

# SUSPENSION AND DEBARMENT INSTRUCTION

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## I. Purpose

- A. This Instruction implements Department of Homeland Security (DHS) Directive 146-01, Suspension and Debarment (SD) Program, and implements uniform SD procedures for DHS pursuant to Federal Acquisition Regulation (FAR) Section 9.402(e), and Nonprocurement Suspension and Debarment Rules, Title 2, Code of Federal Regulations (C.F.R.), Section 180.25(a).
- B. SD referrals may come from any source; this Instruction provides the process for each referral for potential suspension and/or debarment. Every SD action is unique and may have additional or alternative steps in the process.
- C. This Instruction recognizes the role of DHS Operational Components in the DHS SD program and provides guidance that may be tailored for each individual action. However, any tailoring must adhere to the fundamental principle of fairness and coordinated with the applicable Suspension and Debarment Official.
- D. This Instruction is not intended to, and does not create, any rights or benefits, substantive or procedural, enforceable by law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, officers, employees or agents, or any other person.

## II. Scope

This Instruction applies throughout DHS. Nothing in this Instruction limits the authority or interferes with the independence of the Office of Inspector General relating to the investigation of misconduct, fraud, or other criminal matters, as prescribed by the Inspector General Act of 1978, as amended, and DHS Management Directive 0810.1, "The Office of Inspector General."

## III. References

- A. Executive Order (E.O.) 12549, "Debarment and Suspension," February 18, 1986

- B. E.O. 12689, "Debarment and Suspension", August 16, 1989
- C. Title 2, C.F.R., Part 180, "OMB Guidelines to Agencies on Government-wide Debarment and Suspension (Nonprocurement)"
- D. E.O. 12989, "Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Naturalization Act Provisions", February 13, 1996, as amended
- E. E.O. 13286, "Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security," February 28, 2003, as amended
- F. E.O. 13904, "Ensuring Safe and Lawful E-Commerce for the United States Consumers, Businesses, Government Supply Chains, and Intellectual Property Rights Holders," January 31, 2020
- G. Title 2, C.F.R., Part 3000, "Nonprocurement Debarment and Suspension"
- H. Title 2, C.F.R., Part 3002, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards"
- I. Title 48, C.F.R., "Federal Acquisition Regulations System":
  - 1. Part 3, "Improper Business Practices and Personal Conflicts of Interest"
  - 2. Part 9, Subpart 9.1, "Responsible Prospective Contractors"
  - 3. Part 9, Subpart 9.4, "Debarment, Suspension, and Ineligibility"
  - 4. Chapter 30, "Department of Homeland Security, Homeland Security Acquisition Regulation," including Part 3003, "Improper Business Practices and Personal Conflicts of Interest;" Subpart 3009.1, "Responsible Prospective Contractors;" and Subpart 3009.4, "Debarment, Suspension, and Ineligibility"
- J. Department of Homeland Security Acquisition Manual:
  - 1. Chapter 3003, "Improper Business Practices and Personal Conflicts of Interest"
  - 2. Subchapter 3009.1, "Responsible Prospective Contractors"
  - 3. Subchapter 3009.4, "Debarment, Suspension, and Ineligibility"
- K. Financial Management Policy Manual, Chapter 6: Financial Assistance,

## IV. Responsibilities

A. **DHS General Counsel:** Provides supervision, oversight, direction, and guidance to the Department SD Program, including the DHS Suspension and Debarment Official.

B. **DHS Suspension and Debarment Official (SDO):**

1. Reports on matters identified below to the General Counsel, through and under the oversight of appropriate designee(s) of the General Counsel.
2. Determines the appropriate outcome of each case referred for suspension or debarment.
3. Proactively contributes to ensuring that only responsible persons and organizations participate in DHS procurement and other covered transactions.
4. Establishes the policy and processes for the SD program.
5. Ensures referrals for SD are properly processed either by the appropriate Operational Component with delegated SDO authority or at the Department level.
6. Designates a DHS official to conduct fact-finding hearings when there are disputed material facts that warrant a hearing.
7. Refers matters involving disputed material facts to a DHS designated official for a fact-finding hearing.
8. Holds Presentations of Matters in Opposition (PMIO), when appropriate, to allow respondents to submit information and arguments in opposition to the suspension or proposed debarment.
9. Represents the Department as the DHS voting member on the Interagency Suspension and Debarment Committee (ISDC).
10. Ensures Department suspension or debarment actions are coordinated with the ISDC, as appropriate. If necessary, coordinates actions between or among agencies to ensure the best result for the government.
11. Ensures that each Component maintains its own records regarding SD cases for six years [General Records Schedule (GRS) 1.1, Item 10] after the end of the suspension, debarment period, or end date of an Administrative Agreement (AA). Records stemming from a referral which results in "no action" or a determination not to exclude a respondent after initiating

proceedings will be maintained for six years (GRS 1.1, Item 10) from the date of the decision. Ensures that all records are disposed of according to DHS SD Program record guidance.

12. Develops the annual SD report, used for reporting to the ISDC, detailing all DHS suspension, debarment, and related actions that were completed by fiscal year.

13. Establishes training levels, certification requirements, professional development, and expectations for SD personnel.

14. Fosters relationships among all DHS investigative offices and Operational Component Suspension and Debarment Directors (SDDs) by assisting with the establishment of procedures for submitting referrals to SDDs and providing guidance on SD issues.

15. Ensures that SDDs track suspension and debarment program actions using the designated DHS SD case tracking system, the Suspension and Debarment Case Management System (SDCMS).

16. Establishes procedures for respondents to exhaust administrative remedies by appealing an adverse SDO decision prior to the respondent pursuing Federal litigation pursuant to the Administrative Procedure Act (APA). The DHS SDO:

a. Accepts for review, or re-assigns, SD petitions for reconsideration from any Operational Component SDO.

b. Assigns review of petitions for reconsideration of DHS SDO actions to any Operational Component SDO.

c. During this review process, the DHS SDO has the authority to stay the immediate decision while the petition is under review.

d. Petitions for reconsideration may be de novo reviews.

17. Acts ethically and impartially in every action taken or decision made.

C. **Operational Component Heads:**

1. Designate one or more individuals to be dedicated to the Component's SD program as the SDD. This may or may not be a full-time position depending on the number of referrals generated by that Operational Component. The SDD provides appropriate administrative services for that Operational Component SD program.

2. Ensure Operational Components which are SD Centers of Excellence have sufficient staff to support these efforts.

3. Ensure the Department's ability to suspend or debar is not waived during the resolution of other court or administrative litigation, without the prior approval of the relevant SDO.

D. **Operational Component (SD Centers of Excellence) Suspension and Debarment Officials**, when delegated authority concerning referrals:

1. Determine the appropriate outcome of each case referred for suspension or debarment.
2. Refer matters involving disputed material facts to a fact-finding official within DHS for a fact-finding hearing.
3. Hold PMIOs, when appropriate, to allow respondents to submit information and arguments in opposition to the suspension or proposed debarment.
4. Establishes procedures for respondents to exhaust administrative remedies by appealing an adverse SDO decision prior to the respondent pursuing Federal litigation pursuant to the Administrative Procedure Act (APA). The SDO:
  - a. Refers SD petitions for reconsideration to the DHS SDO.
  - b. Accepts petitions for reconsideration from the DHS SDO; including petitions from any Operational Component.
  - c. During this review process, the SDO has the authority to stay the immediate decision while the petition is under review.
  - d. Petitions for reconsideration may be de novo reviews.
5. Ensure that records regarding Operational Component and SD Centers of Excellence suspension and debarment cases are maintained for six years (GRS 1.1, Item 10) after the end of the suspension debarment period or end date of an AA and follows DHS Suspension and Debarment Program records destruction guidance. Records stemming from a referral which results in "no action" or a determination not to exclude a respondent after initiating proceedings will be maintained for six years (GRS 1.1, Item 10) from the date of the decision.

E. **Operational Component Suspension and Debarment Directors (Operational Component SDD)**:

1. Receive information pertaining to potential SD cases (hereinafter referred to as "intake") from any source, analyze the intake and determine the

correct Operational Component to process the potential case. Where appropriate, Operational Components should consult with their Operational Component Counsel prior to contacting the SDO.

2. Track all intake, referrals, and actions and document each case file in accordance with this Instruction and other policy issued by the SDO. Report the status of all intake and referrals to the SDO and assist the SDO in the planning process and requests for information.
3. Review the System for Award Management (SAM) to determine the suspension or debarment status of the subject of the intake.
4. Maintain and update SD records in SAM.
5. Coordinate the appropriate processing of each intake with the appropriate SDD or SDO to ensure no duplication, overlap, or failure to process intake.
6. Gather all relevant facts and determine if there are disputed facts associated with the intake.
7. Prepare intake with recommendations and submit the Administrative Record to the SDO for action. Once the recommendation is sent to the SDO, it becomes a referral and is counted as such at this point in time. For ISDC reporting purposes, only suspensions and proposed debarments are counted as referrals.
8. Ensure that records regarding SD Centers of Excellence and Operational Component suspension and debarment cases for six years (GRS 1.1, Item 10) after the end of the suspension, debarment period, or end date of an AA and follow DHS SD Program Suspension and Debarment Case Management System Records Management Guidance. Records stemming from a referral which results in "no action" or a determination not to exclude a respondent after initiating proceedings will be maintained for six years (GRS 1.1, Item 10) from the date of the decision.
9. Suggest internal and external process improvements to the appropriate SDO for action.
10. Provide appropriate administrative services for that Operational Component.
11. Act ethically and impartially in every action taken or decision made.

F. **Heads of the Contracting Activities (HCA):**

1. Ensure their contracting professionals are trained on when and how to

consider referrals for SD for an Operational Component's contractor.

2. Provide easy access and contact information to the Operational Component's investigative unit, OIG, and SDD.
3. Ensure all contractors are referred to the SDO for potential SD where the Operational Component terminated the contract for cause or default per HSAM 3049.1.
4. Instruct contractors to utilize SAM before entering into any subcontract.
5. Request a DHS Chief Procurement Officer (CPO) compelling reason determination prior to entering into a contract with an excluded party per HSAM 3009.4.

G. **DHS Chief Procurement Officer:**

1. Grant waivers/limited exceptions to let excluded contractors, including Other Transaction Agreement recipients, to participate in covered procurement transactions, including prime contracts and subcontracts.
2. Identify the method(s) and specific limitations of entering into a covered procurement transaction with the excluded party.
3. Immediately informs the DHS SDO and the Deputy Under Secretary for Management of each authorization to contract with an excluded party and provides the rationale for the approval. If a waiver is approved, the DHS CPO must craft a notification of the waiver and an explanation of the finding that a compelling reason exists for the waiver for dissemination to the appropriate congressional oversight committees and the DHS OIG. Within five (5) days of signing of the waiver, the DHS Office of Legislative Affairs submits the notification to the appropriate congressional committees and the DHS CPO submits the notification to the DHS Inspector General.
4. Tracks all contracts terminated for default or cause and populates them in the Enterprise Reporting Application (ERA) site.

H. **DHS Chief Financial Officer:**

1. Grants waivers/limited exceptions to let an excluded party participate in covered non-procurement transactions including, prime and subcontracts, grants, and direct loans.
2. Identifies the method(s) and specific limitations of entering into a covered non-procurement transaction with the excluded party.
3. Promptly informs the DHS SDO and the Deputy Under Secretary for

Management of authorization to enter into a nonprocurement transaction with an excluded party and provides the rationale for the approval. If a waiver is approved, the DHS CFO must craft a notification of the waiver and an explanation of the finding that a compelling reason exists for the waiver for dissemination to the appropriate congressional oversight committees and the DHS OIG. Within five (5) days of signing of the waiver, the DHS Office of Legislative Affairs submits the notification to the appropriate congressional committees and the DHS CFO submits the notification to the DHS OIG.

I. **The Office of the General Counsel:**

1. Provides legal support to the SDDs and the SDOs.
2. Provides legal reviews and comments on all Administrative Records and other appropriate documents when requested.
3. Provides legal review of due process and other issues that may arise associated with the SD process.
4. Ensures attorneys attend meetings, including PMIOs, when requested by the SDOs or SDDs.
5. Advises on the coordination of all applicable remedies, to include criminal, civil, contractual, administrative, and fiscal.

## V. Procedures

A. **Case Generation and Referrals:** Most DHS cases begin with an intake of information for consideration of potential suspension or debarment action to the appropriate SDD and is entered into SDCMS within three (3) workdays after receipt of a complete intake. Generally, SD cases are associated with a criminal conviction, civil judgment, an Inspector General investigation, or other administrative action; but other circumstances may also warrant SD action. A case may be processed for SD if a person or entity demonstrates a lack of business honesty or integrity. Information related to contractor suspension and debarment and possible criminal or fraudulent activities are made to the OIG, consistent with HSAM 3009.402.

1. Triggers include, but are not limited to:
  - a. Termination for default or cause of any contract or federal assistance award.
  - b. Termination for convenience of any contract where there is conduct that reflects a lack of ethics and integrity.
  - c. Dishonestly obtaining or attempting to obtain a contract such as



improperly obtaining competitor information or by misrepresenting size status.

d. Violations of FAR clause 52.222-50, "Combating Trafficking in Persons."

e. Grantee malfeasance or misuse of grant funding.

f. False information provided to obtain flood insurance payment or disaster assistance.

g. Any criminal activity or violation of civil code by a DHS employee indicating unethical behavior on the part of a DHS contractor or grantee.

h. Indictment or conviction of a federal felony that indicates unethical behavior by a DHS employee, contractor, or grantee.

i. Violation of the Immigration and Nationality Act (INA) (Public Law 82-414), as amended (codified in Title 8 the U.S. Code).

j. Violation of trade laws against counterfeit, unsafe, and/or fraudulently entered goods.

k. Violation of other statutes requiring suspension or debarment where DHS is the appropriate lead agency.

2. Any individual or entity may refer a suspension or debarment case. The intake is provided to the SDD or Inspector General office that has the closest association with the basis for the potential suspension or debarment.

3. Even without an intake, an SDD may open a case for suspension or debarment. The SDD may open a case if there is evidence that the individual or organization committed one or more of the causes for debarment or suspension set forth at FAR 9.406-2 or 9.407-2, or 2 C.F.R. §§ 180.700 or 180.800.

**B. Analysis and Processing:**

1. A conviction-based intake should generally be evaluated promptly upon the SDD receiving a complete case.

2. When an intake is received, the SDD reviews it to ensure it includes all necessary documentation and takes appropriate action to complete the file with relevant documents to support the specific cause. [Appendix 1](#) of this Instruction contains a list of documents for possible inclusion in the case file.

3. SDDs take special care if any document in the intake package contains information that is sensitive, privileged, or confidential. This information may need to be removed before submitting to the SDO. If this information needs to be reviewed by the SDO, but not released to the respondents in the suspension or debarment process, this information should be included in an Action Referral Memorandum (ARM). The SDD should mark the ARM as “Sensitive – In Camera Review by the Debarring Official Only” in order to safeguard the information.

4. The SDD analyzes the case file, including any additional research results, and prepares the ARM and the Notice(s) of Proposed Debarment and/or Notice(s) of Suspension, etc. Affiliates of a respondent, if known, are generally included within the ARM for that respondent. The SDD generates a separate ARM for each respondent in a particular case.

5. Affiliates listed in the ARM are sent a separate Notice of Proposed Debarment/Notice of Suspension when the affiliate has a separate address of record from the respondent.

6. The SDD prepares the Lead Agency Request and routes through the ISDC prior to forwarding the Administrative Record to the appropriate SDO. The Lead Agency Request should be conducted prior to the issuance of a Notice of Suspension and must be sent prior to the issuance of a Notice of Proposed Debarment or Show Cause letter. Additionally, Lead Agency Requests should be sent upon receipt of a company’s self-reporting to the SDD/SDO of alleged or criminal misconduct.

7. The SDD forwards the Administrative Record, including supporting documentation used to develop the ARM and notices, to the appropriate SDO, for review and further processing. Once the recommendation is received by the SDO, it becomes a referral. For ISDC reporting purposes, only suspensions and proposed debarments are counted as referrals and are counted as referrals when they are sent to the SDO. The SDD recommends one of the following actions to the appropriate SDO:

- a. Close the referral with no action.
- b. Issuance of a Request for Information or a Show Cause letter.
- c. Propose debarment, including the recommended length of the proposed debarment.
- d. Suspension.
- e. Resolution through an Administration Agreement (AA) or Voluntary Exclusion (VE).

8. If the situation justifies an immediate suspension to protect the Government, the SDD documents the circumstances and recommends that the SDO proceed with the suspension without prior coordination with the ISDC. In this case, the SDD sends a follow up Lead Agency Notice to the ISDC informing of the suspension by the next business day.

9. Occasionally, information may come to the attention of the SDD prior to the receipt of an intake that requires them to gather additional research from a potential respondent. After notifying the appropriate SDO, the SDD prepares a Request for Information and sends it to the respondent via a method of delivery provided under FAR 9.406-3(c) or the Nonprocurement Common Rule (NCR), 2 C.F.R. § 180.615. The respondent is provided an opportunity to present information to the SDD to determine if a referral for suspension or debarment to the SDO is appropriate. If circumstances warrant, the information never becomes a referral, and the case is closed by issuing a memo for the record. A unique record is established in SDCMS and closed in the intake stage, indicating no referral to the SDO was generated.

10. After a review of the initial documents in the administrative record, if the SDO determines that a suspension or debarment action is not yet warranted, the SDO may issue a Show Cause letter, if appropriate.

a. Based on the respondent's response to the Show Cause letter, the SDO may decide that insufficient evidence exists to proceed with a suspension or debarment. In this case the SDD prepares a Decision Memorandum for signature by the SDO and the respondent remains eligible to participate in all federal business/financial relationships. The case is dismissed, based on current facts, and a notification is sent to the respondent within five (5) business days; or,

b. An AA may be offered. If appropriate, the SDD proposes the terms and upon agreement of the SDO and respondent, the SDD generates the final document for signature by the respondent. After signature by the respondent, the SDD provides the document to the SDO for processing. The SDO signs on behalf of the United States Government. Prior to entering an AA, the SDD ensures that an AA Decision Memorandum is signed by the SDO and entered into the Administrative Record. The AA Decision Memorandum should document the facts of the case and the rationale for the decision to enter into an AA rather than suspend or debar the respondent. Under an AA, the respondent remains eligible, but is required to adhere to the terms and conditions of the AA. A technical or administrative failure to adhere to the AA's terms and conditions normally results in a short reprieve of normally ten (10) business days to correct the breach. A material breach, or if a technical or administrative failure goes

uncorrected, may establish a new cause for debarment. At a minimum, the AA period may be extended due to the breach. The final decision to extend or terminate the AA resides with the SDO.

c. If after the review of Show Cause information, the SDO determines that the respondent is not responsible and suspension or debarment is appropriate, the SDD prepares a new ARM and Notice of Suspension or Notice of Proposed Debarment and follows the instructions above for a proposed debarment.

11. If the SDO concurs with SDD recommendation in the ARM, the SDD:

a. Notifies the respondent of Suspension or Proposed Debarment in accordance with FAR 9.406-3 or 9.407-3, or the applicable non-procurement regulation. The Notice of Suspension/Debarment is sent via the applicable delivery method pursuant to FAR Subpart 9.4 or NCR 2 C.F.R. § 180.615. Along with the Notice of Proposed Debarment/Notice of Suspension, the SDD sends a copy of the ARM to the respondent. If there is a reason to withhold from the respondent any portion of the record (normally for show cause or suspension actions), the respondent is informed, in general terms, what was withheld and the reasons for such withholding without disclosing the government's evidence. Upon request, the SDD makes available to each respondent a copy of the Administrative Record which formed the basis for the decision, unless it is marked "Sensitive – In Camera Review by the Debarring Official Only".

(1) In the event that a Notice of Suspension/Proposed Debarment is undeliverable, a search should be performed to locate an alternate address. If an alternate address is found, the ARM and Notice of Proposed Debarment must be sent to the Respondent at the alternate address. A memorandum for the record should be completed by the SDD documenting the mailing process.

b. For Proposed Debarments or Suspensions under the authority of FAR 9.4, and Suspensions under the NCR, the SDD updates SAM within three (3) working days from the effective date of the action. Proposed Debarments under the NCR are not entered into SAM.

c. In accordance with FAR 9.406-3(c) and 9.407-3(c) and allowable for nonprocurement actions, within 30 days after receipt of the notice of suspension or proposed debarment, the respondent or their representative may submit information and argument in opposition to the suspension or proposed debarment. In the

respondent's initial submission, the respondent may request an in-person (virtual or telephonic) PMIO.

d. The SDD may control the PMIO and should ensure all interested government officials who are present for the PMIO receive a copy of the written information submitted by the respondent, or transcript, if any exist.

e. Usually, the PMIO is presented in a single proceeding. These meetings may be held in-person, virtually or telephonically, and should be non-adversarial and generally informal in nature. Prior to the meeting, the SDO or SDD may determine that a recording is necessary and make arrangements to have the meeting transcribed. Government officials may ask questions of the respondent or its representative making the presentation.

(1) Government representatives at the PMIO may include, but are not limited to the SDO, SDD, Operational Component Legal Counsel, and investigators. Someone from the referring organization, who is familiar with the case, may also be present. If another federal agency has an interest in the outcome, they may be present.

(2) At least five (5) business days prior to the PMIO the respondent should submit any written information which the respondent considers important for inclusion in the Administrative Record.

(3) Individual respondents or principals of a business may attend the PMIO and speak for themselves, or the respondent may select the individuals to attend the meeting on the respondent's behalf.

(4) At the conclusion of the PMIO, the SDO or SDD may hold the record open to afford the respondent a reasonable amount of time, generally ten (10) business days, to submit additional documentary evidence for the administrative record.

f. The PMIO includes the opportunity to present matters concerning the present responsibility of the respondent. Normally, if there is a judgment, conviction, or settlement with an admission of liability involved, the facts underlying the matter would not be contested. However, the respondent should be prepared to discuss what happened to cause the misconduct, provide the results of any internal investigations, enumerate mitigating circumstances, and provide details concerning remedial measures that have been implemented, or that are contemplated; to ensure that the root cause

of the suspension and/or proposed debarment has been identified and corrective measures have been taken to ensure there will be no future instances of this misconduct. It is recommended that the respondent send a representative to the PMIO who has knowledge of the incidents, who has the authority to speak on behalf of the respondent and who is capable of answering any questions posed by the government. The respondent may also discuss the duration of the debarment and the possibility of entering into an AA or VE.

g. The SDO determines whether the respondent's written response or PMIO has raised a genuine dispute of material fact(s). If the SDO has decided against debarment or continued suspension, or the provisions of FAR Subpart 9.4 or 2 C.F.R. § 180.830 preclude fact-finding, no fact-finding is conducted. If sufficient facts exist that are not in dispute, the disputed cause of action may be eliminated from the case, and the case may proceed based on the undisputed facts without fact-finding. If the SDO has determined a genuine dispute of material fact(s) exists, the fact-finding official conducts fact-finding and provides a report containing the results of the fact-finding. The written findings of facts are prepared as mandated by FAR 9.406-3(d)(2)(i) and 9.407-3(d)(2)(i) and 2 C.F.R. § 180.840. A copy of the findings of fact is provided to the SDO.

12. **Self-referrals**: In some instances, a respondent may self-refer criminal or other misconduct to the SDD prior to receiving a Notice of Suspension, Notice of Proposed Debarment, or Show Cause.

a. The SDD requests that the respondent submits all documentation in writing and informs the respondent that they may request a PMIO related to their present responsibility. Government representatives at the PMIO may include, but are not limited to, the SDO, SDD, Operational Component Legal Counsel, and investigators. If another federal agency has an interest in the outcome, they may be present as well.

b. The SDD requests the respondent come to the PMIO prepared to discuss present responsibility. Normally, if there is a judgment, conviction, or settlement with an admission of liability involved, the facts underlying the matter would not be discussed. However, the respondent should be prepared to discuss what happened to cause the misconduct, provide the results of any internal investigations, enumerate mitigating circumstances, and provide details concerning remedial measures that have been implemented, or that are contemplated; to ensure that the root cause has been identified and corrective measures have been taken to ensure there will be no future instances of this misconduct. It is recommended that the respondent

send a representative to the PMIO who has knowledge of the incidents, who has the authority to speak on behalf of the respondent and who is capable of answering any questions posed by the government. The respondent may also discuss the duration of any potential debarment and the possibility of entering into an AA or a VE.

c. The SDD requests the respondent provide any information that they would like considered by the SDO in writing at least five (5) business days prior to the PMIO. Requests additional meetings, conversations, or materials as appropriate.

d. There are generally three possible outcomes: 1) a “no action” or a determination not to exclude a respondent; 2) the implementation of an AA or VE; or 3) a proposed debarment.

13. **Voluntary Exclusion Agreements (VE)**: The SDO may find that a VE is an appropriate resolution to a suspension or debarment matter. If appropriate, the SDD proposes the terms and upon agreement of the SDO and respondent, the SDD generates the final document for signature by the respondent. After signature by the respondent, the SDD provides the document to the SDO for processing. The SDO signs on behalf of the United States Government. VEs must be entered into SAM within three (3) working days from the date signed by the SDO. Prior to entering a VE, the SDD ensures that a VE Decision Memorandum is signed by the SDO and entered into the Administrative Record. The VE Decision Memorandum should document the facts of the case and the rationale for the decision.

14. **Petitions**: If a respondent submits a petition for reconsideration, the cognizant suspension and debarment program personnel send a copy of the petition with a cover ARM documenting the history along with the entire Administrative Record to the cognizant SDO for a review, including a de novo review, as determined appropriate. The information is generally provided to the SDO within ten (10) business days. Generally, the DHS SDO reviews requests for reconsideration of decisions made by the Component SDO and the Component SDO reviews requests for reconsideration of decisions made by the DHS SDO.

a. The cognizant SDO reviews the administrative record and issues a written decision. The decision may modify or terminate the suspension or leave it in force; or leave the debarment period as is, reduce the period of debarment, terminate the debarment, or explore entering into an AA with the respondent.

b. The SDO provides the written decision to the SDD at the originating component and the SDD updates the administrative record, provides notice to the respondent of the decision and, if necessary, updates SAM within three (3) working days with any necessary

changes.

15. If a respondent inquires on the status of their pending case, the SDD provides the respondent with a response to that inquiry in a timely manner.

## **VI. Training and Professional Development**

A. The DHS and Operational Component SDOs and SDDs must successfully complete the Federal Law Enforcement Training Center National Suspension and Debarment Training Program within one (1) year of the start of the responsibilities, if not already completed.

B. Operational Component SD staff obtain professional development through Federal Acquisition Certification in Contracting (FAC-C). Professional development should include familiarity with contract and grant fraud. The SDOs and SD Centers of Excellence SDDs should obtain and maintain the Certified Compliance and Ethics Professional (CCEP) designation, or equivalent with approval of the DHS SDO, to properly evaluate compliance and ethics programs of respondent companies and to properly administer respondent AAs.

## **VII. Tracking and Reporting Procedures**

A. The DHS SDO ensures that DHS has a consistent method to track referrals and resulting progress. The Operational Component SDOs and SDDs enter each referral into a tracking system and updates each referral as it progresses through the SD process. Data entry and document upload into the case tracking system must occur within two (2) business days. The DHS SDO ensures that all referrals progress toward completion in a timely manner.

1. The Operational Component SDOs and SDDs are responsible for ensuring that all information is properly reported. DHS reports the SD statistics to the ISDC to be included in the annual 873 Report to Congress. Referrals are counted on the same day that they are sent to the SDO. Show Cause, Suspension, Proposed Debarment, Debarment, Dismissal, No Action, Declination, AA, and VE actions are counted at each stage, as applicable, on the same day they are signed by the SDO. Petitions are counted as such on the day that the SDO signs the final determination in the matter. For petitions, if the decision is to terminate the respondent's exclusion, it is only counted as a petition.

2. If suspending and proposing for debarment under the NCR, the action would count both as a suspension and a proposed debarment the same day the SDO signs the action.

B. The Operational Component SDOs or SDDs enter all information into SAM



and have the responsibility to meet the regulatory timeframes for listing parties as suspended, proposed for debarment, debarred, and voluntarily excluded. These Operational Component SDOs or SDDs are also responsible for uploading all AAs to the Responsibility/Qualification section of SAM.gov within the required timeframe.

C. The DHS CPO tracks all contracts terminated for default or cause and populates them in the Enterprise Reporting Application (ERA) site. The SDDs review the ERA site within five (5) business days after the end of each calendar month to determine if opening a SD referral is appropriate.

D. Annually, the DHS SDO prepares the DHS SD report. This may require supplemental reports from the Operational Component SDOs and SDDs to assist with good administration of the program.

E. The DHS SDO:

1. Reviews reports and information from the ISDC, GAO, DHS IG, or other reviewing body on behalf of the SD program. However, the DHS SDO may request other Component SDOs and SDDs assistance in the review or request further information to support the review.
2. Serves as the DHS voting member of the ISDC. However, all staff, Component SDOs, and SDDs are encouraged to attend the ISDC meetings and to serve on its related interagency working groups. Participation on the working groups is pre-coordinated within DHS.
3. May call meetings of all Operational Component SD staff to discuss DHS processes, including making improvements, and communicating policy changes and updates.

## VIII. Questions

Address questions or inquiries related to the DHS SD Program to the DHS SDO.



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JONATHAN E MEYER  
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Jonathan E. Meyer  
General Counsel

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Date

## Appendix 1: Case File Documents

The SDD reviews referral case files to ensure that each file contains documents relevant to support the specific cause. The following documents should be included, if appropriate:

1. Referral for Consideration Form
2. Name, address, and telephone number for the point of contact for the office making the referral
3. Executive Summary
4. Referral Memorandum
5. Indictment (or other legal document(s) supporting the alleged violation)
6. Judgment & Conviction
7. Notice of Intent to Fine (NIF)
8. Settlement Agreement
9. Final Order
10. Sentencing transcript or memorandum
11. Investigative reports
12. Other evidence of ethical, business integrity, or performance failures
13. Explanation of business corporate structure (i.e., S-corporation, limited liability company, affiliate of "x" company)
14. Status of company (i.e., do they have a current business license in the state?)
15. Current physical address of named respondent(s)
16. Current telephone, fax numbers, and email addresses for named respondent(s)
17. Social Security Number (SSN) and Date of Birth (DOB) for named respondents(s)
18. If the potential suspension or debarment is based on FAR 9.406-2 or 9.407-2, include the pertinent contract information as follows:

- A. The contract number;
  - B. All office identifying numbers or symbols;
  - C. Description of supplies or services;
  - D. The contract value and amount obligated;
  - E. The percentage of contract completion;
  - F. The amount invoiced and the amount paid to the contractor;
  - G. Whether the contract is assigned under the Assignment of Claims Act and, if so, to whom;
  - H. The amount due to the contractor; and
  - I. The contract fund citations or treasury account symbols involved, to expedite accurate return of funds to open accounts, as appropriate.
19. For any other contracts outstanding with the contractor or any of its affiliates—
- A. The contractor number(s);
  - B. The amount(s);
  - C. The amounts paid to the contractor;
  - D. Whether the contract(s) is assigned under the Assignment of Claims Act and, if so, to whom;
  - E. The amount(s) due the contractor; and
  - F. An estimate of any damages sustained by the Government as a result of the contractor's action (explain how the estimate was calculated).
20. To the extent that information is available through FPDS-NG and/or USASpending.gov, provide a list of other agencies that hold current active contracts with the contractors.
21. The comments and recommendations of the contracting officer and each higher-level contracting review authority regarding—
- A. Whether to suspend or debar the contractor;
  - B. Whether to apply limitations to the suspension or debarment;

- C. The period of any recommended debarment; and
  - D. Whether to continue any current contracts with the contractor (or explain why a recommendation regarding the current contract is not included).
22. Any other document that the SDO or SDD deem relevant and helpful in determining whether the respondent should be excluded and/or mitigates length of debarment.

## Appendix 2: Definitions

- A. **Adequate evidence**: Information sufficient to support the reasonable belief that a particular act or omission has occurred.
- B. **Administrative Agreement (AA)**: An agreement between the Federal Government and respondent in lieu of suspension or debarment. Routinely, the agreement includes acceptance of responsibility for the conduct that gave rise to the agreement, a requirement for a code of ethics, a training program for all employees, an audit and internal control program, a compliance program, and a mechanism for reporting misconduct. Violation of the terms of an agreement provides an independent cause for debarment.
- C. **Administrative Record**: The set of information, documents, and records which together identify the allegations, facts, process and determination for each potential suspension or debarment referral. The Administrative Record contains all of the documents that the SDO uses to determine the outcome of the referral.
- D. **Action Referral Memorandum (ARM)**: A document recommending action concerning the respondent.
- E. **Affiliate**: Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third person controls or has the power to control both. Indicia of control include but are not limited to: interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.
- F. **Agency**: Any executive department, military department or defense agency, or other entity of the executive branch, excluding the independent regulatory agencies.
- G. **Agent or representative**: Any person who acts on behalf of, or who is authorized to commit for a participant in a covered transaction.
- H. **Civil Judgment**: The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. §§ 3801-3812).

## Appendix 2: Definitions

I. **Conviction**: 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. See NCR, 2 C.F.R. § 180.920.

J. **Cooperative Agreement**: A legal instrument of financial assistance between a federal awarding agency or pass-through entity and a non-federal entity that, consistent with 31 U.S.C. §§ 6302-6305:

1. Is used to enter into a relationship the principal purpose of which is to transfer anything of value from the federal awarding agency or pass-through entity to the non-federal entity to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. § 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use;

2. Is distinguished from a grant in that it provides for substantial involvement between the federal awarding agency or pass-through entity and the non-federal entity in carrying out the activity contemplated by the federal award;

3. The term does not include:

a. A cooperative research and development agreement as defined in 15 U.S.C. § 3710a; or

b. An agreement that provides only:

i. Direct United States Government cash assistance to an individual;

ii. A subsidy;

iii. A loan;

iv. A loan guarantee; or

v. Insurance.

K. **Covered Transaction**: For purposes of this Instruction, a covered transaction has the same meaning as defined in 2 C.F.R. § 180.200 as a nonprocurement transaction or procurement transaction at the primary tier or a lower tier. Covered transactions at any tier need not involve the transfer of

## Appendix 2: Definitions

Federal funds. A primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including, but not limited to: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements, and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include any other transactions specifically designated as such by Executive Orders.

L. **Debarment**: An action taken by the SDO under FAR 9.406 or under Subpart H of the NCR to exclude a person from Government contracting and Government-approved subcontracting or covered transactions for a reasonable specified period. A person so excluded is debarred.

M. **Debarring Official**: An agency official with delegated authority to act as an SDO and who is authorized to impose a debarment.

N. **Declination**: An SDO's determination, upon receiving a referral recommending issuance of a notice of suspension or proposed debarment, that a notice is not necessary to protect the interests of the Federal Government. Placing a referral on hold in anticipation of additional evidence for future action is not a declination.

P. **De novo review**: A new review of the Administrative Record, including any additional information the respondent presents.

Q. **Excluded or exclusion**: Excluded or exclusion means that a person or commodity is prohibited from being included in covered transactions, whether the person has been suspended; debarred; proposed for debarment under FAR subpart 9.4; or voluntarily excluded. It may also mean the act of excluding a person.

R. **Federal Acquisition Regulation (FAR)**: The regulations at 48 C.F.R. chapter 1, provide uniform policies and procedures for acquisitions by executive agencies of the Federal government.

S. **Financial Assistance**: Assistance that non-federal entities receive or administer in the form of grants, loans, loan guarantees, property, cooperative agreements, interest subsidies, insurance, food commodities, direct appropriations, or other assistance, but does not include amounts received as reimbursement for services rendered to individuals in accordance with guidance issued by the Director of the Office of Management and Budget (OMB) (see 31 U.S.C. § 7501(a)(5)).

T. **Grant**: A legal instrument of financial assistance between a federal awarding agency or pass-through entity and a non-federal entity that, consistent with 31 U.S.C. §§ 6302, 6304:

## Appendix 2: Definitions

1. Is used to enter into a relationship the principal purpose of which is to transfer anything of value from the federal awarding agency or pass-through entity to the non-federal entity to carry out a public purpose authorized by a law of the United States (see 31 U.S.C. § 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use;
2. Is distinguished from a cooperative agreement in that it does not provide for substantial involvement between the federal awarding agency or pass-through entity and the non-federal entity in carrying out the activity contemplated by the federal award;
3. Does not include an agreement that provides only:
  - a. Direct United States Government cash assistance to an individual;
  - b. A subsidy;
  - c. A loan;
  - d. A loan guarantee; or
  - e. Insurance.

U. **Indictment**: Indictment is a formal charge for a criminal offense. A presentment, information, or other filing by a competent authority charging a criminal offense is given the same effect as an indictment.

V. **Ineligible**: Excluded from participation in federal nonprocurement programs pursuant to a determination of ineligibility under statute, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations. Examples of exclusionary authorities include exclusions pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility prevents a person from participation in more than one covered transaction.

W. **Intake**: Preliminary information received from a source pertaining to potential suspension and debarment cases. This information is used to generate a referral for action to the SDO.

X. **Interagency Suspension and Debarment Committee (ISDC)**: The interagency committee established under Executive Order 12549 to monitor agencies' implementation of the Order. The ISDC also facilitates lead



## Appendix 2: Definitions

agency coordination, serves as a forum to discuss current suspension and debarment related issues, and assists in developing unified Federal policy.

Y. **Legal proceedings**: Any criminal proceeding, any civil proceeding, and any proceeding under the Program Fraud Civil Remedies Act (31 U.S.C. §§ 3801-3812), to which the Federal Government or a state or local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

Z. **No Action**: An SDO's determination, upon receiving a formal referral recommending that no action be taken, that no suspension or debarment action be taken concerning a respondent.

AA. **Nonprocurement Common Rule (NCR)**: OMB guidance at 2 C.F.R. Part 180 for federal agencies on the governmentwide debarment and suspension system for nonprocurement transactions. At 2 C.F.R. Part 3000, DHS adopted the OMB guidelines on suspension and debarment.

BB. **Nonprocurement Transaction**: Any transaction, other than procurement contracts, including but not limited to the following: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements, and other transaction agreements. A nonprocurement transaction at any tier does not require the transfer of Federal funds.

CC. **Notice**: A written communication served in person or sent by certified mail, return receipt requested, or in a manner pursuant to FAR Subpart 9.4 or 2 C.F.R. § 180.615, to the last known address of a respondent, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venture of the respondent. Notice, if undeliverable, is considered to have been received by the addressee five (5) days after being properly sent to the last known address.

DD. **Other Transaction Agreement**: Contractual instruments other than procurement contracts, grants, or cooperative agreements.

EE. **Participant**: Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit for a participant in a covered transaction as an agent or representative of another participant.

FF. **Person**: Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental

## Appendix 2: Definitions

entities.

GG. **Petition**: A respondent's request for reconsideration of the suspension or debarment decision or request for reduction in the time period or scope of debarment. See 2 C.F.R. § 180.875, and FAR 9.406-4(c) and 9.407-3(d)(3).

II. **Preponderance of the evidence**: The available body of facts or information that, taken together, leads to the conclusion that it is more likely than not that the contention at issue is true.

JJ. **Presentation of Matters in Opposition (PMIO)**: A meeting which allows the respondent to submit, orally or otherwise, information pertaining to the suspension or debarment that would mitigate, disprove, or otherwise have an impact on the suspension or proposed debarment.

KK. **Principal**: Includes, but not limited to, an officer, director, owner, partner, key employee, or other person within an entity with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant.

LL. **Procurement based suspension and debarment**: Suspensions or debarments for the causes given in FAR 9.406-2 and 9.407-2. The process for procurement based suspension and debarments must comply with the procedures set forth in FAR Subpart 9.4.

MM. **Procurement Contract**: A mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for the supplies or services. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. § 6301, et seq or other transaction agreements.

NN. **Proposal**: A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

OO. **Referral**: A written request prepared in accordance with agency procedures and guidelines, supported by documentary evidence, presented to the SDO for action. This could include request for issuance of a Notice of Suspension, Notice of Proposed Debarment, No Action, Show Cause, or when the intake stems from the respondent, a VE, AA, or Finding of Responsibility. For ISDC reporting purposes, only Suspensions and Proposed Debarments are counted as referrals.

## Appendix 2: Definitions

PP. **Request for Information**: Informal notice sent by the SDD to the respondent requesting additional information on a particular matter. This affords the respondent an opportunity to present information to the SDD to determine if a referral for suspension or proposed debarment is appropriate to refer to the Suspension and Debarment Official (SDO).

QQ. **Responsibility**: Regarding procurement actions, having the general standards listed in FAR 9.104-1 and the ability to do business with the government with integrity, honesty, and lawfulness.

RR. **Respondent**: A person against whom an agency has initiated a suspension or debarment action.

SS. **Show Cause Letter**: Notice sent by the SDO to a respondent that a suspension or debarment action is being considered and affords the respondent the opportunity to present evidence regarding the matter before a decision to suspend or debar is made.

TT. **State**: Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a state, exclusive of institutions of higher education, hospitals, and units of local government. A state instrumentality is considered part of the state government if it has a written determination from the state government that such state considers that instrumentality to be an agency of the state government.

UU. **Suspending official**: An agency official with delegated authority to act as an SDO and who is authorized to impose a suspension.

VV. **Suspension**: An action taken by a suspending official under subpart G of the NCR or the FAR Part 9 that immediately excludes a person from participating in covered transactions and transactions covered under the FAR (48 C.F.R. Chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceeding that may ensue. A person so excluded is "suspended."

WW. **System for Award Management (SAM)**: A list compiled, maintained, and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Orders 12549 and 12689 and any implementing regulations issued by GSA, or guidance established by the Office of Management and Budget, or FAR Subpart 9.4; persons who have been proposed for debarment under FAR Subpart 9.4; and persons who have been determined to be ineligible.

XX. **Unfair trade practices**: The commission of any of the following acts by a contractor:

## Appendix 2: Definitions

1. A violation of Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) as determined by the International Trade Commission.
2. A violation, as determined by the Secretary of Commerce of any agreement of the group known as the “Coordination Committee” for purposes of the Export Administration Act of 1979 (50 U.S.C. App.2401, *et seq.*, “*Export Regulation*”, Transportation Security Administration (TSA Security Agreements) or any similar bilateral or multilateral export control agreement.
3. A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Suspension and Debarment Official.

YY. **Voluntary exclusion or voluntarily excluded (VE)**: A person’s written agreement to be excluded under the terms of a settlement between the person and one or more agencies, with government wide exclusion effect; the status of a person who has agreed to a voluntary exclusion.