



# RESHAPING FEDERAL DEPARTMENT

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FREE WEBINAR ON A NEW PROPOSED RULE  
FEBRUARY 27, 2024 - 9:00 AM ET



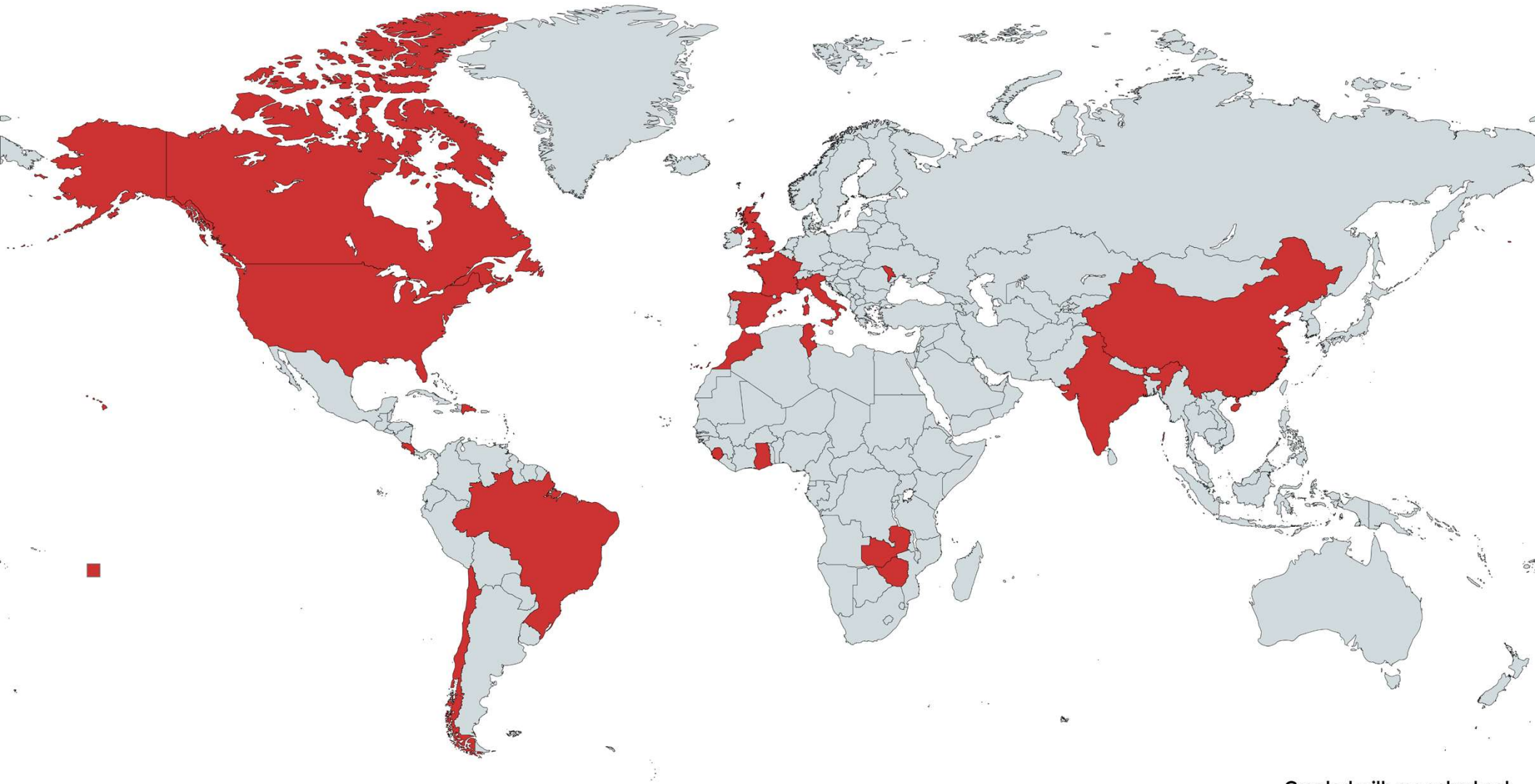
Welcome

*Professor Christopher Yukins*  
*GW Law School*

- Recording and materials at **[www.publicprocurementinternational.com](http://www.publicprocurementinternational.com)** and recording at **GW Law Government Procurement Law Program YouTube** page
- Audience Questions & Answers
- Speakers' statements are in their personal capacities



# Worldwide Webinar – Nearly 250 Registrants from 23 Countries



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# Panelists



**Sarah Drabkin** serves as the Suspension and Debarment and Whistleblower Manager in the Office of the Procurement Executive at the U.S. Department of State.



**Duc Nguyen**, a former debarring official at the U.S. Environmental Protection Agency (EPA), now is a managing director with Affiliated Monitors, Inc.



**John Pachter**, now senior counsel at the international law firm of Haynes Boone, co-teaches GW Law's seminar on debarment and has extensive experience in debarment and monitoring.



**Associate Dean Jessica Tillipman** writes and teaches regularly on debarment at GW Law, and co-launched the Law School's popular debarment seminar.

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# RESHAPING FEDERAL DEBARMENT

FREE WEBINAR ON A NEW PROPOSED RULE  
FEBRUARY 27, 2024 - 9:00 AM ET

## Webinar – Proposed Rule To Reshape Federal Debarment

Tue., February 27, 2024 – 9:00 Eastern – 15:00 CET

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Join us for a free hour-long GW Law webinar on a proposed rule which would reshape federal debarment to consolidate the contracts and





## Federal Acquisition Regulation: Improving Consistency Between Procurement and Nonprocurement Procedures on Suspension and Debarment

A Proposed Rule by the [Defense Department](#), the [General Services Administration](#), and the [National Aeronautics and Space Administration](#) on 01/09/2024



This document has a comment period that ends in 16 days. (03/11/2024)

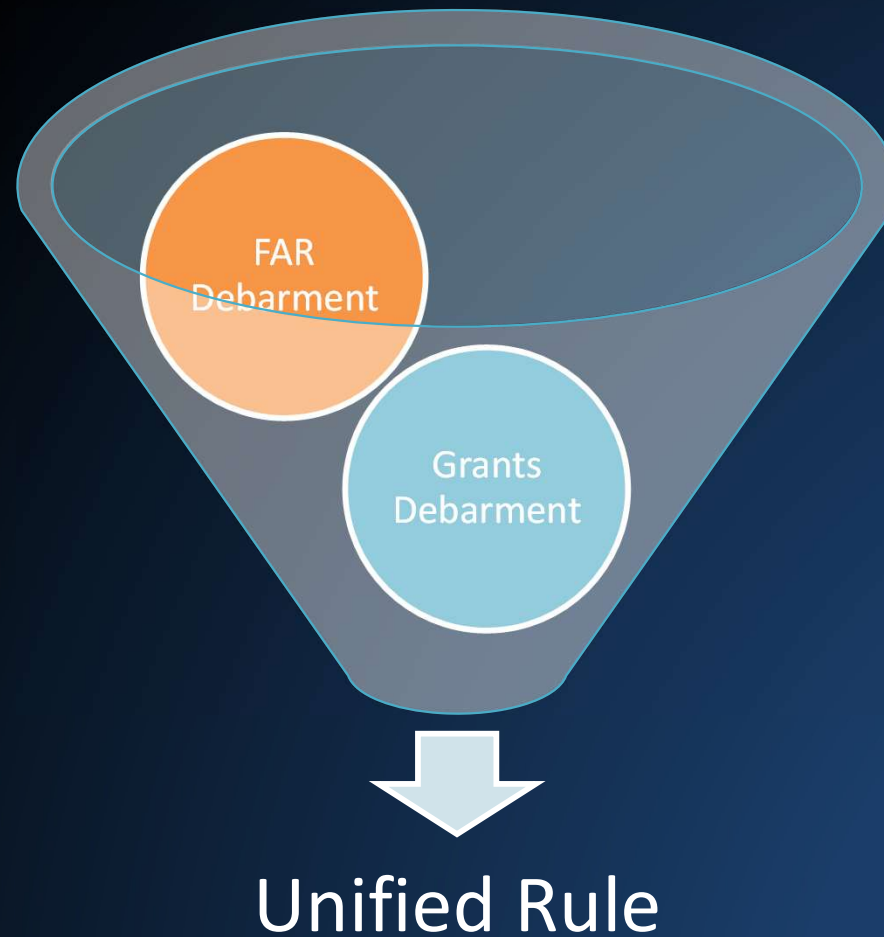
[SUBMIT A FORMAL COMMENT](#)

3 comments received. [View posted comments](#)

Proposed rule linked on Program Page

PUBLISHED DOCUMENT		DOCUMENT DETAILS
	<b>AGENCY:</b> Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).	<b>Printed version:</b> <a href="#">PDF</a>
	<b>ACTION:</b> Proposed rule.	<b>Publication Date:</b> <a href="#">01/09/2024</a>
	<b>SUMMARY:</b> DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to improve consistency between the procurement and nonprocurement procedures on suspension and debarment, based on the recommendations of the Interagency Suspension and Debarment Committee.	<b>Agencies:</b> <a href="#">Department of Defense</a> <a href="#">General Services Administration</a> <a href="#">National Aeronautics and Space Administration</a>
	<b>DATES:</b> Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before March 11, 2024 to be	<b>Dates:</b> Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before March 11, 2024 to be considered in the formation of the final rule.
		<b>Comments Close:</b> <a href="#">03/11/2024</a>
		<b>Document Type:</b>

# Goal of Proposed Rule: Consolidated Discretionary Debarment Regimes



# Elements of Proposed Rule

- FAR Case 2019-015
  - Comments due March 11, 2024
- Emphasis that the “Government uses suspension and debarment procedures to protect its business interests”
- FAR Subpart 9.4 vs. Nonprocurement Common Rule (NCR)
  - Reciprocal debarment per EO 12689 (1989)
- Proposed rule would change FAR to bring two systems into alignment
- No change to FAR “debarment upon notice” rule
- Conformed title: “suspending and debarring official”
- Definitions of:
  - “Administrative agreement”
  - “Conviction”
  - “Pre-Notice Letter”
  - “Voluntary Exclusion”
- New “aggravating” factors
- Recognize state/local proceedings



# Background to Proposed Rule

- **Question for Sarah Drabkin:** Could you give us some history and background to the proposed rule?

A middle-aged man with grey hair and glasses, wearing a dark blue suit, white shirt, and striped tie, is seated in a wheelchair. He is holding a large white rectangular sign with both hands. The sign contains the text "Who Is a Debaring Official?". The background is a solid blue color.

**Who Is a  
Debaring  
Official?**

# Definition of Suspending and Debaring Official (SDO)

*Suspending and debaring official* means—

- (1) An **agency head**; or
- (2) A **designee** authorized by the agency head to impose a suspension and/or a debarment.

# Panel Discussion

- **Question to Sarah Drabkin:** Does this regulatory definition of an SDO have a practical impact?



**NOTICE =  
IMMEDIATE DEBARMENT**

No change under FAR regime



# No Convergence: Whether Notice = Debarment

**One difference which is not being changed in this rule is that a notice of proposed debarment under the FAR has the effect of immediately excluding the party but does not have this effect in the NCR.** This is done in part in recognition of the necessity to continue to protect the Government's interests and taxpayer's money by minimizing business risk where procurements are involved. The FAR gives the suspending and debarring official **two tools with immediate exclusion effect upon imposition—a proposal for debarment and a suspension.** Both have been in the FAR as recognized tools for decades, with different standards for use. The Federal Acquisition Regulatory Council (**FAR Council**) **notes that contracts are more likely than nonprocurement transactions, such as Federal financial assistance, to require immediate exclusion when something goes wrong.** See 2 CFR 180.810. Participants in nonprocurement transactions—while subject to the terms and conditions of a Federal award—are **typically required to meet overall program goals and objectives, rather than perform to an exact contractual requirement. Federal financial assistance typically is for public purposes of support or economic stimulation,** rather than for the direct benefit of the U.S. Government. See 31 U.S.C. 6303 to 6305. In this rule the **FAR Council is continuing to keep both tools,** so the suspending and debarring official will continue to have the discretion to choose whichever tool is appropriate for the particular situation. This rule also recognizes the **use of a pre-notice letter, for the suspending and debarring official to consider using instead of an immediate exclusion.**

# Explanation for Retaining Distinct FAR Approach

The importance of protecting the Government's interests is reflected in recurring **Appropriations Act language** since 2012 (see, *e.g.*, Pub. L. 112–55, Pub. L. 112–74, and Pub. L. 117–328), which states that **funds may not be used to enter into a contract with any corporation that was convicted of a felony criminal violation under Federal law within the preceding 24 months, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that further action is not necessary** to protect the interests of the Government. In instances in which an agency has issued a proposed debarment under the FAR, a **Federal agency has considered that further action may be necessary concerning that particular party, and therefore, the exclusion is consistent with statutory intent.**

# Panel Discussion

- **Question to John Pachter:** Should the FAR rule align with the Nonprocurement Common Rule (NCR) to state that a notice of debarment does not result in an immediate exclusion?



# Panel Discussion

- The *Federal Register* notice says that if a contractor that does not receive notice “makes a case for nonreceipt of notice, FAR 9.406–4 allows a debarred person to seek reinstatement by requesting the debarment period or extent of debarment be reduced.”
- **Question for John Pachter:** Please comment on this.



What Is a “Conviction”?

# New Definition of “Conviction”

*Conviction* means—

- (1) A **judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction**, whether entered upon a verdict or plea, including a plea of nolo contendere; or
- (2) **Any other resolution that is the functional equivalent of a judgment establishing a criminal offense by a court of competent jurisdiction**, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

# Why “Conviction” Definition

The **rationale for a revised definition of “conviction” is that fact-finding proceedings should not be necessary when there is a sufficient evidentiary basis that the contractor was responsible for the misconduct for purposes of a proposed debarment.** The definition of “conviction” in 2 CFR 180.920 is adopted and means a judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt. The new definition is located at FAR 9.403 rather than FAR 2.101, so it applies only to FAR subpart 9.4.



# Panel Discussion: Conviction

- Questions for Jessica Tillipman:
  - What if a corporation is found liable for state *civil damages* under circumstances that in another jurisdiction could constitute criminally reckless behavior – where, for example, there is a collapse of a bridge? Is that a sufficient “conviction”?
  - What about a *foreign* conviction? Is that enough to warrant debarment?



# PRE-NOTICE LETTER



# New Definition: “Pre-Notice Letter”

- *Pre-notice letter* means a written correspondence issued to a potential respondent in a suspension or debarment matter, which does not immediately result in an exclusion or ineligibility. The letter is issued at the discretion of the suspending and debarring official. **The letter is not a mandatory step** in the suspension or debarment process.

# Why Definition of “Pre-Notice Letter”

The new definition of “**pre-notice letter**” clarifies that the letter is not **mandatory**. Suspension and debarment procedures under both the FAR and the NCR recognize the authority of **agencies to handle actions as informally as practicable** consistent with principles of fundamental fairness (see FAR 9.406–3(b)(1) and 9.407–3(b)(1); 2 CFR 180.610). Accordingly, suspending and debarring **officials may choose to engage in preliminary discussions with potential respondents or their counsel under a variety of circumstances**. Adding a definition of “pre-notice letter” reflects existing practice. The Interagency Suspension and Debarment Committee has tracked the issuance of pre-notice letters in its reports since fiscal year 2009; **the use of the letters has significantly increased over the past decade**. Including a definition highlights **another option that agencies may consider to resolve concerns involving contractor present responsibility**, short of a formal notice under the suspension and debarment rules.

# Panel Discussion: Providing Record

- **Question for Duc Nguyen:** What are different approaches to making the administrative record available to the respondent?





# New Factors

# New Factors for Consideration

FAR 9.406–1(a) contains **remedial measures and mitigating factors for the debarring official to consider**. The suspension regulations incorporate the factors by reference at FAR 9.407–1(b)(2). The proposed rule seeks to **add seven new aggravating or mitigating factors that a suspending and debarring official should consider** before arriving at a decision. The factors are equivalent to NCR factors at 2 CFR 180.860(a) through (f), (j), (k), (m), and (s). Unlike the FAR, the NCR makes it clear that **aggravating factors may also be considered** by the suspending and debarring official. Incorporating these aggravating factors will provide consistency between the two rules, as well as more guidance and increased options for the suspending and debarring official to consider when making present responsibility determinations.

# New Factors for Debarment – FAR 9.406-1

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the suspending and debarring official.

(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence

(11) Whether the contractor has a **pattern or prior history of wrongdoing, the frequency of incidents and/or duration of the wrongdoing, and the actual or potential harm or impact that results**, or may result, from the wrongdoing.

(12) Whether and to what **extent the contractor planned, initiated, or carried out the wrongdoing, and the kind of positions held by the individuals involved** in the wrongdoing.

(13) Whether the **wrongdoing was pervasive** within the contractor's organization.

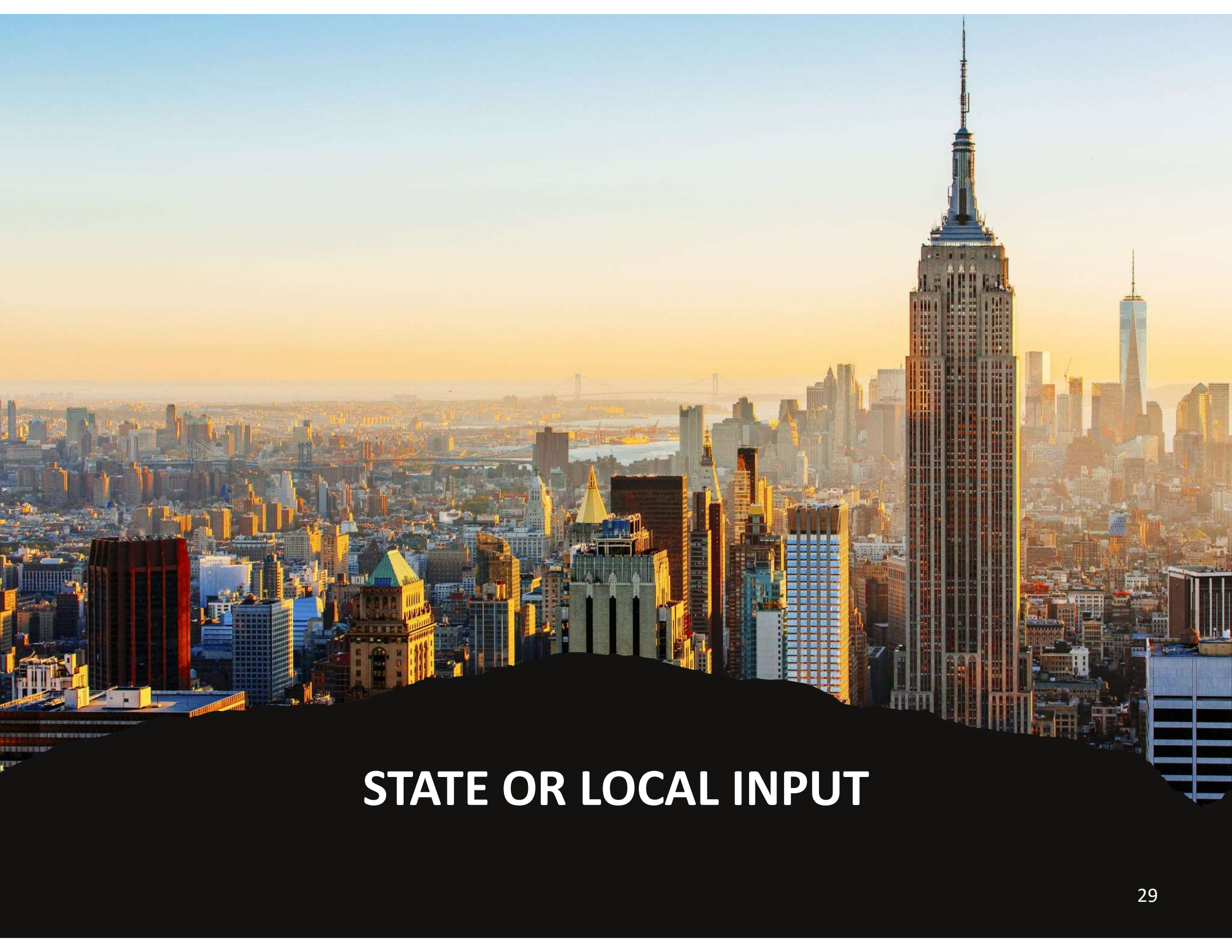
(14) Whether the **contractor's principals tolerated the offense**.

(15) Whether the **contractor is or has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes** for debarment specified in this part.

(16) Whether the contractor has **entered into an administrative agreement with a Federal agency or a similar agreement with a State or local government** that is not Governmentwide but is **based on conduct similar to one or more of the causes** for debarment specified in this part.

(17) Whether there are **any other factors** appropriate to the circumstances of a particular case.





# STATE OR LOCAL INPUT

# Bases for Suspension

Language is added to FAR 9.407–1(b)(1) explaining that the **suspending and debarring official has wide discretion to impose suspensions when immediate action is necessary to protect the Government's interest**. New language is also added to the section indicating that an **indictment, or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions**. The new language is equivalent to the NCR language at 2 CFR 180.705(b) and (c).



## Input from State and Local Proceedings

FAR 9.407–3(b)(2), (c)(6), and (d) **revise the list of parties who can contribute advice on pending or contemplated legal proceedings**, to include “advice from the Department of Justice, a U.S. Attorney's office, State attorney general's office, or a State or local prosecutor's office.”

The language is equivalent to the NCR language at 2 CFR 180.735(a)(4). **The FAR currently fails to take into account that suspensions can be based on State and local legal proceedings.**

# Panel Discussion

- **Question for Sarah Drabkin:** Do these new references to state and local government proceedings change practice in the federal agencies?

An illustration on a teal background showing several hands in white sleeves interacting with documents. One hand is pointing at a document on the left, another is pointing at a document on the right which has a red 'X' mark. A third hand is holding a pen over the right document. A red folder is visible in the bottom right corner.

# ADMINISTRATIVE AGREEMENTS

# New Definition of Administrative Agreement

Administrative agreement means an **agreement between an agency suspending and debarring official and the contractor used to resolve a suspension or debarment proceeding, or a potential suspension or debarment proceeding.**



# Why Definition of “Administrative Agreement”

- The rationale for adding a definition of “administrative agreement” to the FAR is that **over the years suspending and debarring officials have come to recognize the value of resolving present responsibility concerns through administrative agreements**. Such agreements provide **an alternative for the Government to implement protective measures short of exclusion**, particularly for those contractors who are working toward present responsibility but need additional time to implement appropriate remedial measures to mitigate the business risk to the Government. Administrative agreements often require that the parties to the agreement take **certain verifiable actions to demonstrate present responsibility within a prescribed timeframe, such as the implementation of enhanced internal corporate governance practices and procedures and/or the use of independent third-party monitors**. In unique circumstances, an administrative agreement **may include a contractor's agreement not to participate in certain procurement and/or nonprocurement transactions** or in specific activities for the term of the administrative agreement or pending the implementation of appropriate remedial measures. Administrative agreements are fact-specific, and therefore vary between agencies and from one agreement to another. Currently, FAR part 9 mentions administrative agreements in the context of the statutory requirement that administrative agreements must be entered into the Federal Awardee Performance and Integrity Information System (FAPIIS) (see FAR 9.406–3(f) and 9.407–3(e)). However, **the FAR is silent as to its definition. Incorporating a definition will provide clarity as to what constitutes an administrative agreement.**



# Posting Administrative Agreement



- FAR 9.406–3(f) and 9.407–3(e)(1) add the requirement for the suspending and debarring official to enter an administrative agreement into FAPIIS, whether the agreement resolves a suspension or debarment action or whether it was a potential suspension or debarment action. This requirement is being added to confirm that potential suspension or debarment actions are covered.
- Now in sam.gov under “Responsibility & Qualification”

# Panel Discussion

- **Question for Duc Nguyen:** Will the reference to administrative agreements – and to posting on FAPIIS -- have a practical effect?

# Voluntary Exclusion

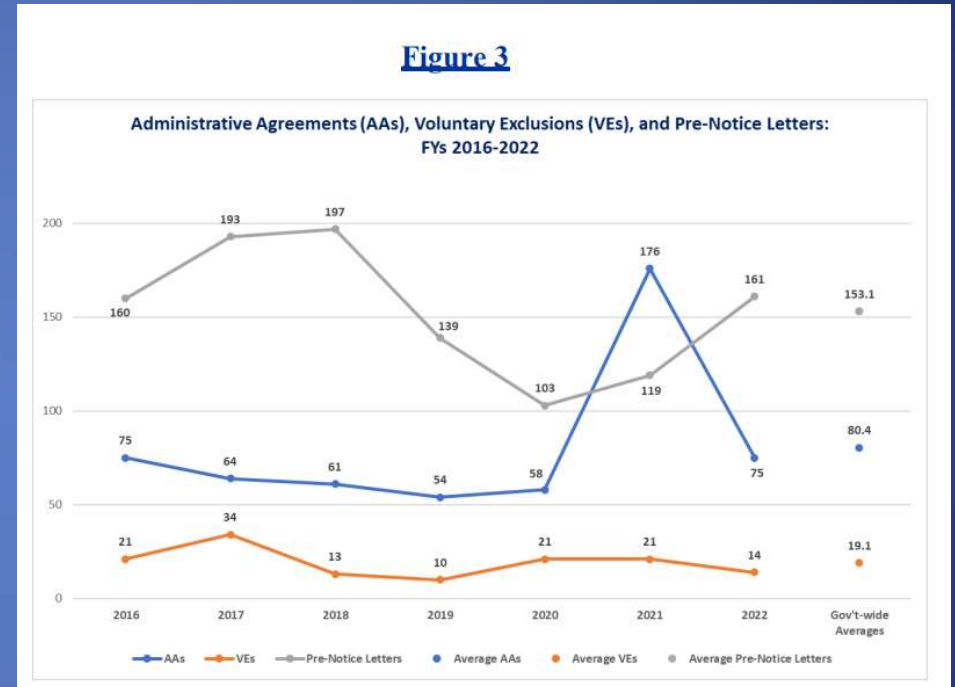


# Why Definition of “Voluntary Exclusion”?

A new definition is added for “voluntary exclusion” which applies throughout FAR part 9 to denote the procedures the Federal Government uses with contractors for these types of agreements. **Voluntary exclusions are briefly described in the NCR at [2 CFR 180.640](#) and [180.645](#). The FAR does not currently describe voluntary exclusions.** A contractor may choose to agree to a voluntary exclusion so that it may **represent itself in a more favorable light to various constituencies** including but not limited to customers, creditors, and the public at large, by **indicating that it chose to voluntarily exclude itself rather than be being involuntarily excluded by the Government** through suspension or debarment. A contractor who is voluntarily excluded will be **placed on the excluded parties list in the System for Award Management (SAM); the exclusion must have Governmentwide effect** pursuant to the terms of the voluntary exclusion agreement.

# Panel Discussion

- Question for Sarah Drabkin: The chart at right is from the most recent ISDC report, and notes the incidence of voluntary exclusions. Are voluntary exclusions useful?





Resource  
on  
Program  
Page



Perspectives on the  
*Interagency Suspension & Debarment  
Committee Annual Report*

Shifting the Focus to Risk Management

A woman with short brown hair, wearing glasses and a dark apron over a black t-shirt, stands in a doorway with her arms crossed. She is smiling and looking towards the camera. The background shows a dimly lit interior, possibly a cafe or restaurant, with warm lights and a brick wall. The text "IMPACT ON SMALL BUSINESS" is overlaid in large white letters across the center of the image.

# IMPACT ON SMALL BUSINESS

# Exclusions: Predominantly Small Businesses

The following is a breakdown of those distinct entities which had an entity registration in active status and concurrent active exclusion record per fiscal year (FY):

<b>Suspension and debarment—SAM exclusions</b>	<b>FY 2017</b>	<b>FY 2018</b>	<b>FY 2019</b>	<b>Median</b>
	<b>SB/total exclusions</b>	<b>SB/total exclusions</b>	<b>SB/total exclusions</b>	<b>SB %</b>
Small Business/Total Exclusions	152/203	189/253	180/245	
Small Business Percentage	75%	75%	73.4%	75

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# CONCLUSION