

# CRS Report for Congress

## Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments

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## Summary

The amount spent on government contracts, coupled with widely reported contractor misconduct, has generated congressional interest in debarment and suspension. Debarment or suspension of contractors is one means agencies use to ensure that they deal only with contractors who are responsible in fulfilling their legal and contractual obligations. Debarment removes a contractor's eligibility for government contracts for a fixed period of time, while suspension temporarily debars a contractor for the duration of an agency investigation or litigation. Like government procurement law generally, the law of suspension and debarment has multiple sources, and contractors can currently be debarred or suspended either under statutory provisions or under the Federal Acquisition Regulation (FAR).

Some statutes require or allow agency officials to exclude contractors that have engaged in conduct prohibited under the statute. Such statutory debarments and suspensions are also known as inducement debarments and suspensions because they further induce contractor compliance with statutes. Statutory debarments and suspensions are federal-government-wide; they are often mandatory, or at least beyond agency heads' discretion; and they are punishments. Statutes prescribe the debarments' duration, and agency heads generally cannot waive statutory debarments.

The FAR also authorizes debarment and suspension of contractors. Such administrative debarments and suspensions are also known as procurement debarments and suspensions because they protect government interests in the procurement process. Administrative debarments can result when contractors are convicted of, found civilly liable for, or found by agency officials to have committed certain offenses, or when other causes affect contractor responsibility. Administrative suspensions can similarly result when contractors are suspected of, or indicted for, certain offenses, or when other causes affect contractor responsibility. Debarred or suspended contractors are excluded from contracts with executive branch agencies. Administrative exclusions are discretionary and can be imposed only to protect government interests. Agencies can use administrative agreements instead of debarment and can continue current contracts of debarred contractors. The seriousness of a debarment's cause determines its length, which generally cannot exceed three years, but agency heads can waive debarments for compelling reasons.

The 110<sup>th</sup> Congress enacted several bills addressing debarment and suspension, including the Sudan Accountability and Divestment Act (P.L. 110-174), a Supplemental Appropriations Act (P.L. 110-252, §§ 6101-03), and the Duncan Hunter National Defense Authorization Act (P.L. 110-417, §§ 871-73). The 110<sup>th</sup> Congress also considered other bills that would have (1) created new statutory debarments; (2) supplemented the FAR provisions on contractor responsibility, debarment, and suspension; or (3) increased the information about contractors' responsibility available to contracting officers. Similar proposals may be put forward in the 111<sup>th</sup> Congress.

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# Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments

As a general rule, government agencies contract with the lowest qualified responsible bidder or offeror. Debarment and suspension relate to the responsibility of bidders and offerors. Government agencies debar and suspend contractors in order to preclude future contractual dealings with contractors that are “nonresponsible,” or not responsible, in fulfilling their legal or contractual obligations. Debarment removes a contractor from eligibility for future contracts with the government for a fixed period of time, while suspension temporarily debar a contractor for the duration of any agency investigation of the contractor or ensuing legal proceedings. Debarment and suspension are collectively known as exclusions.

This report reviews the legal framework for the exclusion of government contractors and discusses recent congressional efforts to make contractor debarment and suspension more effective means of ensuring that the government does not deal with nonresponsible contractors.

## Overview of Debarment and Suspension

Contractors can currently be debarred or suspended under federal statutes or under the Federal Acquisition Regulation (FAR), an administrative rule governing contracting by executive branch agencies.<sup>1</sup> There is only one explicit overlap between the causes of debarment and suspension under statute and those under the FAR, involving debarments and suspensions for violations of the Drug-Free Workplace Act of 1988.<sup>2</sup> However, the “catch-all” provisions of the FAR — which allow (1) debarment for “any ... offense indicating a lack of business integrity or business honesty” and (2) debarment or suspension for “any other cause of [a] serious

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<sup>1</sup> The FAR is promulgated by the General Services Administration (GSA), the Department of Defense (DOD), and the National Aeronautics and Space Administration (NASA) under the authority of the Office of Federal Procurement Policy Act of 1974. *See* Office of Federal Procurement Policy Act of 1974, P.L. 93-400, 88 Stat. 796 (codified at 41 U.S.C. §§ 401-38); DoD, GSA & NASA, Establishing the Federal Acquisition Regulation: Final Rule, 48 Fed. Reg. 42,102, 42,142 (Sept. 19, 1983).

<sup>2</sup> The Drug-Free Workplace Act of 1988, P.L. 100-690, §§ 5151-5160, 102 Stat. 4181 (codified at 41 U.S.C. §§ 701-07), is mentioned in FAR 9.406-2(b)(1)(ii) and 9.407-2(a)(4), which corresponds to 48 C.F.R. § 9.406-2(b)(1)(ii) and 9.407-2(a)(4).

or compelling nature”<sup>3</sup> — could potentially make the same conduct a grounds for debarment or suspension under statute and under the FAR.

**Statutory Debarment and Suspension.** Some federal statutes include provisions specifying that contractors who engage in certain conduct prohibited under the statute shall or may be debarred or suspended from future contracts with the federal government.<sup>4</sup> Because they are designed to provide additional inducement for contractors’ compliance with the statutes, such statutory debarments and suspensions are also known as inducement debarments and suspensions. The terms “statutory debarment” and “statutory suspension” are also used in reference to exclusions that result under executive orders,<sup>5</sup> even though executive orders are not statutes, as a way of grouping exclusions that result from executive orders with other inducement-based exclusions and contrasting them with administrative or procurement exclusions.

Statutes providing for debarment and suspension often require that the excluded party be convicted of wrongdoing under the statute, but at other times, findings of wrongdoing by agency heads suffice for exclusion.<sup>6</sup> Sometimes the exclusion applies only to certain types of contractors, or dealings with specified agencies (e.g., institutions of higher education who contract with the government, contracts with the Department of Defense).<sup>7</sup> Most of the time, however, the exclusion applies more broadly to all types of contractors dealing with all federal agencies.<sup>8</sup> Persons identified by statute — often the head of the agency administering the statute requiring or allowing exclusion — make the determinations to debar or suspend contractors.<sup>9</sup> Debarments last for a fixed period specified by statute, while suspensions last until a designated official finds that the contractor has ceased the conduct that constituted its violation of the statute.<sup>10</sup> Generally, statutory exclusions can only be waived by a few officials under narrow circumstances, if at all.<sup>11</sup> Agency

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<sup>3</sup> 48 C.F.R. § 9.406-2(a)(5) & (c); 48 C.F.R. § 9.407-2(c).

<sup>4</sup> *See, e.g.*, 21 U.S.C. § 862 (authorizing debarment for violations of federal or state controlled substance laws).

<sup>5</sup> *See, e.g.*, Executive Order 11246, as amended (providing for suspension of contractors who fail to comply with equal employment opportunity and affirmative action requirements).

<sup>6</sup> *Compare* 21 U.S.C. § 862 (debarment based on conviction) *with* 41 U.S.C. § 10(b) (debarment based on agency head’s findings).

<sup>7</sup> *See, e.g.*, 10 U.S.C. § 983 (debarment for institutions of higher education only); 48 C.F.R. § 209.470 (same); 10 U.S.C. § 2408 (debarment from Department of Defense contracts only).

<sup>8</sup> *See, e.g.*, 40 U.S.C. § 3144 (government-wide debarment for failure to pay wages under the Davis-Bacon Act).

<sup>9</sup> *See, e.g.*, 42 U.S.C. § 7606 (Administrator of the Environmental Protection Agency to debar contractors for certain violations of the Clean Air Act).

<sup>10</sup> *Compare* 41 U.S.C. § 701(d) (providing for debarment for up to five years) *with* 33 U.S.C. § 1368 (suspensions for certain violations of the Clean Water Act end with the violation).

<sup>11</sup> *Compare* 33 U.S.C. § 1368 (allowing the President to waive a debarment “in the (continued...)”) )

heads generally cannot waive exclusions to allow debarred or suspended contractors to contract with their agency. **Table 1** surveys the main statutory debarment and suspension provisions presently in effect.

**Table 1. Statutory<sup>a</sup> Debarments and Suspensions<sup>b</sup>**

Statute	Cause of Debarment	Mandatory or Discretionary	Decision Maker	Duration & Scope	Waiver of Debarment
Buy American Act (41 U.S.C. § 10(b))	Violations of the Buy American Act in constructing, altering, or repairing any public building or work in the United States using appropriated funds	Mandatory	Head of the agency that awarded the contract under which the violation occurred	3 years; government-wide	Not provided for
Clean Air Act (42 U.S.C. § 7606)	Conviction for violating 42 U.S.C. § 7413(c)	Mandatory	EPA Administrator	Lasts until EPA Administrator certifies the condition is corrected; government-wide <i>but</i> limited to the facility giving rise to the conviction	Waiver by President when he or she determines it is in the paramount interests of the United States and notifies Congress
Clean Water Act (33 U.S.C. § 1368)	Conviction for violating 33 U.S.C. § 1319(c)	Mandatory	EPA Administrator	Lasts until EPA Administrator certifies the condition is corrected; government-wide <i>but</i> limited to the facility giving rise to the conviction	Waiver by President when he or she determines it is in the paramount interests of the United States and notifies Congress
Davis-Bacon Act (40 U.S.C. § 3144) <sup>c</sup>	Failure to pay prescribed wages for laborers and mechanics	Mandatory	Comptroller General	3 years; government-wide	Not provided for

<sup>11</sup> (...continued)

paramount interests of the United States” with notice to Congress) *with* 40 U.S.C. § 3144 (making no provisions for waiver).

Statute	Cause of Debarment	Mandatory or Discretionary	Decision Maker	Duration & Scope	Waiver of Debarment
Drug-Free Workplace Act of 1988 (41 U.S.C. § 701(d))	Violations of the act as shown by repeated failures to comply with its requirements, or employing numerous individuals convicted of criminal drug violations	Mandatory	Head of the contracting agency	Up to 5 years; government-wide	Waiver under FAR procedures
Executive Order 11246, as amended	Failure to comply with equal employment opportunity and affirmative action requirements	Discretionary	Secretary of Labor	Lasts until the contractor complies with the EEO and affirmative action requirements; government-wide	Not provided for
Military Recruiting on Campus (10 U.S.C. § 983; 48 C.F.R. § 209.470)	Policy or practice prohibiting military recruiting on campus	Mandatory	Secretary of Defense	Lasts so long as the policy or practice triggering the suspension; limited to Department of Defense Contracts	Not provided for
Service Contract Act (41 U.S.C. § 354)	Failure to pay compensation due to employees under the act	Mandatory	Secretary of Labor or the head of any agency	3 years; government-wide	Waiver by the Secretary of Labor because of unusual circumstances
Walsh-Healy Act (41 U.S.C. § 37)	Failure to pay the minimum wage, requiring mandatory and uncompensated overtime, use of child labor, or maintenance of hazardous working conditions	Mandatory	Secretary of Labor	3 years; government-wide	Waiver by the Secretary of Labor; no criteria for waiver specified

**Source:** Congressional Research Service.

- a. The term “statutory” is used here, as is customary, to contrast all types of inducement exclusions — whatever their legal basis — with those exclusions under the FAR that are designed to protect the government’s interests in the procurement process.
- b. There are two other statutory provisions discussing debarment that are not included in this table because they provide for personal debarment. Section 862 of Title 21 of the United States Code allows the court sentencing an individual for violating federal or state laws on the distribution of controlled substances to debar that individual for up to one year, in the case of first-time

offenders, or for up to five years, in the case of repeat offenders. Section 2408 of Title 10 of the United States Code similarly prohibits persons who have been convicted of fraud or any other felony arising out of a contract with DOD from working in management or supervisory capacities on any DOD contract, or engaging in similar activities. Contractors who knowingly employ such “prohibited persons” are themselves subject to criminal penalties.

- c. The statutory debarment provided for in the Davis-Bacon Act is better known under its former location within the United States Code, 40 U.S.C. § 276a-2(a).

**Administrative Debarment and Suspension.** As a matter of policy, the federal government seeks to “prevent improper dissipation of public funds”<sup>12</sup> in its contracting activities by dealing only with responsible contractors.<sup>13</sup> Debarment and suspension promote this policy by precluding agencies from entering into new contractual dealings with contractors whose prior violations of federal or state law, or failure to perform under contract, suggest they are nonresponsible.<sup>14</sup> Because exclusions under the FAR are designed to protect the government’s interests, they may not be imposed solely to punish prior contractor misconduct.<sup>15</sup> Federal courts will overrule challenged agency decisions to debar contractors when agency officials seek to punish the contractor — rather than protect the government — in making their exclusion determinations.<sup>16</sup>

**Debarment.** The FAR allows agency officials to debar contractors from future executive branch contracts under three circumstances. First, debarment may be imposed when a contractor is convicted of or found civilly liable for any integrity offense. Integrity offenses include the following:

- fraud or criminal offenses in connection with obtaining, attempting to obtain, or performing a public contract
- violations of federal or state antitrust laws relating to the submission of offers
- embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receipt of stolen property
- intentional misuse of the “Made in America” designation

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<sup>12</sup> *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (“It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition.”) (internal citations omitted).

<sup>13</sup> 48 C.F.R. § 9.402(a) (directing agency contracting officers to “solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only”).

<sup>14</sup> *See id.* (“Debarment and suspension are discretionary actions that ... are appropriate means to effectuate [the] policy [of dealing only with responsible contractors].”).

<sup>15</sup> 48 C.F.R. § 9.402(b) (“The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment.”).

<sup>16</sup> *See, e.g., IMCO, Inc. v. United States*, 97 F.3d 1422, 1427 (Fed. Cir. 1996) (upholding an agency’s debarment determination but noting that the outcome would have been different had the debarment been imposed for purposes of punishment).



- other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor<sup>17</sup>

Second, debarment may be imposed when (1) the Secretary of Homeland Security or the Attorney General finds, by a preponderance of the evidence, that a contractor is not in compliance with the employment provisions of the Immigration and Nationality Act, or when (2) an agency official finds, by a preponderance of the evidence, that the contractor has committed serious violations of the terms of a government contract or subcontract;<sup>18</sup> committed violations of the Drug-Free Workplace Act of 1988;<sup>19</sup> intentionally affixed a “Made in America” label, or similar inscription, on ineligible products; or committed an unfair trade practice as defined in Section 201<sup>20</sup> of the Defense Production Act.<sup>21</sup> Finally, debarment may be imposed whenever an agency official finds, by the preponderance of the evidence, that there exists “any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor.”<sup>22</sup>

Debarments last for a “period commensurate with the seriousness of the cause(s),” generally not exceeding three years.<sup>23</sup> Debarment-worthy conduct can be

<sup>17</sup> 48 C.F.R. § 9.406-2(a)(1)-(5).

<sup>18</sup> For purposes of the FAR, serious violations of the terms of a government contract or subcontract include (1) willful failure to perform in accordance with a term of the contract or (2) a history of failure to perform or unsatisfactory performance under contract. 48 C.F.R. § 9.406-2(b)(1)(i)(A)-(B).

<sup>19</sup> Such violations include (1) failure to comply with the requirements in Section 52.223-6 of the FAR or (2) employment of so many persons who have been convicted of violating criminal drug statutes in the workplace as to indicate that the contractor failed to make good faith efforts to provide a drug-free workplace. 48 C.F.R. § 9.406-2(b)(1)(ii)(A)-(B). FAR 52.223-6 requires that contractors (1) publish a statement notifying employees that the manufacture, distribution, possession, or use of controlled substances in the workplace is prohibited and specifying actions to be taken in response to employee violations; (2) establish drug-free awareness programs to inform employees of the policy; (3) provide employees with a written copy of the policy; (4) notify employees that their continued employment is contingent upon their compliance with the policy; (5) notify agency contracting officials of employee convictions for violations of controlled substance laws; and (6) take steps to terminate or ensure treatment of employees convicted of violating controlled substance laws.

<sup>20</sup> Section 201 covers (1) violations of Section 337 of the Tariff Act of 1930; (2) violations of agreements under the Export Administration Act of 1979 or similar bilateral or multilateral export control agreements; or (3) knowingly false statements regarding material elements of certifications concerning the foreign content of an item.

<sup>21</sup> 48 C.F.R. § 9.406-4(b)(1)-(2).

<sup>22</sup> 48 C.F.R. § 9.406-4(c).

<sup>23</sup> 48 C.F.R. § 9.406-4(a)(1). Debarments are limited to one year for violations of the Immigration and Nationality Act, but can last up to five years for violations of the Drug-Free Workplace Act. 48 C.F.R. § 9.406-4(a)(1)(i)-(ii). The FAR allows debarring officials to extend the debarment for an additional period if they determine that an extension is necessary to protect the government’s interests. 48 C.F.R. § 9.406-4(b). Extension cannot

(continued...)

imputed from officers, directors, shareholders, partners, employees, or other individuals associated with a contractor to the contractor, and vice versa, as well as between contractors participating in joint ventures or similar arrangements.<sup>24</sup> Due process requires that contractors receive written notice of proposed debarments and of debaring officials' decisions, as well as the opportunity to present evidence within the decision-making process for all debarments except those based upon contractors' convictions.<sup>25</sup>

**Suspension.** The FAR also allows agency officials to suspend government contractors (1) when the officials suspect, upon adequate evidence, any of the following offenses, or (2) when contractors are indicted for any of the following offenses:

- fraud or criminal offenses in connection with obtaining, attempting to obtain, or performing a public contract
- violation of federal or state antitrust laws relating to the submission of offers
- embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receipt of stolen property
- violations of the Drug-Free Workplace Act of 1988<sup>26</sup>
- intentional misuse of the "Made in America" designation
- unfair trade practices, as defined in Section 201 of the Defense Production Act<sup>27</sup>
- other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor<sup>28</sup>

Agency officials may also suspend a contractor when they suspect, upon adequate evidence, that there exists "any other cause of so serious or compelling a nature that it affects the present responsibility of a ... contractor or subcontractor."<sup>29</sup>

A suspension lasts only as long as an agency's investigation of the conduct for which the contractor was suspended, or any ensuing legal proceedings. It may not

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<sup>23</sup> (...continued)

be based solely upon the facts and circumstances upon which the initial debarment was based, however. *Id.*

<sup>24</sup> 48 C.F.R. § 9.406-5(a)-(c).

<sup>25</sup> 48 C.F.R. § 9.406-3. When debarment is based on a conviction, the hearing that the contractor received prior to the conviction suffices for due process in the debarment proceeding.

<sup>26</sup> See *supra* note 19 for a description of what conduct violates the Drug-Free Workplace Act.

<sup>27</sup> See *supra* note 20 for a listing of unfair trade practices under Section 201 of the Defense Production Act.

<sup>28</sup> 48 C.F.R. § 9.407-2(a)-(b).

<sup>29</sup> 48 C.F.R. § 9.407-2(c).

exceed 18 months unless legal proceedings have been initiated within that period.<sup>30</sup> Suspension-worthy conduct can be imputed, just like debarment-worthy conduct,<sup>31</sup> and similar due-process protections apply.<sup>32</sup>

***Agency Discretion, Administrative Agreements, Continuation of Current Contracts, and Waivers.*** Not all contractors who engage in conduct that could lead to debarment or suspension under the FAR are actually excluded, permanently or temporarily, from contracting with executive branch agencies. Nor does the debarment or suspension of a contractor guarantee that executive branch agencies do not presently have contracts with that contractor, or will not contract with that contractor before the exclusion period ends. Several aspects of the exclusion process under the FAR explain why this is so.

First, under the FAR, debarment or suspension of contractors is discretionary.<sup>33</sup> The FAR says that agencies “may debar” or “may suspend” a contractor when grounds for exclusion exist,<sup>34</sup> but it does not require them to do so.<sup>35</sup> Rather, the FAR advises contracting officers to focus upon the public interest in making debarment determinations.<sup>36</sup> The public interest encompasses both (1) safeguarding public funds by excluding contractors who may be nonresponsible from contracting with the government and (2) avoiding economic injury to contractors who might technically be excludable but are fundamentally responsible and safe for the government to contract with.<sup>37</sup> Because of this focus on the public interest, agency officials can find that contractors who engaged in exclusion-worthy conduct should *not* be excluded because they appear unlikely to engage in similar conduct in the future.<sup>38</sup> Any circumstance suggesting that a contractor is unlikely to repeat past misconduct — such as changes in personnel or procedures, restitution, or cooperation in a government investigation — can potentially incline an agency’s decision against

<sup>30</sup> 48 C.F.R. § 9.407-4(a).

<sup>31</sup> 48 C.F.R. § 9.407-5.

<sup>32</sup> 48 C.F.R. § 9.407-3(a)-(d). The due process protections with suspension are not as extensive as those with debarment because suspension is “less serious” than debarment.

<sup>33</sup> 48 C.F.R. § 9.402(a) (“Debarment and suspension are discretionary actions.”).

<sup>34</sup> 48 C.F.R. § 9.406-2(a), 9.407-1(a).

<sup>35</sup> 48 C.F.R. § 9.406-1(a) (“The existence of a cause for debarment ... does not necessarily require that the contractor be debarred.”).

<sup>36</sup> *Id.* Suspensions under the FAR are based on the standard of the “government’s interests.” 48 C.F.R. § 9.407-1(a). This is broadly similar, but not identical, to the “public interest,” which is why the focus of this paragraph is limited to debarments.

<sup>37</sup> *See, e.g., Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 14-15 (D.C. Cir. 1998) (“Suspending a contractor is a serious matter. Disqualification from contracting ‘directs the power and prestige of government’ at a single entity and may cause economic injury.”).

<sup>38</sup> 48 C.F.R. § 9.406-1(a). *See, e.g., Roemer v. Hoffman*, 419 F. Supp. 130, 132 (D.D.C. 1976) (stating that the proper focus, in debarment determinations, is upon whether the contractor is presently responsible notwithstanding the past misconduct).

debarment.<sup>39</sup> Moreover, exclusion can be limited to particular “divisions, organizational elements, or commodities” of a company if agency officials find that only segments of a business engaged in wrongdoing.<sup>40</sup> Other contractors cannot challenge agency decisions not to propose a contractor for debarment or not to exclude a contractor proposed for debarment.<sup>41</sup> They can only contest an agency’s certification of a contractor’s present responsibility,<sup>42</sup> which is required prior to a contract award.<sup>43</sup>

Second, agencies can use administrative agreements as alternatives to debarment.<sup>44</sup> In these agreements, the contractor generally admits its wrongful conduct and agrees to restitution; separation of employees from management or programs; implementation or extension of compliance programs; employee training; outside auditing; agency access to contractor records; or other remedial measures.<sup>45</sup> The agency, for its part, reserves the right to impose additional sanctions, including debarment, in the future if the contractor fails to abide by the agreement or engages in further misconduct.<sup>46</sup> Such agreements are not explicitly provided for within the FAR, but are within agencies’ general authority to determine with whom they contract.<sup>47</sup> Only the agency signing the agreement is a party to it, and other agencies may not be aware of the agreement’s existence, a situation which the Government Accountability Office (GAO) has suggested should be remedied in order to provide

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<sup>39</sup> 48 C.F.R. § 9.406-1(a)(1)-(10).

<sup>40</sup> *Id.* at (b). *See, e.g.,* Peter Kiewit Sons’ Co. v. Army Corp. of Eng’rs, 534 F. Supp. 1139, 1155 (D.D.C. 1982), *rev’d on other grounds*, 714 F.2d 170 (D.C. Cir. 1983) (holding that an agency cannot properly debar a corporation-contractor based upon the misconduct of two subsidiaries and a corporate division).

<sup>41</sup> *See, e.g.,* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (holding that agency refusal to act is generally not judicially reviewable).

<sup>42</sup> *See, e.g.,* Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1334-39 (Fed. Cir. 2001) (upholding a challenged agency responsibility determination).

<sup>43</sup> 48 C.F.R. § 9.103(b) (“No purchase or award shall be made unless the contracting official makes an affirmative determination of responsibility.”).

<sup>44</sup> Office of Management and Budget, *Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations*, Aug. 31, 2006, available at [<http://www.whitehouse.gov/omb/memoranda/fy2006/m06-26.pdf>] (“Agencies can sometimes enter into administrative agreements ... as an alternative to suspension or debarment.”).

<sup>45</sup> Alan M. Grayson, *Suspension and Debarment* 37-38 (1991).

<sup>46</sup> *See, e.g.,* United States Department of State, Bureau of Political Military Affairs, In the Matter of General Motors Corporation & General Dynamics Corporation, Oct. 22, 2004, available at [[http://www.contractormisconduct.org/ass/contractors/26/cases/108/528/general-dynamics-4\\_ca.pdf](http://www.contractormisconduct.org/ass/contractors/26/cases/108/528/general-dynamics-4_ca.pdf)].

<sup>47</sup> 48 C.F.R. § 1.601(a) (“Unless specifically prohibited by another provision of law, authority and responsibility to contract ... are vested in the agency head.”).

contracting officers with more complete information about contractors' responsibility when making awards.<sup>48</sup>

Third, even when a contractor is debarred, suspended, or proposed for debarment under the FAR, an agency may generally allow the contractor to continue performance under any current contracts or subcontracts unless the agency head directs otherwise.<sup>49</sup> The debarment or suspension serves only to preclude an excluded contractor from (1) receiving contracts from executive branch agencies; (2) serving as a subcontractor on certain contracts with executive branch agencies;<sup>50</sup> or (3) serving as an individual surety for the duration of the debarment or suspension.<sup>51</sup> Any contracts that the excluded contractor presently has remain in effect unless they are terminated for default or for convenience under separate provisions of the FAR.<sup>52</sup>

Finally, the FAR authorizes agencies to waive a contractor's exclusion and enter into new contracts with a debarred or suspended contractor.<sup>53</sup> For an exclusion to be waived, an agency head must "determine, in writing, that there is a compelling reason to do so."<sup>54</sup> Compelling reasons exist when (1) goods or services are available only from the excluded contractor; (2) an urgent need dictates dealing with the excluded contractor; (3) the excluded contractor and the agency have entered an agreement not to debar the contractor that covers the events upon which the debarment is based; or (4) reasons relating to national security require dealings with the excluded contractor.<sup>55</sup> Waivers are agency-specific and are not regularly communicated to other agencies, a situation which the GAO has also suggested remedying.<sup>56</sup> Agency determinations about the existence of compelling reasons are not, *per se*, reviewable by the courts; however, other contractors can challenge awards to formerly excluded

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<sup>48</sup> GAO, *Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process* 12-13 (2005), available at [<http://www.gao.gov/highlights/d05479high.pdf>].

<sup>49</sup> 48 C.F.R. § 9.405-1(a). However, when the existing contracts or subcontracts are "indefinite quantity" contracts, an agency may not place orders exceeding the guaranteed minimum. 48 C.F.R. § 9.405-1(b)(1). Similarly, an agency may not (1) place orders under optional use Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements with excluded contractors or (2) add new work, exercise options, or otherwise extend the duration of current contracts or orders. 48 C.F.R. § 9.405-1(b)(2)-(3).

<sup>50</sup> With subcontracts that are subject to agency consent, there can be no consent unless the agency head provides compelling reasons for the subcontract. 48 C.F.R. § 9.405-2(a). With subcontracts that are not subject to agency consent, there must be compelling reasons for the subcontract only when its amount exceeds \$30,000. 48 C.F.R. § 9.405-2(b).

<sup>51</sup> 48 C.F.R. § 9.405(a)-(c); § 9.405-2(a)-(b).

<sup>52</sup> See 48 C.F.R. § 49.000-607.

<sup>53</sup> 48 C.F.R. § 9.405(a).

<sup>54</sup> *Id.*

<sup>55</sup> Defense Federal Acquisition Regulation Supplement (DFARS) § 209.405(a)(2)(i)-(iv), available at [<http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html>].

<sup>56</sup> *Federal Procurement*, *supra* note 48, at 14.

contractors through the customary bid protest process.<sup>57</sup> Moreover, even when an agency does not waive a contractor’s exclusion, it can reduce the period or extent of debarment if the contractor shows (1) newly discovered material evidence; (2) reversal of the conviction or civil judgment on which the debarment was based; (3) bona fide changes in ownership or management; (4) elimination of other causes for which the debarment was imposed; or (5) other appropriate reasons.<sup>58</sup>

**Excluded Parties List System.** A key aspect of the administrative debarment and suspension system under the FAR is the Excluded Parties List System (EPLS). The FAR requires that the General Services Administration (GSA) operate a Web-based EPLS ([<https://www.epls.gov>]), into which agencies must submit information on all excluded contractors within five working days of the exclusion determination.<sup>59</sup> All executive branch agencies have access to the EPLS, and contractors listed in the EPLS are “excluded from receiving contracts” from executive branch agencies.<sup>60</sup> The EPLS thus helps to ensure that exclusions of contractors under the FAR are effective throughout the executive branch.<sup>61</sup>

The EPLS only includes contractors who are currently debarred or suspended, have been previously debarred or suspended, or have been proposed for debarment.<sup>62</sup> It does not include contractors who made voluntary changes to their personnel or policies in order to show continuing responsibility, or who entered administrative agreements with government agencies. In fact, the inclusion of administrative agreements in the EPLS is one of the changes that the GAO has recommended to improve the suspension and debarment process.<sup>63</sup>

**Table 2. Comparison of Statutory and Administrative Debarments**

Characteristic	Statutory Debarments	Administrative Debarments
Authority for debarments	Various statutes	FAR (Part 9); Office of Federal Procurement Policy Act

<sup>57</sup> 48 C.F.R. § 33.103 & 104.

<sup>58</sup> 48 C.F.R. § 9.406-4(c)(1)-(5).

<sup>59</sup> 48 C.F.R. § 9.404(a)(1), (c)(3).

<sup>60</sup> 48 C.F.R. § 9.405(a).

<sup>61</sup> 48 C.F.R. § 9.406-1(c).

<sup>62</sup> 48 C.F.R. § 9.404(c)(6).

<sup>63</sup> *Federal Procurement*, *supra* note 48, at 14.

Characteristic	Statutory Debarments	Administrative Debarments
Basis for debarments	Specified violations of statutes (e.g., violations of federal or state controlled substance laws; certain violations of the Buy American Act, Clean Air Act, Clean Water Act; etc.)	1. Contractors convicted of or found civilly liable for specified offenses 2. Agency officials found contractors engaged in specified conduct 3. Other causes affect present responsibility
Debarring official	Generally head of the agency administering the statute	Head of the contracting agency or a designee
Purpose	Often mandatory, occasionally discretionary	Always discretionary
Scope	Punitive	Preventative; cannot be punitive
Duration	Prescribed by statute	Commensurate with the offense, generally not over 3 years
Extent	Government-wide	Executive branch agencies
Waiving official	Generally the head of the agency administering the statute	Head of the contracting agency

**Source:** Congressional Research Service.

## Recently Enacted and Proposed Amendments

The magnitude of federal spending on contracts, coupled with recent high-profile examples of contractor misconduct, heightened congressional interest in debarment and suspension. As the largest purchaser of goods and services in the world, the federal government spent more than \$439 billion on government contracts in FY2007 alone.<sup>64</sup> Some of this spending was with contractors who reportedly received contract awards despite having previously engaged in serious misconduct, such as failing to pay taxes, bribing foreign officials, falsifying records submitted to

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<sup>64</sup> USASpending.gov, *Contracts and Other Spending in Billions of Dollars (2008)*, available at [<http://www.usaspending.gov/index.php>].

the government, and performing contractual work so poorly that fatalities resulted.<sup>65</sup>

Given this context, Members of the 110<sup>th</sup> Congress considered several bills that would have strengthened the existing debarment and suspension regime. Some of these bills have been enacted, including the Sudan Accountability and Divestment Act (P.L. 110-174); a Supplemental Appropriations Act (P.L. 110-252, §§ 6101-03);<sup>66</sup> and the Duncan Hunter National Defense Authorization Act (P.L. 110-417, §§ 871-73).<sup>67</sup> Many other bills were not enacted, but sought to make debarment and suspension more effective means of excluding nonresponsible contractors by (1) creating new statutory debarments; (2) supplementing the FAR provisions on contractor responsibility, debarment, and suspension; and (3) increasing the information about contractors' responsibility available to contracting officers. Similar legislation may be put forward in the 111<sup>th</sup> Congress.

**Amendments Enacted in the 110<sup>th</sup> Congress.** The 110<sup>th</sup> Congress enacted several amendments to the pre-existing debarment and suspension laws. These amendments are briefly summarized below, with analysis of the approach to strengthening debarment and suspension represented by each enacted amendment saved for the following section.

First, the Sudan Accountability and Divestment Act created a new statutory debarment. It required the heads of executive agencies to ensure that all agency contracts for the procurement of goods and services include a clause requiring the contractor to certify that it does not conduct business operations, as defined under the act, in Sudan.<sup>68</sup> Agency heads may debar or suspend for up to three years contractors who are found to have falsely certified that they do not conduct business in Sudan.<sup>69</sup>

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<sup>65</sup> See, e.g., Project on Government Oversight, *Federal Contractor Misconduct: Failures of the Suspension and Debarment System* (2002), available at [<http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html>] (“[S]ince 1990, 43 of the government’s top contractors paid approximately \$3.4 billion in fines/penalties, restitution, and settlements. Furthermore, four of the top 10 government contractors have at least two criminal convictions. And yet, only one of the top 43 contractors has been suspended or debarred from doing business with the government, and then, for only five days.”); Kathleen Day, Medicare Contractors Owe Taxes, GAO Says, *The Washington Post*, Mar. 20, 2007, at D1 (failure to pay taxes); Contract Fraud Loophole Exempts Overseas Work, *Grand Rapids Press*, Mar. 2, 2008, at A9 (bribery of foreign officials); Ron Nixon & Scott Shane, Panel to Discuss Concerns on Contractors, *New York Times*, July 18, 2007, at A15 (falsified records); Terry Kivlan, Shoddy Standards Blamed for Troop Electrocutions in Iraq, *National Journal’s Congress Daily, PM Edition*, July 11, 2008 (poor quality work causing fatalities).

<sup>66</sup> These sections of the Supplemental Appropriations Act are sometimes known as the “Close the Contractor Fraud Loophole Act.”

<sup>67</sup> These sections of the Duncan Hunter National Defense Authorization Act are sometimes called the “Clean Contracting Act.”

<sup>68</sup> P.L. 110-174, § 6(a), 121 Stat. 2520.

<sup>69</sup> *Id.* at § 6(b)(3).



Second, the Supplemental Appropriations Act of 2008 augmented the FAR provisions on contractor responsibility, debarment, and suspension. It amended the FAR to require that contractors provide timely notification of violations of federal criminal law or overpayments in connection with the award or performance of a “covered contract or subcontract.”<sup>70</sup> Covered contracts or subcontracts are those that are greater than \$5 million in amount and more than 120 days in duration, regardless of whether they are performed outside the United States or include commercial items.<sup>71</sup> The act did not specify whom contractors are to notify, but regulations implementing the act require notification of both the contracting agency’s inspector general and the contracting officer.<sup>72</sup>

Third, the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 increased the information about contractors’ responsibility available to contracting officers. It required the creation of a database with information beyond that in the EPLS for use by agency officials.<sup>73</sup> The database covers all contractors that have at least one government contract worth \$500,000 or more.<sup>74</sup> For these contractors, the database includes a brief description of all civil, criminal, or administrative proceedings involving contracts with the federal government that resulted in a conviction or a finding of fault within the past five years.<sup>75</sup> It also includes all terminations for default, administrative agreements, and nonresponsibility determinations relating to federal contracts within the past five years.<sup>76</sup> Entities with contracts worth more than \$10 million, in total, are required to submit this information as part of the award process and update the information semiannually.<sup>77</sup> Access to the database is limited to acquisition officials of federal agencies, other government officials as appropriate, and the chairman and ranking Member of the congressional committees with jurisdiction.<sup>78</sup> The act also called for the Interagency Committee on Debarment and Suspension to resolve which of multiple agencies wishing to exclude a contractor should be the lead agency in bringing exclusion proceedings and to coordinate exclusion actions among

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<sup>70</sup> P.L. 110-252, §§ 6101-03, 122 Stat. 2323. Previously, under FAR 9.405 and 52.209-5(a), contractors with awards worth more than \$30,000 had to disclose the existence of indictments, charges, convictions, or civil judgments against them. Disclosure of existing legal proceedings is, however, different from disclosure of grounds upon which future legal proceedings could be based.

<sup>71</sup> *Id.*

<sup>72</sup> DoD, GSA & NASA, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,093 (Nov. 12, 2008).

<sup>73</sup> P.L. 110-417, §§ 871-73, 122 Stat. 4356.

<sup>74</sup> *Id.* at § 872(b)(1).

<sup>75</sup> *Id.* at § 872(c).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at § 872(f).

<sup>78</sup> *Id.* at § 872(e)(1).

agencies.<sup>79</sup> The involvement of the Interagency Committee is potentially significant because although the FAR previously encouraged agencies to coordinate their exclusion efforts, it provided no requirement or mechanism for them to do so.<sup>80</sup>

**Amendments Proposed in the 110<sup>th</sup> Congress.** In addition to these enacted amendments to the pre-existing debarment and suspension laws, the 110<sup>th</sup> Congress considered numerous other bills addressing contractor exclusion. The proposals in these bills can be broadly categorized as involving one or more of the following three approaches to making debarment and suspension more effective means of excluding nonresponsible contractors. These approaches are (1) creating new statutory debarments covering additional misconduct; (2) supplementing the FAR provisions on contractor responsibility, debarment, and suspension; and (3) increasing the information about contractors' responsibility available to contracting officers in their decision making. Because similar proposals are likely in the 111<sup>th</sup> Congress, the approaches which these proposals exemplified are analyzed in the following paragraphs.

**New Statutory Debarments.** Members of the 110<sup>th</sup> Congress introduced several bills that would have created new statutory debarments for various types of perceived misconduct by contractors. Some proposed debarments would have addressed typical procurement concerns, such as those for contractors who violate the Foreign Corrupt Practices Act, or similar applicable laws in foreign countries;<sup>81</sup> misrepresent themselves as qualifying small businesses under the Small Business Act;<sup>82</sup> procure sweatshop goods for the government;<sup>83</sup> or knowingly fail to report violations of federal criminal law or receipt of "significant overpayments" in connection with a government contract to the inspector general of the contracting agency.<sup>84</sup> Other proposed statutory debarments would have promoted broader policy goals, such as compliance with immigration law;<sup>85</sup> protection of national security;<sup>86</sup> and payment of income taxes.<sup>87</sup> Some of the proposed statutory debarments would also have added to or changed the executive branch personnel involved in exclusion

<sup>79</sup> *Id.* at § 873(a)(1)-(2).

<sup>80</sup> 48 C.F.R. § 9.402(c) ("When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods or procedures for coordinating their actions.").

<sup>81</sup> *See, e.g.*, H.R. 6426 § 11 (debarment from Department of Defense contracts only).

<sup>82</sup> *See, e.g.*, H.R. 1873 § 302.

<sup>83</sup> *See, e.g.*, H.R. 1992 § 318.

<sup>84</sup> *See, e.g.*, S. 2916 § 2. Although similar to the amendment to the FAR made by P.L. 110-252, this provision of S. 2916 was not tied to the FAR and so would have created a new statutory debarment.

<sup>85</sup> *See, e.g.*, H.R. 1591 § 569; H.R. 3496 § 2; H.R. 3867 § 206. The debarment in H.R. 1591 § 569 was not included in H.R. 2206, the version of the bill enacted as P.L. 110-28.

<sup>86</sup> *See, e.g.*, S. 680, as introduced, § 128 (allowing the head of an executive agency to debar a contractor after finding the contractor to be a "serious threat to national security").

<sup>87</sup> *See, e.g.*, H.R. 4881 § 3 (debarment of contractors with delinquent tax debt).

or waiver determinations. Requiring an agency's inspector general to review all contracts worth more than a specified amount and report any improper conduct or wrongdoing to the agency head for possible exclusion was one approach proposed in the 110<sup>th</sup> Congress.<sup>88</sup> Another approach proposed in the 110<sup>th</sup> Congress required the agreement of multiple executive branch agency heads to waive an exclusion.<sup>89</sup>

Such statutory debarments have some advantages as a strategy for checking contractor misconduct. Their use could allow Congress to remove agency discretion in excluding contractors by substituting mandatory debarments under statute for discretionary ones under the FAR. However, to be sure that exclusion necessarily follows specified conduct, statutes would probably need to state that agency officials *shall* debar contractors for engaging in that conduct, rather than that agency officials *may* debar contractors, or *shall consider* debarring contractors, for engaging in that conduct.<sup>90</sup> Statutory debarments can also be punishments for past misconduct, unlike administrative debarments. A statutory debarment can explicitly link a contractor's prior actions (e.g., hiring illegal immigrants) to its future ability to contract with the federal government.<sup>91</sup> Administrative debarments, in contrast, are currently "not for purposes of punishment"<sup>92</sup> and must be based on the public interest in protecting public funds from nonresponsible contractors.<sup>93</sup> Further, statutes mandating or allowing debarment can require the involvement of agency personnel who are not involved in exclusion decisions under the FAR, or impose more stringent conditions on waivers than the FAR imposes. Agency inspectors general, for example, are not routinely involved in agency contracting activities under the FAR. They are thus less prone than agency contracting officials, who deal with contractors on a regular basis, to become "too close" to specific contractors to make effective exclusion determinations about them,<sup>94</sup> and their involvement in agency exclusion processes

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<sup>88</sup> See, e.g., H.R. 1684 § 301.

<sup>89</sup> See, e.g., H.R. 1591, as engrossed by the Senate, § 569 (waiver possible only when the Administrator of GSA, the Secretary of Homeland Security, and the Attorney General agree that it is "necessary to national defense or in the interest of national security"); H.R. 6782 § 7 (waiver, in cases involving convictions for violation of immigration laws, only possible with the consent of the Administrator of GSA, Secretary of Homeland Security, and Attorney General).

<sup>90</sup> Compare H.R. 1591, as engrossed by the Senate, § 569 (requiring debarment of contractors who hire illegal aliens) with S. 680, as introduced, § 128 (granting agency heads discretion to debar on the basis of national security) and H.R. 1585 § 804 (stating that the Secretary of Defense "shall consider" debarring or suspending contractors who engage in certain conduct).

<sup>91</sup> See, e.g., H.R. 1591, as engrossed by the Senate, § 569 ("[A]n employer who holds a Federal contract, grant, or cooperative agreement and is determined to have violated this section shall be debarred from the receipt of new Federal contracts ... for ... 10 years.").

<sup>92</sup> Congress could theoretically legislate changes to the FAR to allow punitive debarments or suspensions under the FAR.

<sup>93</sup> 48 C.F.R. § 9.406-1(a).

<sup>94</sup> See, e.g., Kenneth P. Doyle, Ex-CIA Official Foggo Pleads Guilty to One Count of Honest-Services Fraud, 90 *Fed. Cont. Rep.* 271 (Oct. 7, 2008) (describing how a contracting (continued...)

could provide a check on agency decision making.<sup>95</sup> Allowing waivers only when two executive branch agency heads agree,<sup>96</sup> or with the President's consent,<sup>97</sup> likewise imposes more stringent conditions on waivers than does the FAR. The FAR allows the head of each federal agency to make an independent waiver determination for his or her agency.<sup>98</sup>

The proliferation of statutory debarments could pose other problems, however. Drafters of statutes requiring or allowing debarment would have to ensure that the legislative vehicles used to introduced statutory debarments do not inadvertently limit the debarments' scope. Debarments introduced in appropriations bills, for example, could be limited to contractors dealing with particular agencies if the bill specified that the debarment was from funds appropriated under the legislation.<sup>99</sup> In this example, similar provisions would need to be introduced into the appropriations for all agencies to ensure that the statutory debarment has government-wide effect. Statutory debarments, when mandatory, could also limit agency flexibility in dealing with contractors and meeting agency needs. A statute specifying that "contractors shall be debarred" would not allow agency officials the discretion not to debar a contractor that made changes in its personnel or policies, or the flexibility to enter an administrative agreement in lieu of debarment. Further, such a statute would probably substitute waivers only by the President, or the head of the agency administering the statute, for waivers by individual agency heads.<sup>100</sup>

**Changes to the FAR.** In addition to proposals creating further statutory exclusions, the 110<sup>th</sup> Congress considered several proposals to supplement the FAR provisions on contractor responsibility, debarment, and suspension. Proposed changes to the FAR included the following:

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<sup>94</sup> (...continued)

official at the Central Intelligence Agency steered agency contracts to a contractor owned by his friend in exchange for money); Boeing Reaches Tentative \$615 Million Settlement with Government Due to Contract Scandals, 85 *Fed. Cont. Rep.* 544 (May 16, 2006) (describing how an Air Force contracting official was influenced in her official decisions by her discussions about future employment with one contractor). Debarment and suspension determinations under the FAR are ultimately made by the agency head, or his or her designee. *See* 48 C.F.R. § 9.403. However, these determinations are based upon the recommendations of contracting officers who work closely with the contractors. *See Grayson, supra* note 45, at 23.

<sup>95</sup> *See, e.g.*, H.R. 1684 § 301.

<sup>96</sup> *See, e.g., id.*; H.R. 6782 § 7.

<sup>97</sup> *See, e.g.*, H.R. 1581 § 301 (allowing the President to waive debarment upon a determination that the waiver "is in the national security interest of the United States").

<sup>98</sup> 48 C.F.R. § 9.405(a) (allowing waivers when agency heads find compelling reasons).

<sup>99</sup> *See, e.g.*, S. 3182 § 507 (debarment from funds appropriated to the Departments of Commerce and Justice and related agencies). *See also* H.R. 2638 § 8038; H.R. 3867 § 206; and H.R. 6426 § 11 for other agency-specific debarments.

<sup>100</sup> *Compare* 33 U.S.C. § 1368 (waiver by the President) *with* 48 C.F.R. § 9.405(a) (waiver by agency heads).

- specifying that a contractor cannot be found responsible *unless* it engages in certain desirable conduct, or *if* it engages in certain undesirable conduct;<sup>101</sup>
- specifying that certain conduct indicates a “lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor;”<sup>102</sup>
- adding conduct to the grounds upon which an excluding official may propose a contractor for debarment or may suspend a contractor;<sup>103</sup>
- requiring that agency officials propose contractors who engage in certain conduct for debarment;<sup>104</sup>
- requiring contractors to supply additional information to the agency in its bid or offer for use in agency decision making;<sup>105</sup> and
- requiring excluding officials to justify in writing their decision not to debar or suspend a contractor who engaged in certain conduct.<sup>106</sup>

Such amendments to the FAR could increase the likelihood of government-wide administrative debarment and non-award of contracts to nonresponsible contractors without creating numerous statutory debarment provisions scattered throughout the United States Code. For example, language specifying that contractors cannot be

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<sup>101</sup> See, e.g., H.R. 3383 § 2 (“Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall prescribe in regulations a requirement that a contracting officer of the Department of Defense may not determine a contractor to be responsible for purposes of the award of a covered contract ... unless the entity to be awarded the contract has in place ... an internal ethics compliance program.”). See also S. 606 § 102 (precluding a contractor from being found responsible if it has exhibited a pattern of overcharging the government or failing to comply with the law); S. 2394 § 3 (establishing that a contractor that has tax debt cannot be responsible); H.R. 4779 § 2105 (stating the certain misconduct effects present responsibility).

<sup>102</sup> See, e.g., H.R. 3854 § 4 (“The imposition of liquidated damages on a contractor or subcontractor for failure to comply with the procedures for the substitution of subcontractors on 2 contracts within a 3-year period shall be deemed to be adequate evidence of the commission of an offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor within the meaning of part 9.4 of the [FAR].”).

<sup>103</sup> See, e.g., S. 2394 § 8 (adding (1) knowingly making false statements regarding federal tax information and (2) convictions or civil judgments of liability for tax evasion or other tax offenses to the list of causes of debarment and suspension in the FAR).

<sup>104</sup> See, e.g., H.R. 4881 § 3 (addressing knowingly making false statements regarding federal tax information).

<sup>105</sup> See, e.g., *id.* (covering tax debt).

<sup>106</sup> See, e.g., S. 2394 § 8 (knowingly making false statements regarding federal tax information). Such proposed requirements differ from the pre-existing requirement that agencies document their decisions not to debar whenever a notice of proposed debarment has been issued. 48 C.F.R. § 9.404. Under the proposed requirements, agencies would have to justify the nonexclusion of all contractors who engage in certain conduct, not just those contractors whom agency officials determine should be considered for exclusion.

found responsible if they have engaged in certain conduct<sup>107</sup> would ensure that no contracts are awarded to these contractors because a contractor must be found responsible to be awarded a contract.<sup>108</sup> Similarly, language specifying that contractors who engage in certain conduct must be proposed for debarment<sup>109</sup> would ensure that agencies at least consider debarring these contractors, even if they ultimately decide against debarment. However, statutes that stop short of requiring findings of nonresponsibility or exclusion in certain situations<sup>110</sup> would continue agency officials' existing discretion to find contractors responsible for awards and make exclusion determinations.<sup>111</sup> Thus, changing the FAR to specify only that certain conduct indicates "a lack of business integrity or business honesty,"<sup>112</sup> or to create additional grounds for debarment or suspension,<sup>113</sup> might only minimally increase the likelihood of exclusion or non-award under the FAR. Similarly, requiring agency officials to justify nonexclusion or award determinations in writing<sup>114</sup> might not decrease the frequency of nonexclusion or non-award determinations even though written justifications could be subjected to increased public scrutiny.

***Increasing Information Available About Contractors' Responsibility.***

A third approach found in legislative proposals in the 110<sup>th</sup> Congress to better ensure that the government does not contract with nonresponsible contractors involved increasing the information about contractors' responsibility available to agency officials in the hopes that nonresponsible contractors can be more easily detected and avoided. The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 implemented some of these proposed changes, but the full range of proposed changes was broader than the provisions enacted in the Duncan Hunter Act.

Creation of a centralized database with information beyond that currently available in the EPLS was one commonly proposed method of increasing the information available about contractors' responsibility. Proposed legislation called for this expanded database to include some or all of the following information about contractors:

- state or federal civil, criminal, or administrative proceedings;
- federal contracts terminated for default;
- administrative agreements between the contractor and federal or state governments;

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<sup>107</sup> See, e.g., S. 2394 § 3.

<sup>108</sup> 48 C.F.R. § 9.103(b) ("No purchase or award shall be made unless the contracting officials make an affirmative determination of responsibility.").

<sup>109</sup> See, e.g., H.R. 4881 § 3.

<sup>110</sup> See, e.g., S. 2394 § 3 (contractors with delinquent tax debt cannot be found responsible); H.R. 3383 § 2 (contractors without ethics compliance programs cannot be found responsible).

<sup>111</sup> 48 C.F.R. § 9.406-2(a); 9.407-1(a).

<sup>112</sup> See, e.g., H.R. 3854 § 4.

<sup>113</sup> See, e.g., S. 2394 § 8.

<sup>114</sup> See, e.g., S. 2904 § 8.

- final findings of nonresponsibility by federal or state procurement officials;
- assessments of the quality of work on federal or state awards;
- findings of federal or state audit disputes;
- orders from federal or state agencies asking the contractor to show cause why it should not be excluded;
- publicly available government reports, such as those from the GAO, Congressional Budget Office, and agency inspectors general, concerning contractor performance or specific instances of waste, fraud, and abuse; and
- evidence of repeated, pervasive, or significant violations of law by contractors.<sup>115</sup>

Requiring contractors to supply this information, or other information, as part of the contract award process was another proposed method for increasing the information available about contractors' responsibility.<sup>116</sup>

A related strategy sought to increase the information available to Congress and the public about agencies' contracting activities so that problematic agency actions could be detected more readily. Such proposals often required agency officials to justify in writing their decisions not to exclude contractors who engaged in specified conduct<sup>117</sup> or to find a contractor who had engaged in specified conduct "responsible."<sup>118</sup> Reporting to Congress on the number of annual exclusions imposed by agencies<sup>119</sup> or the number of waivers granted for compelling reasons<sup>120</sup> were other proposals.

Because the EPLS currently lists only those contractors who are presently excluded, have previously been excluded, or have been proposed for debarment,<sup>121</sup> an expanded database with information about civil, criminal, or administrative proceedings involving contractors, assessments of the quality of contractors' work on

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<sup>115</sup> See, e.g., H.R. 5658 § 4502 (calling for information on civil, criminal or administrative proceedings, terminations for default, administrative agreements, and findings of nonresponsibility); H.R. 3033 § 2 (same); S. 3139 § 201 (same); H.R. 6411 § 7 (adding assessments of the quality of work on federal contracts, audit disputes, and show-cause orders to the elements of H.R. 5658 and requiring inclusion of government reports); S. 3139 § 201 (requiring inclusion of evidence of violations of law).

<sup>116</sup> See, e.g., H.R. 3033 § 5 (requiring contractors to disclose information about criminal, civil, and administrative proceedings, etc., in writing when bidding); H.R. 4881 § 3 (requiring contractors to submit a form certifying that they do not have seriously delinquent tax debt and authorizing the Secretary of the Treasury to disclose information describing any seriously delinquent tax debts to the agency head).

<sup>117</sup> See, e.g., S. 2394 § 8.

<sup>118</sup> See, e.g., S. 3139 § 201.

<sup>119</sup> See, e.g., H.R. 2033 § 5.

<sup>120</sup> See, e.g., H.R. 3383 § 3.

<sup>121</sup> 48 C.F.R. § 9.404(c)(6).

federal or state contracts, and similar information<sup>122</sup> would significantly increase the information available to agency officials in their decision making. In principle, more extensive information should lead to better decision making by giving agency officials a more thorough picture of contractors' responsibility. In practice, however, more extensive information about past misconduct might not necessitate different contracting decisions given the FAR's current focus upon present and future responsibility, rather than past misconduct *per se*.<sup>123</sup> Moreover, increased quantities of information to be scrutinized by agency officials carry their own costs, especially when some of the information could concern situations in which the contractor was ultimately found not to be at fault.<sup>124</sup> Agency employees could have to spend additional time in reviewing the broader range of information in any expanded database, and they would not be able to rely on mere listings of civil, criminal, or administrative proceedings to make decisions if *all* proceedings — and not just those that ended with findings of contractor fault — were listed. Requiring contractors to supply information as part of the award process would ensure that agency officials do not have to spend time gathering this information, although they still might have to verify the information and enter it into the database.

Reports to Congress on agency exclusions are not currently required under the FAR, or under most statutes prescribing debarments, so this change could potentially increase the quality of agency decision making by subjecting it to increased scrutiny. The EPLS is currently accessible to the public at [<https://www.epls.gov>]; thus, any gains in the quality of decision making to result from public access to information about contractors would probably require information beyond that already in the EPLS. Contractors are, however, likely to resist wide-spread publication<sup>125</sup> of much of this information on privacy grounds.<sup>126</sup>

## Conclusion

Debarments and suspensions of contractors, whether under statutory provisions or under the FAR, ensure that contractors who have failed to fulfill legal or contractual obligations have limited opportunities for future contractual dealings with the government. Statutory debarments are often mandatory, leaving no discretion to contracting officers; are punishments; and last for a period prescribed by statute, with limited opportunities for agencies to waive them. Statutory suspensions otherwise

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<sup>122</sup> See, e.g., H.R. 3033 § 2; H.R. 5658 § 4502; H.R. 6411 § 7; S. 3139 § 201.

<sup>123</sup> 48 C.F.R. § 9.402(b) (“The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment.”).

<sup>124</sup> See, e.g., H.R. 6411 § 7 (requiring information on *all* proceedings involving contractors); S. 3139 § 201 (requiring *all* complaints, indictments, and legal actions regardless of their outcome).

<sup>125</sup> See, e.g., H.R. 3033, § 2 (calling for the database of contractor information to be available to the public on the Web).

<sup>126</sup> See, e.g., Stan Soloway, Fine Line between Transparency and Chaos, *Washington Tech.*, July 14, 2008, available at [[http://www.washingtontechnology.com/print/23\\_12/33117-1.html](http://www.washingtontechnology.com/print/23_12/33117-1.html)].



resemble statutory debarments, but last only until a designated agency official finds that the contractor has ceased the conduct violating the statute. Administrative debarments, by contrast, are within the discretion of agency contracting officials; cannot be punitive; may generally last no longer than three years; and can be waived by agency heads. Administrative suspensions are temporary administrative debarments, lasting only as long as any agency investigation of contractor misconduct or ensuing legal proceedings.

Congress has recently explored several approaches to making debarment and suspension more effective means of ensuring that federal contracts are not repeatedly awarded to contractors that are publicly known for not paying taxes, bribing foreign officials, falsifying records, or similar misconduct. The 110<sup>th</sup> Congress enacted legislation (1) creating an additional statutory debarment encouraging divestment from Sudan; (2) amending the FAR to require that contractors report violations of federal criminal law or receipt of overpayments during the award or performance of certain contracts; (3) creating an expanded database of information about contractors' responsibility for use by agency officials; and (4) involving the Interagency Committee on Debarment and Suspension more integrally in coordinating agency exclusion actions. Congress also considered several other bills that would have (1) created new statutory debarments covering additional misconduct; (2) supplemented the FAR provisions on contractor responsibility, debarment, and suspension; and (3) increased the information about contractors' responsibility available to contracting officers in their decision making. Similar proposals may be put forward in the 111<sup>th</sup> Congress.