



# Exclusion System Summary United States

## I. Government-Wide Legal and Institutional Framework:

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### Government-Wide Exclusion Framework? Yes.

- Exclusion decisions are made independent of the procurement process and according to national legislation or centralized regulations. Exclusions have government-wide effect.

#### *Governing Policy:*

- Procurement Suspensions & Debarments: [Subpart 9.4 of the Federal Acquisition Regulation \("FAR"\)](#) (Title 48 of the Code of Federal Regulations ("C.F.R.")).
- Nonprocurement Common Rule ("NCR"): [2 C.F.R. Part 180](#).
- Agency FAR Supplements and implementing regulations.

#### *Primary Legal Foundation:*

- Administrative/Regulatory Law.
  - Exclusions related to procurement contracts are governed by FAR Subpart 9.4.
  - Exclusions related to nonprocurement programs and activities (e.g., grants, cooperative agreements) are governed by 2 C.F.R. Part 180.

#### *Related Law and Regulation:*

- [Executive Order 12549 \(Feb. 18, 1986\)](#).
- Various statutory provisions (e.g., [42 U.S.C. § 7606](#) (Clean Air Act); [33 U.S.C. § 1368](#) (Clean Water Act)).
- Various agency-specific regulations (e.g., [2 C.F.R. Part 1532](#) (Environmental Protection Agency); [29 C.F.R. § 5.12](#) (Davis-Bacon and Related Acts)).

### **Decision-Maker:** Agency Level; May Not Be Functionally Independent from Senior Procurement Officials.

- Each federal agency has a Suspending and Debarment Official ("SDO") with authority to make government-wide exclusion decisions.

#### *Qualification:*

- Not explicitly defined in the legal framework and varies from agency to agency, but SDOs generally have expertise in public procurement and high ethical character.

*Independence:*

- Varies from agency to agency. Certain agencies mandate independence from the procurement function (e.g., Department of Defense, Department of State, U.S. Agency for International Development), while others do not.

## II. Functioning and Enforcement of the Government-Wide Exclusion System:

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### General Provisions:

*Type of Procedures:* Administrative.

*Decision Deadline:*

- Absent an extension for good cause, the SDO must make a final determination within 30 days (if governed by the FAR) or 45 days (if governed by the NCR) after closing the official record. (See FAR 9.406-3(d); 2 C.F.R. § 180.870)
- "Record closure" follows after all parties receive an opportunity to submit evidence for/against the action and the SDO notifies the parties that the record has closed.

*Provisional Exclusions:* Yes.

- Suspensions may be imposed pending completion of an investigation or legal proceedings if necessary to protect the government's interest. (FAR 9.407-1; 2 C.F.R. § 180.700)
- Also, under the FAR, a supplier is excluded immediately upon issuance of a Notice of Proposed Debarment. (FAR 9.405(a)) Under the NCR, an exclusion is not effective until the SDO either suspends the supplier pending completion of proceedings or issues a final decision to debar. (2 C.F.R. § 180.810)

**Commencement of Proceedings:** Ability to Initiate an Exclusion Proceeding.

- The SDO can initiate an exclusion proceeding without a prior referral. However, it is extremely rare in certain agencies for the SDO to act without first receiving a formal referral (e.g., the Environmental Protection Agency). These referrals should provide the information necessary to establish cause and satisfy the required evidentiary burden.
- Non-governmental parties can submit complaints and/or evidence to the SDO, although these complaints are typically reviewed first by a separate division/investigative office.

**Notice Requirements & Opportunity to be Heard:** Yes & Yes.

*Notice of Proceedings:*

- Suppliers receive notice of proceedings when:
  - The SDO determines that grounds exist; and/or
  - The exclusion, including any provisional exclusions or suspensions, becomes effective.
- Notice of proceedings must contain the grounds for exclusion and should generally contain enough information about the alleged misconduct to allow the respondent to meaningfully respond.
- The SDO must make reasoning available to the supplier (not the public).
  - The public nature of the SDO's written determinations varies from agency to agency; most agencies do not make their SDO's determinations public.

### *Opportunity to be Heard:*

- Suppliers are entitled to present a defense to the SDO and may:
  - Obtain the administrative record.
  - Make a written submission contesting the exclusion to the SDO.
  - Request an in-person hearing with the SDO.
  - Call witnesses to an in-person hearing to testify on the supplier's behalf (subject to the SDO's discretion; also, in-person hearings have been suspended by regulation during the COVID-19 pandemic).
- Suppliers are also entitled to a formal fact-finding hearing when the exclusion is not based on a conviction or civil judgment and there is a genuine dispute over material facts. (FAR 9.406-3(b)(2); 2 C.F.R. § 180.830)

### **Appellate Review of Exclusion Decisions:** Yes.

*Nature and Forum of Review:* Administrative and Judicial.

- All agencies allow excluded suppliers to request reconsideration. A few agencies (*e.g.*, the Environmental Protection Agency) have procedures for administrative appeals above the SDO.
- All exclusion decisions are subject to judicial review. Excluded parties are not required to pursue agency reconsideration before filing an action in federal court.

*Means Available to the Supplier:* As part of appellate review, suppliers may:

- Obtain the evidentiary record.
- Make a written submission to the appellate body.
- Request an in-person hearing with the appellate body.
- Call witnesses to an in-person hearing to testify on the supplier's behalf.

*Duration of Appeal Process:* Typically, one to six months. However, cases in federal courts may take longer, especially if appealed.

### **Legal Representation:**

- A supplier **may** be represented by counsel.

### **Subsequent Modification of Exclusion Decision:** Yes.

- Both the FAR and the NCR give the SDO discretion to revisit a decision based on error or new evidence. (FAR 9.406-4(c); 2 C.F.R. §§ 180.875-180.880)

### III. Substantive Grounds for Government-Wide Exclusion:

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**Automatic Exclusion:** Yes.

- Violations of certain laws (e.g., the Clean Air Act and Clean Water Act, among others) will automatically trigger an exclusion, without any action by the SDO.
- Other violations may lead to an automatic referral to the SDO.

**Discretionary Exclusion:** Yes.

Any of the following grounds can be proven by a supplier's criminal or civil judgement (i.e., "conviction-based debarment") or an administrative finding (i.e., "fact-based debarment") by the SDO:

- Corruption;
- Fraud;
- Collusion and/or infringing competition;
- Coercion or intimidation;
- Obstruction of an investigation;
- Theft or embezzlement;
- Money laundering;
- Tax-related offenses;
- Labor-related offenses;
- Social harms;
- Terrorist offenses or offenses linked to terrorism;
- Commercial regulatory violations;
- Poor performance, non-performance, and/or failure to perform on public contracts.

*Conviction-based Catch-all:*

- "Commission of any . . . offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility" of the supplier. (FAR 9.406-2(a)(5); 2 C.F.R. § 180.800(a)(4))

*Fact-based Catch-all:*

- "[A]ny . . . cause of so serious or compelling a nature that it affects the present responsibility" of the supplier. (FAR 9.406-2(c); 2 C.F.R. § 180.800(d))

The SDO may decide not to exclude when:

- Supplier has demonstrated its present responsibility by taking sufficient corrective actions and/or remedial measures;
- Supplier enters into an agreement to resolve the exclusion action; or
- Exclusion is otherwise not in the government's interest.

**Exclusion based on Bankruptcy and Cross-Debarment:** Discretionary & Discretionary.

- Neither ground is enumerated in the regulatory framework, but the factual basis for a supplier's bankruptcy or debarment by another jurisdiction may provide cause for an exclusion action under one of the "catch-all" grounds.

## IV. Scope and Effect of Government-Wide Exclusion:

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### Types of Excluded Suppliers:

#### *Contract-by-Contract Exclusions:*

- Individuals and Corporations.

### Scope of Exclusion:

#### *Extension to Other Agencies and Organizations:*

- Exclusions prohibit the excluded party from being awarded a contract or nonprocurement transaction by any federal agency.
- Exclusions **may** extend to subnational (state or local) governments, but only if mandated by the subnational government's own laws.
- There are no known countries or international organizations that automatically recognize and apply exclusions from the United States.

#### *Effect on Ongoing Contracts:*

- Ongoing contracts are **not** automatically cancelled.
- Subsequent (non-material) modifications to ongoing contracts **are permitted**, so long as the modification does not add new work, exercise options, or otherwise extend a current contract's duration. (FAR 9.405-1; 2 C.F.R. § 180.415)

#### *Effect on Subcontracting:*

- Under the FAR, an excluded supplier **cannot** serve as a subcontractor for any subcontract subject to government consent (See FAR Subpart 44.2) or any subcontract in excess of US\$35,000 absent a compelling reason to do so. These prohibitions do not apply to subcontracts for commercially available off-the-shelf items. (FAR 9.405-2)
- Under the NCR, an excluded supplier **cannot** participate at any tier of a nonprocurement transaction. (2 C.F.R. § 180.420).

#### *Effect on Excluded Individuals:*

- Excluded individuals are generally **not permitted** to receive federal contracts, subcontracts, grants, and many other sources of federal financing and may be prohibited from being employed by a government contractor as a senior manager or corporate director. An organization that derives significant revenues from federal contracting and that places one or more excluded individuals into positions of authority may have its present responsibility called into question.
  - The FAR prohibits excluded persons from serving as an "agent" or "representative." The NCR prohibits excluded persons from being a "participant" or a "principal" in a nonprocurement transaction. (FAR 9.405(a); 2 C.F.R. § 180.130)
  - Excluded individuals generally may serve in "back office" functions not related to a supplier's federal contracting business.
- An exclusion **may** extend to companies controlled by the excluded individual.

### *Tailoring Exclusion:*

- Yes. Exclusions **may** be limited to certain divisions, operating units, or business lines within the company, if the decision-maker so decides.

### **Effect on Affiliates:**

#### *Corporate Affiliates:*

- Exclusions **may** apply to any affiliated company (controlling, controlled, under common control) named in the notice of proceedings. (FAR 9.406-3; 2 C.F.R. § 180.625)
- Affiliated companies **must** be given an opportunity to contest the action. Entities excluded solely by their affiliation with the supplier may contest only the existence of affiliation.

#### *Imputation of Misconduct to Other Parties:*

- Misconduct of any officer, director, shareholder, partner, employee, or other individual associated with the corporate supplier **may** be imputed to the contractor or organization when the conduct occurred in connection with the individual's performance of duties or on behalf of the supplier or with the supplier's knowledge, approval, or acquiescence. (FAR 9.406-5(a); 2 C.F.R. § 180.630(a))
- Misconduct of a corporate supplier **may** be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the supplier who participated in, knew of, or had reason to know of the contractor's conduct. (FAR 9.406-5(b); 2 C.F.R. § 180.630(b))
- Conduct of one entity may be imputed to another. (FAR 9.406-5(c); 2 C.F.R. § 180.630(c))
- Parties to whom another's misconduct imputed **must** be given an opportunity to contest the action.

### **Duration of Exclusions:**

#### *Duration Specified in Legal Framework:*

- Both the FAR and the NCR provide that debarments should generally not exceed three years but allow for longer periods of debarment, depending on the circumstances. (FAR 9.406-4(a); 2 C.F.R. § 180.865(a))

#### *Duration Depends on Applicable Exclusion Ground?*

- Yes, for a few specific grounds. In most cases, the SDO may consider the grounds and underlying circumstances to determine the appropriate exclusion length.

### **Exceptions/Waivers to Exclusions:**

- Yes. A contract may be awarded to an excluded supplier if a senior government official (*i.e.*, agency head or designee), in the official's discretion, determines in writing that there is a "compelling reason" to do so. (FAR 9.405(a); 2 C.F.R. § 180.135(a))

### **Non-Exclusion Remedies:**

- There is a wide range of criminal, civil, and administrative remedies available in the United States. These remedies may be pursued at the same time as exclusion in parallel proceedings. Examples of non-exclusionary administrative remedies include: (i) notice to show cause; (ii) administrative agreements; (iii) and contractual remedies, such as termination and liquidated damages.

## V. Government-Wide Transparency and Exclusion List:

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**Official List of Excluded Suppliers?** Yes, and it is publicly available.

- [System for Award Management \("SAM"\)](#).
- Public list provides only broad information on the basis for each listed exclusion.

**Procurement Checks:**

- Yes. Procuring entities must check SAM before awarding a contract.

**Reporting on Exclusions:**

*Number of Exclusions & Regular Reporting:* Figures are known through public reports issued by the [Interagency Suspension and Debarment Committee](#).

*Other Transparency Mechanisms:* The public can access official records, including downloadable datasets from SAM, to analyze exclusion actions.

## VI. Limited Scope Exclusion Systems:

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**Entity-Wide (e.g., Single-Agency) Exclusion?**

- Generally no, although an entity-specific exclusion may be incorporated as a term or condition in an administrative agreement.

**Contract-By-Contract (e.g., Single-Tender) Exclusion?**

- Yes. Pursuant to FAR Subpart 9.1, the relevant contracting officer must make a responsibility determination before awarding a procurement contract; a contracting officer may find an offeror is nonresponsible and thus not eligible to be awarded a specific contract.

**Subnational Exclusions:**

- Exclusion mechanisms exist at the Provincial/State and Municipal/Local levels.
- Exclusion decisions of one subnational body do not automatically extend to other subnational bodies (subject to state/local law).