debarment practice are new eyes and fresh ideas unconstrained by the fears, uncertainties, and limitations of the past.

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198. See FAR 9.403, 9.406, 9.407.

199. See *id.*

200. See Guidelines for Nonprocurement Debarment and Suspension, 51 Fed. Reg. 6372 (Feb. 21, 1986).

