

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

ELECTION ASSISTANCE COMMISSION

2 CFR Chapter 58

Nonprocurement Debarment and Suspension

AGENCY: U.S. Election Assistance Commission (EAC).

ACTION: Proposed Rulemaking.

SUMMARY: The Election Assistance Commission (EAC) invites the general public and other Federal agencies to take this opportunity to comment on proposed debarment and suspension regulations. These proposed regulations will apply to nonprocurement grants, cooperative agreements and other similar transactions. Under this system, a person who is debarred or suspended is excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities. The proposed regulations adopt the format established by the Office of Management and Budget (OMB) in a document on nonprocurement debarment and suspension published in the **Federal Register** on August 31, 2005. In today's notice EAC proposes establishing a new 2 CFR chapter 58 Part 5800 that adopts OMB's final government-wide guidance on nonprocurement debarment and suspension and contains supplemental EAC nonprocurement debarment and suspension provisions.

DATES: You must submit comments on or before 5 p.m. Eastern Standard Time on June 4, 2010.

ADDRESSES: You may submit comments on the proposed debarment and suspension regulations by any of the following methods. Please submit your comments via only one of the methods described.

- *E-Mail:* Send comments to HAVAcomments@eac.gov with "Comments for Debarment and Suspension" in the subject line.

- *Fax:* Send to "EAC Regulations" at (202) 566-3128. Comments sent by fax must be limited to 6 pages.

- *Mail:* Send to "EAC Regulations" at U.S. Election Assistance Commission, 1201 New York Avenue, Suite 300, Washington, DC 20005. Comments sent by mail must be unbound, be on paper no larger than 8.5" by 11"; and be submitted in duplicate. Mailed comments will not be accepted in electronic form (floppy disk, CD, etc.).

- *Hand Delivery/Courier:* Deliver to Suite 300, 1201 New York Avenue, Washington, DC 20005 between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. Comments submitted by hand delivery must be unbound, be on paper no larger than 8.5" by 11"; and be submitted in duplicate. Comments sent by courier or hand delivery will not be accepted in electronic form (floppy disk, CD, etc.).

Note: All submissions must include the agency name and regulation title (*i.e.* "Nonprocurement Debarment and Suspension") for this information and collection/recordkeeping requirement. Please also identify comments on regulatory text by subpart and section. Note that all comments received will be publicly posted, including any personal information provided. The EAC will post comments without change unless the comment contains profanity or material that is prohibited from disclosure by law.

FOR FURTHER INFORMATION CONTACT: Andrew Guggenheim or Tamar Nedzar, Election Assistance Commission, 1201 New York Avenue, Suite 300, Washington, DC 20005; Telephone: 202-566-3100.

SUPPLEMENTARY INFORMATION:

Background

On February 18, 1986, President Reagan issued Executive Order 12549, (3 CFR, 1986 Comp., 189 51 FR 6370), to establish a governmentwide debarment and suspension system covering the full range of Federal procurement and nonprocurement activities, and to establish procedures for debarment and suspension from participation in Federal nonprocurement programs. Section 6 of the Executive Order authorized OMB to issue guidelines to Executive departments and agencies that govern which program and activities are covered by the Executive Order, prescribe Governmentwide criteria and Governmentwide minimum due process procedures, and set forth other related details for the effective administration of the guidelines. Section 3 directed agencies to issue implementing

regulations that are consistent with OMB guidelines. Pursuant to the Executive Order, on February 21, 1986 OMB published initial guidelines for nonprocurement debarment and suspension that applies to grants, cooperative agreements and similar transactions. Under this system, a person who is debarred or suspended is excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities. Debarment or suspension of a participant in a program by one agency is registered with the GSA-maintained Excluded Parties List System and has government-wide, reciprocal effect on that participant's ability to obtain procurement and nonprocurement contracts.

After notice and comment by the public, EAC will adopt the OMB regulations found in 2 CFR part 180. To adopt these regulations, 2 CFR 180.25 requires federal agencies to address certain agency specific elements. The following regulations fulfill this requirement EAC's proposed regulations state what contracts are covered under this policy, identify the official authorized to grant exceptions to an excluded persons list, and state the person responsible for communicating requirements to both first and second tier program participants.

In general, the proposed regulation gives the authority over debarment and suspension to the Contracting Officer. In the event of a vacancy or conflict of interest by the contracting officer, the debarment and suspension official will be the Chief Financial Officer. Covered transactions include all agency nonprocurement transactions, first-tier contracts and subcontracted funded by the EAC in excess of \$25,000 or 30 percent of the value of the first-tier transaction, whichever is lesser. EAC is also providing covered individuals a right to request a reconsideration of a debarment action. In this process, an individual having received a disposition of the debarment action may submit to the Contracting Officer any newly discovered material evidence; proof of a reversal of the conviction or civil judgment upon which the debarment was based; a bona fide change in ownership or management; elimination of other causes for which the debarment or suspension was imposed; or other reasons the debarring official finds

appropriate. By default, elements not addressed in the agency specific regulations will be covered by the government-wide sections in the Common Rule.

Regulatory Analysis

A. Executive Order 12866

EAC is an independent agency and is not subject to Executive Order 12866.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This regulatory action will not have a significant adverse impact on a substantial number of small entities.

Unfunded Mandates Act of 1995

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of \$100 million or more in any one year.

Paperwork Reduction Act of 1995

This final rule does not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

Federalism (Executive Order 13132)

This regulatory action does not have Federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13211

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

Congressional Review Act

The Congressional Review Act, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States.

EAC will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect

until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective 30 days from the date of publication in the **Federal Register**.

List of Subjects in 2 CFR Part 5800

Administrative practice and procedure, Debarment and suspension, Assistance programs, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, under the authority at 2 CFR 180.30, the Election Assistance Commission proposes to amend title 2 of the Code of Federal Regulations, by establishing chapter 58, consisting of part 5800 to read as follows:

Title 2—Grants and Agreements

Chapter 58—Election Assistance Commission

PART 5800—NONPROCUREMENT DEBARMENT AND SUSPENSION

Sec.

5800.10 What does this part do?

5800.20 Does this part apply to me?

5800.30 What policies and procedures must I follow?

Subpart A—General

5800.137 Who in the Department of State may grant an exception to let an excluded person participate in a covered transaction?

Subpart B—Covered Transactions

5800.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?

Subpart C—Responsibilities of Participants Regarding Transactions

5800.332 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?

Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions

5800.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

5800.765 May I ask the suspending official to reconsider a decision to suspend me?

5800.875 May I ask the debarring official to reconsider a decision to debar me?

5800.880 What factors may influence the debarring official during reconsideration?

5800.890 How may I appeal my debarment?

Subpart E Through H [Reserved]

Subpart I—Definitions

5800.930 Debarment official.

5800.970 Nonprocurement transaction.

5800.1010 Suspending official.

Subpart J [Reserved]

Authority: Sec. 2455, Pub. L. 103–355, 108; Stat. 3327 (31 U.S.C. 6101 note); E.O. 12549; (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3); CFR, 1989 Comp., p. 235).

§ 5800.10 What does this part do?

This part adopts the Office of Management and Budget (OMB) guidance in Subparts A through I of 2 CFR part 180, as supplemented by this part, as the U.S. Election Assistance Commission ("the Commission" or "EAC") policies and procedures for nonprocurement debarment and suspension. It thereby gives regulatory effect for the Commission to the OMB guidance as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, "Debarment and Suspension" and 31 U.S.C. 6101 note.

§ 5800.20 Does this part apply to me?

This part and, through this part, pertinent portions of the OMB guidance in Subparts A through I of 2 CFR part (see table at 2 CFR 180.100(b)) apply to you if you are a—

(a) Participant or principal in a "covered transaction" (see Subpart B of 2 CFR part 180 and the definition of "nonprocurement transaction" at 2 CFR 180.970);

(b) Respondent in a Commission suspension or debarment action;

(c) Commission debarment or suspension official; or

(d) Commission grants officer, agreements officer, or other official authorized to enter into any type of nonprocurement transaction that is a covered transaction.

§ 5800.30 What policies and procedures must I follow?

The Commission policies and procedures that you must follow are the policies and procedures specified in each applicable section of the OMB guidance in Subparts A through I of 2 CFR part 180, as that section is supplemented by the section in this part with the same section number. The contracts that are covered transactions, for example, are specified by section 220 of the OMB guidance (*i.e.*, 2 CFR 180.220) as supplemented by section 220 in this part (*i.e.*, § ___.220). For any section of OMB guidance in Subparts A through I of 2 CFR 180 that has no corresponding section in this part, Commission policies and procedures are those in the OMB guidance.

Subpart A—General**§ 5800.137 Who at the Commission may grant an exception to let an excluded person participate in a covered transaction?**

The Commission's Contracting Officer has the authority to grant an exception to let an excluded person participate in a covered transaction, as provided in the OMB guidance at 2 CFR 180.135.

Subpart B—Covered Transactions**§ 5800.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?**

Pursuant to 2 CFR 180.220(c), the Commission extends coverage of nonprocurement suspension and debarment requirements beyond first-tier procurement contracts to include any subcontract to be funded by the Commission, the value of which is expected to equal to or exceed \$25,000 or 30% of the value of first-tier transaction, whichever is lesser.

Subpart C—Responsibilities of Participants Regarding Transactions**§ 5800.332 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?**

If a lower-tier transaction is covered pursuant to § 5800.220, you as a participant must include a term or condition in lower-tier transactions requiring lower-tier participants to comply with Subpart C of the OMB guidance in 2 CFR part 180.

Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions**§ 5800.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?**

To communicate to a participant the requirements described in 2 CFR 180.435 of the OMB guidance, you as an agency official must include a term or condition in the transaction that requires the participant's compliance with subpart C of 2 CFR part 180, and requires the participant to include a similar term or condition in lower-tier covered transactions.

§ 5800.765 May I ask the suspending official to reconsider a decision to suspend me?

Yes. Within 30 days of receiving a final notice of suspension, you may make a written request for the suspending official to reconsider your suspension.

§ 5800.875 May I ask the debarring official to reconsider a decision to debar me?

Yes. Within 30 days of receiving a final notice of debarment, you may make a written request for the debarring official to reconsider your debarment pursuant to § 5800.880. The disposition of your request for reconsideration; or the result of your appeal; shall be considered a final agency action.

§ 5800.880 What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on:

- (a) Newly discovered material evidence;
- (b) A reversal of the conviction or civil judgment upon which your debarment was based;
- (c) A bona fide change in ownership or management;
- (d) Elimination of other causes for which the debarment was imposed; or
- (e) Other reasons the debarring official finds appropriate.

§ 5800.890 How may I appeal my debarment?

(a) If the Commission debarring official issues a decision under 2 CFR 180.870 to debar you after you present information in opposition to a proposed debarment under § 180.815, you may ask for review of the debarring official's decision in two ways:

(1) You may ask the debarring official under § 875 to reconsider the decision for material errors of fact or law that you believe will change the outcome of the matter; or

(2) You may request a review by the EAC's debarment appeals body (DAP), which is composed of the Executive Director, Chief Financial Officer, and Chief Operating Officer. The DAP will review your appeal and make a determination on whether to sustain or reverse the decision of the debarring official. The DAP will then make a recommendation to the EAC Commissioners who will vote by circulation on whether to accept or reject the recommendation of the DAP. A request to review the debarring official's decision to debar you must be made within 30 days of your receipt of the debarring official's decision under § 180.870 or paragraph (a)(1) of this section. However, the DAP may recommend to the EAC Commissioners that the debarring official's decision be reversed, based on a majority vote of the DAP, only where the DAP finds that the decision is based on a clear error of material fact or law, or where DAP finds that the debarring official's decision was arbitrary, capricious, or an abuse of discretion. You may appeal the

debarment official's decision without requesting reconsideration, or you may appeal the decision of the debarring official on reconsideration.

(b) A request for review under this section must be in writing; prominently state on the envelope or other cover and at the top of the first page "Debarment Appeal;" state the specific findings you believe to be in error; and include the reasons or legal bases for your position. The appeal request should be delivered or addressed to the U.S. Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005.

(c) After the circulation vote of the EAC Commissioners has been certified, either the Commission debarring official or the DAP must notify you of their decision under this section, in writing, using the notice procedures set forth at §§ 180.615 and 180.975.

(e) Nothing in this part prohibits the EAC from delegating the appeal review process to another Federal agency through a memorandum of understanding or interagency agreement.

Subparts E through H—[Reserved]**Subpart I—Definitions****§ 5800.930 Debarring official.**

For the Commission, the debarring official for all nonprocurement transactions is the Commission's Contracting Officer. In the case of a vacancy in the position of the Contracting Officer, the alternate debarring official is the Chief Financial Officer.

§ 5800.970 Nonprocurement transaction.

While the Commission treats all payments made to states under 42 U.S.C. 15301, 15302 and 15401 as grants, this part does not apply to grants made to states and political subdivisions therein.

§ 5800.1010 Suspending official.

For the Commission, the debarring official for all nonprocurement transactions is the Commission's Contracting Officer. In the case of a vacancy in the position of the Contracting Officer, the alternate debarring official is the Chief Financial Officer.

Subpart J—[Reserved]

Alice Miller,

Chief Operating Officer, U.S. Election Assistance Commission.

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