

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Modernizing Suspension and Debarment)	Docket No. GN 19-309
Rules)	
)	

**COMMENTS OF THE
SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION AND
STATE E-RATE COORDINATORS' ALLIANCE**

The Schools, Health & Libraries Broadband Coalition (“SHLB”) and State E-rate Coordinators’ Alliance (“SECA”) (collectively, “SHLB-SECA”) submit these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned docket.¹ The Commission proposes to adopt new rules consistent with the Office of Management and Budget Guidelines to Agencies on Government Debarment and Suspension (the “Guidelines”) in place of existing rules.² The *NPRM* seeks comment on the proposed rules and various implementation issues.

SHLB-SECA is concerned that the proposed rules are overbroad and fail to consider the unique aspects of the USF programs. In these comments, we identify our concerns with the proposed rules and offer recommendations to ensure that any adopted rules are both fair and effective.

¹ *Modernizing Suspension and Debarment Rules*, GN Docket No. 19-309, Notice of Proposed Rulemaking, FCC 19- 120 (rel. Nov. 25, 2019) (“*NPRM*”).

² Office of Management and Budget, Guidance for Governmentwide Debarment and Suspension (Nonprocurement), 71 Fed. Reg. 66431 (Nov. 15, 2006), *codified* at 2 CFR pt. 180 (“Guidelines”).

SUMMARY

The Universal Service Fund (“USF”) programs provide critical support to participants across the country. Removing bad actors from participation in these programs is an important tool in the Commission’s administration of the Fund. We recognize the constraints that the current suspension and debarment rules pose to the Commission’s enforcement efforts. The rules cover a narrow range of conduct and offer limited flexibility. Indeed, certain requirements in the existing rules serve to insulate bad actors from timely suspension and debarment.

Nevertheless, we express concern about certain proposals in the *NPRM*. First, the rules should recognize that suspension or debarment is a serious action with severe consequences. Formal suspension and debarment procedures should be limited to fraud, repeated or willful violations, and other intentional and serious misconduct. It should not serve as a remedy for mere negligence or good faith mistakes.

Second, the rules must provide procedural safeguards to ensure that individuals or organizations subject to suspension and debarment are treated fairly. Because USAC currently employs a *de facto* suspension process which lacks any due process protections, SHLB-SECA urges the Commission to eliminate the practice and to clarify the Administrator’s role under the new rules.

Third, the rules must balance threats to the integrity of the USF programs on the one hand and an ominous, damaging suspension or debarment to participants on the other. The rules should offer flexibility and authorize the Commission to use alternative remedies where appropriate, for example, precluding a transaction in lieu of or prior to suspending a participant, granting exceptions to allow an excluded party to participate in a transaction, and authorizing debarment officials to tailor debarments or propose alternative remedies. SHLB-SECA firmly

supports the use of a “limited denial of participation” as a parallel, more flexible alternative to suspension and debarment. We also endorse giving debarred participants an opportunity to reduce the period and scope of debarment.

Fourth, the Commission’s efforts to remove bad actors from USF participation should not result in unfair and unnecessary harm to innocent third-parties. USF beneficiaries should be permitted to continue receiving services from a suspended or debarred provider for the duration of the contract, whether the services are delivered under a contract or month-to-month basis. SHLB-SECA also encourages the Commission to clarify its suggestion that it would reject a participant’s application for funding solely because a party with whom they do business was suspended or debarred.

Fifth, the rules must effectively address the realities of the USF programs. SHLB-SECA agrees that the Commission should be permitted to take remedial action before issuance of a judgment or conviction. We believe, however, that the criteria in the Guidelines for imputing conduct from an individual to an organization should be more carefully crafted. The rules should also provide that incorrect advice given in connection with USF program rules may not, without more, be grounds for suspension and debarment.

Finally, because the Commission proposes to “significantly expand the scope of [its] suspension and debarment rules beyond the current non-discretionary USF suspensions and debarments,” it is imperative that new rules offer sufficient clarity and specificity to participants subject to the rules.³ The Commission should more clearly define which conduct it believes is sufficient to warrant suspension or debarment and specify which information may be deemed so unfavorable that rejection of a transaction is warranted.

³ *NPRM* at ¶ 79.

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I. BACKGROUND

The SHLB Coalition is a broad-based coalition of organizations that share the goal of promoting open, affordable, high-quality broadband for anchor institutions and their communities. SHLB members include representatives of schools, libraries, health care providers and networks, state broadband offices, private sector companies, state and national research and education networks, and consumer organizations.

The State E-rate Coordinators' Alliance is an organization consisting of E-rate coordinators representing 44 states and two territories. Representatives of SECA assist E-rate applicants in all aspects of the program and provide face-to face and online E-rate training for applicants and service providers. As state E-rate coordinators, members serve as intermediaries between the applicant and service providers, USAC, and FCC. SECA does not have any administrative staff and relies entirely on our members' volunteer activities.

II. DISCUSSION

A. THE RULES SHOULD ALLOW THE COMMISSION TO TAKE REMEDIAL ACTION WITHOUT A FINAL CONVICTION OR CIVIL JUDGMENT

We acknowledge that the narrow trigger for suspension and debarment under existing rules is a constraint on the Commission's authority.⁴ Requiring a final conviction or civil judgment may preclude the Commission from timely removing bad actors – and in some cases from removing bad actors at all. Moreover, even if a conviction or civil judgment is pursued, the litigation may take years. In theory, existing rules could permit even an individual or company

⁴ 47 CFR § 54.8(c) (suspension and debarment are triggered only by a final conviction or civil judgment for the “attempt or commission of criminal fraud, theft, embezzlement, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstruction of justice and other fraud or criminal offense” arising out of activities associated with or related to one of the four USF programs).

engaging in egregious misconduct to continue to participate in any USF program while litigation is pending.

For these reasons, SLHB-SECA supports the adoption of rules allowing the Commission to take remedial action, in appropriate circumstances, before the issuance of a judgment or conviction. However, as discussed in more detail below, the Commission must still ensure that the suspension and debarment rules include known timelines, are fundamentally fair and provide due process to participants.

B. SUSPENSION OR DEBARMENT SHOULD BE LIMITED TO FRAUD OR REPEATED WILLFUL VIOLATIONS AND SHOULD NOT SERVE AS A REMEDY FOR MERELY NEGLIGENT CONDUCT

The Guidelines are clear that suspension and debarment are not to be used for punishment.⁵ Formal suspension and debarment procedures are drastic remedies and should be used judiciously. The consequences are severe and could likely result in a participant's exclusion from other government programs. In the case of schools, libraries, and other beneficiaries, the effect could be devastating. Similarly, for companies, a suspension or debarment could mean bankruptcy.

SHLB-SECA urges the Commission to limit formal suspension and debarment procedures to fraud or repeated willful violations, as we do not believe it should serve as a remedy for merely negligent conduct or mistaken actions guided by good faith. Many violations of E-rate and Rural Health Care program rules – which may have to be reported as a disclosure under the proposed rules – use a strict liability standard with no consideration of whether the responsible party made a good faith error or was willfully trying to evade program requirements. Further, program rules tend to be vague, and participants are often forced to use their best

⁵ See 2 C.F.R § 180.125(b)-(c).

judgment in interpreting and applying the rules. For these reasons, good faith mistakes and negligent conduct should not be grounds for suspension or debarment under any new rules.

The Commission already has sufficient tools at its disposal to address most issues or instances or misconduct that arise. The Commission can “direct USAC to suspend or delay universal service support amounts, either wholly or in part, when the Commission has proof, or credible information, that leads it to reasonably believe, based on the totality of the information available, that all or part of a payment would be in violation of the statutes and regulations applicable to the [applicable] program.”⁶ The Commission – or USAC – can seek recovery of improperly disbursed funds. In the E-rate and Rural Health Care programs, applications already undergo significant review prior to a commitment of funding, and oftentimes at the post-commitment phase, in order to identify any potential abuse or misuse of program funds. The programs also are subject to a robust payment quality assurance plan and Beneficiary Contributor Audit Program, each of which also ensures compliance with program rules. Where at all possible, we endorse the use of these and any other less severe measures to address program non-compliance prior to or in lieu of suspension or debarment.

C. USAC’S *DE FACTO* SUSPENSION PROCESS SHOULD BE ELIMINATED

USAC currently administers its own *de facto* suspension process whereby it delays or altogether stops administrative processing due to potential violations of Commission rules. The practice has been used to conduct years-long investigations, initiate endless reviews, and withhold funding from USF participants, all while offering virtually no transparency or

⁶ *Lifeline and Link Up Reform and Modernization*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd. 3962, 4015 n.403 (2016) (2016 Lifeline Order).

reasonable due process safeguards, including notice of the alleged violation or an opportunity to respond.

The objective of suspension and debarment is to safeguard the USF against bad actors by ensuring that they do not receive program benefits. Refusing to start or finish reviewing an application for funding, refusing to decide whether to commit or deny funding, and refusing to issue payment all constitute *de facto* suspensions from participation in USF programs. And USAC has used the practice over the years to in effect suspend applicants and service providers indefinitely and without recourse.

This proceeding gives the Commission the perfect regulatory vehicle to eliminate USAC's *de facto* suspension process. We urge the Commission to do just that. The new suspension and debarment rules will enable the Commission to accomplish much of what USAC has historically used the procedure to accomplish. However, we expect that, unlike USAC's process, the new rules will be transparent and replete with reasonable due process protections.

We also encourage the Commission to take the opportunity to clarify USAC's role in the suspension and debarment process. SHLB-SECA believes that suspension and debarment should be the exclusive responsibility of the FCC, not USAC. We believe that this will lead to greater efficiency and fairness. To ensure that USAC is no longer employing its *de facto* process, the Commission should require USAC to report to the Commission any funding applications that do not have decisions after September 30 and any invoices that have not been paid in 90 days. If there are applications or invoices that are not completed by these deadlines, USAC should be required to notify applicants or service providers of the reason for the delay and an estimated time for resolution.

D. THE CRITERIA IN THE GUIDELINES FOR IMPUTING CONDUCT FROM AN INDIVIDUAL TO AN ORGANIZATION SHOULD BE MODIFIED

The Guidelines include imputation rules that would “plug a gap” in the current suspension and debarment rules, allowing the Commission to take action “against an organization, not just a principal, or the reverse, in appropriate circumstances.”⁷ Section 180.630(a) of the Guidelines states that “a Federal agency may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence.”⁸

The criteria in the Guidelines for imputing conduct from an individual to an organization should be modified in any new suspension and debarment rules. Under the Guidelines, an individual’s misconduct may be imputed to an organization or company, even though that organization or company had no knowledge of it, when the improper conduct occurred in the individual’s performance of duties. For example, a procurement officer for a large school district engages in misconduct in connection with the E-rate program’s competitive bidding process, such as accepting a bribe. No one at the school district knows of, or had any reason to know of, the procurement officer’s conduct. Under the Guidelines, this individual’s misconduct could be imputed to the school district, and the school district could be suspended or debarred from E-rate participation as a result. Not only would subjecting the school district to suspension or debarment under these circumstances be fundamentally unfair; it would disallow the school district from obtaining funding for E-rate supported services for the period of suspension or

⁷ *NPRM* at ¶ 26 n.43.

⁸ 2 CFR § 180.25(a).

debarment. For these reasons, we believe that rules concerning imputation of conduct should be more carefully crafted.

At a minimum, we urge the Commission to change the imputation standard in any adopted rules to require not only that the individual's misconduct be related to the performance of his or her duties, but *also* that it be undertaken with the organization's knowledge, approval, or acquiescence.

E. THE RULES SHOULD CLARIFY THAT INCORRECT ADVICE GIVEN IN CONNECTION WITH USF PROGRAM RULES MAY NOT BY ITSELF BE GROUNDS FOR SUSPENSION OR DEBARMENT

The Guidelines define "principal" to mean (a) an "officer, director, owner, partner, principal, investigator, or other person . . . with management or supervisory responsibilities" or (b) a "consultant or other person, whether or not employed by the participant or paid with Federal funds, who (1) [i]s in a position to handle Federal funds; (2) [i]s in a position to influence or control the use of those funds; or (3) [o]ccupies a technical or professional position capable of substantially influencing the development or outcome of an activity [in a transaction]."⁹ The Commission proposes expanding the definition of "principal" in the Guidelines to ensure that all persons who have a critical influence on, or substantial control over, a covered transaction may be considered "principals," whether or not employed by the participant.¹⁰ Under this expansive definition, such persons could include without limitation: "management and marketing agents, accountants, consultants, investment bankers, engineers, attorneys, and other professionals who are in a business relationship with participants in connection with a covered transaction under an FCC program."¹¹

⁹ 2 CFR § 180.995.

¹⁰ *NPRM* at ¶ 33.

¹¹ *Id.* at ¶ 33.

By broadening the definition of “principal,” the Commission is significantly expanding its suspension and debarment net to include nearly any individual who serves in an advisory capacity on behalf of a participant. For this reason, we encourage the Commission to clarify that incorrect or allegedly incorrect advice given in connection with USF program rules may not be grounds for suspension or debarment. Advice alone does not constitute substantial influence or control over a covered transaction. USF participants are free to accept or reject advice, whether it be good, bad or somewhere in between. Unless there is substantial evidence to show that the party giving advice was grossly negligent or did so with the specific intent of causing the recipient to violate program rules, it is unreasonable to conclude that the party’s advice “caused” the violation. Without more, the act of giving advice should never constitute grounds for suspension or debarment.

F. SPECIFIC RULES SHOULD BE ADOPTED TO ALLOW THE COMMISSION TO PRECLUDE PARTICIPANTS FROM ENTERING INTO A PARTICULAR TRANSACTION RATHER THAN SUSPENDING OR DEBARRING THE PARTICIPANT

The Commission notes that one way for it to prevent a transaction when a primary tier participant discloses unfavorable information is to institute and complete a suspension or debarment proceeding before the transaction is approved or concluded.¹² The *NPRM* requests comment on whether the rules should include less drastic remedies, for example, merely precluding the participant from entering into the transaction at hand prior to or in lieu of suspending the participant.¹³

SHLB-SECA firmly supports the use of less severe, alternative measures to suspension and debarment where appropriate. Formal suspension and debarment procedures are drastic

¹² *Id.* at ¶ 59-60.

¹³ *Id.* at ¶ 60.

remedies and should be used judiciously. The measures are only two of the many tools available to the Commission, ones that it should use as sparingly and with as much caution as possible, erring on the side of a less drastic remedy whenever the circumstances warrant it. The FCC should, as it suggests, adopt specific rules to afford itself the discretion to simply preclude the participant from entering into the particular transaction at hand, prior to or in lieu of suspending or debarring the participant. Allowing the participant to enter into the transaction, but monitoring the participant's activities more closely, could be another option in appropriate circumstances. The Commission could also require a compliance plan to ensure that the party is instituting internal controls and processes to prevent future violations.

The Commission also seeks comment on procedures to ensure due process for any party affected by the Commission's decision to preclude a transaction.¹⁴ As previously discussed, USAC already has firmly in place a process that provides no due process protection, is totally opaque, and which enables USAC to in effect suspend participants from USF program participation. What would benefit the programs, we believe, is for the Commission to adopt a modified, formally authorized version of the procedure that USAC currently employs.

Accordingly and because rigid, zero-tolerance policies tend to do more harm than good, we urge the FCC to adopt formal, less drastic measures to address the isolated problems that do not necessarily warrant suspension or debarment or where suspension or debarment might not be necessary under the circumstances. However, any discretionary process that the FCC ultimately adopts must come complete with reasonable due process, transparency, and known time limits.

¹⁴ *Id.*

G. THE SUGGESTION THAT THE FCC WOULD REJECT THE APPLICATION OF A PRIMARY TIER PARTICIPANT SOLELY BECAUSE A LOWER TIER PARTICIPANT WAS CONVICTED OF FRAUD IN ANOTHER GOVERNMENT PROGRAM IS ALARMING

The Commission notes that disclosure requirements for lower tier participants are less extensive than those for primary tier participants. According to the Commission, if it were to adopt rules requiring lower tier participants to disclose unfavorable information only required of primary tier participants (e.g., convictions), the Guidelines would not provide a mechanism for the Commission to reject a related primary tier participant's application solely because of the lower tier participant's disclosure.¹⁵ The *NPRM* seeks comment on whether the Commission should adopt rules that would allow it to reject a transaction based on the disclosure of unfavorable information relating to the lower tier participant.¹⁶

As an initial matter, we seriously question whether the disclosures proposed in the *NPRM* will help the Commission protect the USF, as it suggests. More alarming, however, is the Commission's suggestion that it may reject the application of a primary tier participant solely because a lower tier participant with whom they do business was convicted of fraud in another government program.¹⁷ The Commission's efforts to remove bad actors from USF participation should not result in unfair and unnecessary harm to innocent third-parties. It does the USF programs a great disservice to even consider rejecting automatically every application that a participant with a questionable past has touched. Under these circumstances, the Commission has an obligation to closely examine the nature of the relationship between the parties to determine

¹⁵ *Id.* at ¶ 61.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 61 (observing that the Guidelines do not provide a mechanism for the rejection of a school's E-rate application if the school is utilizing an E-rate consultant who has been convicted of fraud in another program but has not yet been debarred).

what and how much if any undue influence or control the consultant, contractor or advisor may have had. And procedures should be implemented to hold harmless any innocent primary tier participant to the transaction in which the lower tier participant was involved.

H. THE COMMISSION SHOULD NOT BE AUTHORIZED TO REJECT A TRANSACTION WHERE IT CONSIDERS THE DISCLOSURE OF UNFAVORABLE INFORMATION RELATING TO THE LOWER-TIER PARTICIPANT “SO SIGNIFICANT” THAT THE TRANSACTION SHOULD BE DENIED

The Commission seeks comment on whether it should adopt rules that would allow it, or the Administrator, to reject a transaction where the Commission considers the disclosure of unfavorable information relating to the lower tier participant so significant that the transaction should be denied, even without initiation of a suspension or debarment proceeding.¹⁸ The Commission asserts that providing it this discretion would provide it with maximum flexibility to protect the USF.¹⁹

As written, we have no choice but to oppose this overly broad grant of discretion to the FCC and USAC to abrogate primary tier transactions. The Commission, and USAC especially, should not be permitted to reject nonprocurement transactions, such as applications for USF funding. As there is no discussion of this proposed rule in context or even one example of the kind of offending information that would trigger this powerful a response from the Commission, there is no question that, in this instance, the grant of remedial discretion would be unacceptably broad.

We fail to see the logic or fairness of this proposal. It requires no nexus whatsoever between the lower tier participant and the primary tier participant's transactions or any cause and

¹⁸ *Id.* at ¶ 62.

¹⁹ *Id.*

effect to be shown between the lower tier participant's conduct that was so unfavorable and the result of the primary tier participant's transaction. Nevertheless, this proposal grants to the Commission the discretion to reject such transactions and grants the lower participant absolutely no recourse.

Should this proposal be adopted as part of the new suspension and debarment rules, then the rules should at a minimum (1) define which conduct of a lower tier participant it believes is sufficiently egregious to warrant denying the primary tier participant's transaction and (2) provide an opportunity for the primary tier participant to terminate its relationship with the lower tier participant as a way to save its transactions.

I. EXCEPTIONS SHOULD BE GRANTED TO ALLOW EXCLUDED PARTIES TO PARTICIPATE IN A TRANSACTION AND THE RULES SHOULD SPELL OUT FACTORS THE COMMISSION MAY TAKE INTO ACCOUNT WHEN MAKING THE DETERMINATION

The Guidelines permit an agency head to grant an exception to allow an excluded party to participate in a transaction.²⁰ The Commission seeks comment on whether the rules should spell out factors for invoking such an exception or, alternatively, whether the determination should be left solely to the discretion of the full Commission or Chairman.²¹

We agree that exceptions should be granted under appropriate circumstances and believe that any new rules should spell out factors for invoking such an exception. Rarely should rules be hard and fast. Fundamental fairness and important pragmatic considerations dictate that exceptions should be granted where appropriate. To ensure that the decision-making process is transparent and fair, the rules should spell out the factors that will be taken into account, as

²⁰ See 2 CFR § 180.135(a) (providing that an agency head may grant an exception permitting an excluded person to participate in a particular covered transaction).

²¹ *NPRM* at ¶ 63.

excluded parties should be apprised of any and all information that may warrant an exception. In addition, the decision-maker should be given the discretion to consider other factors that may be relevant under the circumstances, including any non-enumerated mitigating factors. To further ensure transparency and fairness, and to help expedite the process, we believe that the authority to decide whether to grant an exception should be delegated to the bureaus overseeing the programs.

The Commission proposes, and SHLB-SECA agrees, that one consideration should be whether a provider of services is the sole source of services in the area.²² Exclusion of a region's only provider ultimately risks harm to consumers and beneficiaries. The Commission, therefore, should include this consideration among any factors that may warrant an exception. Because we agree that exceptions should be made for sole provider of services in an area, it makes sense for the Commission to opt for an alternative remedy, if at all possible. Settlement agreements, compliance agreements, and limited participation of denials are all tools that the FCC can and should use to ensure the provider's compliance. Though at some point, if the service provider's misconduct continues, and depending on the nature of the misconduct, the Commission may need to lift the exception.

J. THE COMMISSION SHOULD ADOPT A “LIMITED DENIAL OF PARTICIPATION” MECHANISM AS A PARALLEL AND MORE FLEXIBLE ALTERNATIVE TO SUSPENSION AND DEBARMENT

The Commission seeks comment on the adoption of a “limited denial of participation” mechanism, its potential usefulness, and the standards that might be appropriate to trigger this remedy. This mechanism, the Commission explains, would “allow the agency to protect its programs from conduct of bad actors for a shorter period than a suspension or debarment, while

²² *Id.*

affording the party the opportunity to come into compliance expeditiously, without causing the wrongdoer to be automatically excluded across all agency programs or government-wide.”²³

SHLB-SECA firmly supports use of a limited denial of participation as a less severe alternative to suspension and debarment when the circumstances warrant it. A limited denial of participation could be put to good use to counteract the one-off bad conduct of participants with no history of the same, similar, or other misconduct and who demonstrably express their willingness to toe the line in the future. Though we note that it is important that the mechanism offer the same due process protections that participants subject to suspension and debarment would receive.

The Commission also asks what standards might be appropriate for triggering this remedy. It would make sense to forego the limited denial of participation where there is evidence of substantial wrongdoing that would warrant debarment. On the other hand, while we agree that this may be an effective tool to force participants to respond to information requests and other directives, we have concerns about the Commission using this this mechanism for this purpose. If the Commission is to use the limited denial of participation as a tool to force participants to do what USF rules legitimately require them to do, there must be clear parameters placed around it – for example, the opportunity to contest the legitimacy of certain requests and proof of a repeated or express refusal on the part of the participant to respond.

It is important that the Commission also address the effect and duration of limited denials of participation. If a limited denial of participation is to be adopted, we believe its effect should be limited to future awards; it should not cover existing contracts or customers. For example, the limited denial of participation applies to new Lifeline customers but does not deny funding for

²³ *Id.* at ¶ 65.

existing customers. Or, it applies to new E-rate commitments but does not affect commitments already issued. The limited participation of denial should be of limited duration. It should be shorter than a suspension period and be automatically rescinded unless suspension or debarment action is taken.

K. PARTICIPANTS SHOULD BE PERMITTED TO CONTINUE RECEIVING SERVICES WITH A SUSPENDED OR DEBARRED PROVIDER FOR THE DURATION OF THE CONTRACT

The Guidelines would permit a USF participant to choose to continue with an excluded entity if the transaction were in existence when the agency excluded the person.²⁴ The Commission seeks comment on the extent to which participants should be permitted to continue receiving services when on a month-to-month or similarly short-term basis.²⁵

SHLB-SECA supports giving USF program applicant-beneficiaries, such as schools, libraries, and health care providers the option to receive uninterrupted support from a suspended or debarred entity for the duration of the contract or to substitute a new provider for that service. Unless it can be shown that continuing to do business with a suspended or debarred provider presents a danger to the programs, beneficiaries should be afforded the option to receive uninterrupted support, whether the services are being delivered on a fixed or month-to-month basis.

The FCC's objective where suspension and debarment are concerned is to deter misconduct and rid its programs of bad actors. But in doing so, the Commission should be

²⁴ 2 CFR § 180.310(a) (permitting but not requiring participants to continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person); 2 CFR § 180.310(b) (disallowing renewals or extensions of covered transactions, other than no-cost time extensions, with any excluded person unless agency grants exception for the transaction).

²⁵ *NPRM* at ¶ 70.

mindful of the primary objective of the USF programs: providing critical financial support to beneficiaries. The suspension and debarment policies should not interfere, or only minimally interfere, with the receipt of benefits to beneficiaries. Accordingly, we do not support requiring beneficiaries to transition to a new provider where beneficiaries are receiving month-to-month services for an indefinite term. Instead, we believe the better approach is to allow beneficiaries to either (1) continue receiving service with the suspended or debarred service provider, (2) perform a Service Provider Identification Number (SPIN) change, if allowable under state and local procurement rules, or (3) rebid the contract or service.

L. THE RULES SHOULD OFFER DEBARRED PARTICIPANTS AN OPPORTUNITY TO REDUCE THE PERIOD AND SCOPE OF THE DEBARMENT

The typical debarment period, the Commission notes, is not more than three years, although that period may be adjusted based on the seriousness of the causes for debarment and evaluation of factors listed in the Guidelines.²⁶ The Guidelines also allow a debarred person to ask the debarring official to reconsider the decision or reduce the time period or scope of the debarment.²⁷ The Commission seeks comment on mitigating factors that may warrant a reduction in the debarment period in response to a request for reconsideration.²⁸

SHLB-SECA agrees that debarred participants should be given an opportunity to petition to reduce the periods and scope of debarment. If participants can demonstrate that they have instituted training and oversight measures to facilitate program compliance, they should have an opportunity to reduce the debarment period. On reconsideration, the Commission should take

²⁶ *Id.* at ¶ 73.

²⁷ *See* 2 CFR §§ 180.850, 180.835.

²⁸ *NPRM* at ¶ 73.

into account mitigating factors, such as whether the party has effective ethics and compliance policies in place or has taken substantial steps to improve compliance efforts.

The Commission also asks whether it should treat applicant schools, libraries, and health care providers differently than other parties for purposes of determining the period of debarment or in the review of applicable factors.²⁹ We believe it is absolutely necessary to treat schools, libraries, and health care providers differently than other USF participants. These are not commercial enterprise; these are the non-profit organizations that the FCC's programs were designed to benefit. School, libraries, and health care providers provide vital educational and health services to communities throughout the country. Denying access to USF benefits does much more than harm the organizations, it hurts the communities they serve – and that is the harm the FCC should be determined, at all costs and whenever possible, to avoid. The Commission should take advantage of all of the tools at its disposal – exceptions, settlement agreements, close monitoring, short-term suspensions and so on – to avoid or at least lessen the impact of suspension and debarment on the communities that these participants have a duty to serve.

**M. DEBARRING OFFICIALS SHOULD BE PERMITTED TO FASHION
LESSER REMEDIES OR TAILOR THE TERMS OF SUSPENSION AND
DEBARMENT**

The *NPRM* seeks comment on alternative remedies or settlements. Specifically, the Commission asks whether a debarring official should have authority to tailor debarments for particular circumstances or propose alternative remedies.³⁰

²⁹ *Id.* at ¶ 74.

³⁰ *Id.* at ¶ 75.

Consistent with our comments throughout and for all of the same reasons, SHLB-SECA supports the use of alternative remedies or settlements in lieu of suspension and debarment. Debarment is a drastic sanction that should be imposed only as a remedy of last resort. The debarring official, therefore, should be granted broad authority to tailor debarments for particular circumstances or propose remedies in lieu of suspension and debarment. We note that the process should not be a rigid one. It needs to be flexible enough to address all of the particular circumstances, including mitigating ones, that may or may not be present. We specifically endorse the Commission's proposal to afford the debarring official authority to negotiate a settlement under which the respondent would agree to the repayment of funds or a reduction in program support, rather than suspension or debarment. Such a resolution would be appropriate if, for instance, it is based on an isolated case of misconduct or the respondent has taken substantial remedial steps. We also believe input from the appropriate bureau would be beneficial to the debarring official before determining a particular remedy. As the Commission notes, Bureau staff "are likely to have the best knowledge of how alternative remedies might impact delivery of services to beneficiaries."³¹

N. PROCESS QUESTIONS

We discuss below certain process questions in the *NPRM* related to the implementation of the new rules.

1. Presentation of Evidence in Suspension and Debarment Proceedings

We agree that the Commission should "develop coordination procedures to permit the bureaus most responsible for the implementation of its USF programs ... to make presentations in the proceedings because they are likely to have insights on ways to implement suspension or

³¹ *Id.* at ¶ 75.

debarment without adversely impacting the persons or entities the programs are designed to assist.”³²

The history of the E-rate program shows that when professionals who have little or no institutional memory of or experience with the program are given authority to make decisions that substantially impact program participants, their lack of familiarity with this very complex program frequently results in a longer, unnecessarily difficult, frustrating review process. It is extremely important, therefore, that anyone to whom the FCC grants authority to prosecute suspension and debarment actions be well-versed in the history of the particular USF program, its rules, and its policy goals and objectives.

There must be adequate separation between the official bringing the action and the suspending or debaring official, and officials conducting the proceedings must be neutral. The division of a federal agency tasked with investigating a party to a suspension or debarment proceeding and presenting evidence and arguments against that party cannot possibly be a neutral decision-maker in that proceeding. Therefore, the FCC’s Enforcement Bureau should play no role whatsoever in the decision-making process, no matter how practical its involvement in that process may appear.

2. Appeal and Review of Suspension and Debarment Actions

Any individual or entity facing suspension or debarment should have the right to request reconsideration and, alternatively, the immediate right to seek judicial review. To ensure fairness and expedited decision-making, it is important that the Commission adopt supplemental rules applicable to applications for review or petitions for reconsideration.

³² *Id.* at ¶ 77.

i. Petitions for Reconsideration

The Commission should grant stays of suspension or debarment actions for “good cause” when petitions for reconsideration are filed. It should also make the decision within 60 days. To help ensure fairness and to facilitate more expeditious and better decision-making, the Commission should provide guidance for what constitutes “good cause.”

We endorse an automatic stay for failure to make a “good cause” determination within 30 days. Without this trigger, there is no incentive for the FCC’s decision-maker to decide this important, threshold issue expeditiously. Delay harms everyone directly and indirectly affected by the process.

ii. Applications for Review

We disagree with the Commission’s proposal to exempt suspension and debarment orders from rules requiring automatic stays.³³ Long, frustrating and costly delay has been the hallmark of the E-rate decision-making process since the program’s inception. Not granting an automatic stay upon the filing of an application for review of a suspension or debarment order would do nothing to counterbalance this historic, institutional tendency towards delay. Automatic stays would encourage the FCC to expedite the decision-making process and provide important due process protection to the subjects of suspension or debarment orders (along with any innocent party that might be harmed collaterally) against long and unfair delay.

If and when a stay of a suspension or debarment order is granted, the FCC should instruct USAC not to interfere with the application process of, or payment to, any entity that the order affects for the duration of the stay – unless there is a reasonable, factual basis for concluding that continuing to process the application or making a particular payment would violate program

³³ *Id.* at ¶ 78.

rules. If the Administrator makes this determination, then any entity that the decision materially affects should be permitted to appeal via an expedited and transparent review process.

If the Commission exempts these decisions from an automatic stay, the Commission should then deem the suspension or debarment decision made by the suspending or debarring officer to be a final agency action, without need for Commission review. That would permit the affected parties to seek immediate judicial review, including stay. The Commission should not create procedures that simply block judicial review while irreparable harm occurs.

iii. Expedited Review

Expedited review of all suspension or debarment-related decisions is essential. The Commission proposes that any stay of a suspension or debarment not exceed 120 days.³⁴ We support the Commission's attempt to ensure an expedited review process. However, the 120-day maximum stay does not mirror the maximum that the Guidelines give to agencies to render a decision in a suspension or debarment proceeding, which is 45 days.³⁵ We assume that the 120-day limit on stays is not intended to change the amount of time that the Guidelines give the FCC to render decisions from 45 days to 120 days. To protect against unfair and costly administrative delay, and to safeguard the process, we propose that if the FCC fails to render a decision within 45 days that the stay be extended automatically until the date of the decision.

III. CONCLUSION

SHLB-SECA thanks the Commission for asking these important questions, and we appreciate the opportunity to comment. For the foregoing reasons, SHLB-SECA urges the Commission to proceed cautiously in implementing any new suspension and debarment rules and

³⁴ *Id.* at ¶ 78.

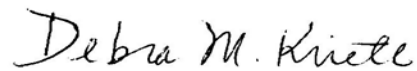
³⁵ 2 CFR § 180.870(a) and (b).

to carefully review the proposals and concerns discussed herein. We believe these recommendations will enhance the Commission's suspension and debarment authority and at the same time provide substantially more fairness, flexibility, expediency and transparency.

Respectfully submitted,



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