

**7535-01-U**

**NATIONAL CREDIT UNION ADMINISTRATION**

**RIN: 3133-AE85**

**NCUA Suspension and Debarment Procedures.**

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Final Suspension and Debarment Procedures.

**SUMMARY:** On March 15, 2018, the NCUA Board (Board) proposed new suspension and debarment procedures to protect the Federal Government's interest in only doing business with presently responsible contractors. After consideration of public comments, this notice sets forth the NCUA's final procedures for suspension and debarment and establishes administrative processes for contractors subject to the procedures. The final procedures will appear on the NCUA's public website.

**DATES:** These final procedures are effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Kevin Tuininga, Associate General Counsel for Administrative Law, Office of General Counsel, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428 or telephone: (703)

518-6543.

## **SUPPLEMENTARY INFORMATION**

- I. Background
- II. Comments Received
- III. The Final Procedures
- IV. Regulatory Procedures

### **I. Background**

On March 15, 2018, the NCUA Board (Board) proposed new suspension and debarment procedures as part of its efforts to modernize its procurement processes. These proposed procedures were intended to implement best practices in spending funds available to the NCUA, including those in the agency's Operating Fund and the National Credit Union Share Insurance Fund. Although the NCUA is not required to follow government-wide acquisition laws and regulations, those laws and regulations have proven effective and include guidelines developed over years of seeking public comment on expenditure processes. Suspension and debarment remedies are now an important component of government procurement programs. After considering comments received, the Board has decided to adopt the procedures as proposed.

## **II. Comments Received**

The Board received three comments on the proposal. Commenters included two national credit union trade associations and one regional trade association. All three commenters supported the proposal. One commenter suggested that the agency “consult with the [Office of the Inspector General] regarding whether such procedures would be of benefit to the NCUA Office of General Counsel.”

The Board values these comments and believes it should adopt the procedures as proposed. Implementing these procedures in the near term ensures prompt compliance with the NCUA Inspector General’s recommendations. The Board is open to further recommendations of the Inspector General but, at this developing stage, declines to extend the final procedures to legal services agreements. Lawyers are subject to codes of professional responsibility related to their bar memberships, which already impose the highest standards of ethical conduct and include avenues for disciplinary action that can preclude further practice of law. This approach also aligns with the current practice of the Federal Deposit Insurance Corporation, which excludes law firms and lawyers from its contractor suspension and debarment procedures.<sup>1</sup>

## **III. The Final Procedures**

As discussed above, the Board has chosen to adopt the procedures as proposed. For a complete discussion of all eight sections of the procedures, please see the preamble to the proposed procedures at 83 Fed. Reg. 12318 (Mar 21, 2018) or

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<sup>1</sup> 12 CFR 367.1(c).

<https://www.gpo.gov/fdsys/pkg/FR-2018-03-21/pdf/2018-05626.pdf>. The Board will post the final procedures on the NCUA website.

#### **IV. Regulatory Procedures**

##### **A. Regulatory Flexibility Act**

For any final rule it adopts, the Regulatory Flexibility Act (RFA) requires the NCUA to prepare a final regulatory flexibility analysis that, among other things, describes the steps the agency has taken to minimize economic impact on small entities (currently defined by the NCUA as federally insured credit unions with under \$100 million in assets), unless the NCUA certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

As discussed in the proposal, the NCUA does not expect the final Suspension and Debarment Procedures would ever apply to a federally insured credit union. In addition, the NCUA does not expect that the Procedures would have a significant economic impact on any other small businesses, as defined in the RFA and as further established by the Office of Advocacy of the Small Business Administration.

The final procedures closely follow the suspension and debarment procedures of the Federal Acquisition Regulation, which already applies to government contractors, without imposing any additional economic burden. To the extent of any variation from the Federal Acquisition Regulations, the final procedures contain no recordkeeping or

substantive regulatory requirements, varying only in adjudication processes. The final procedures therefore will not have a significant economic impact on a substantial number of federally insured credit unions under \$100 million in assets or on other small entities as defined by the Small Business Administration. Accordingly, the NCUA has determined and certifies that the final procedures will not have a significant economic impact on a substantial number of small entities. No final regulatory flexibility analysis is required.

### **B. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency creates a new paperwork burden on regulated entities or modifies an existing burden.<sup>2</sup> For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. The final procedures will not create any new paperwork burden that meets the definition of an information collection. Thus, the NCUA has determined that these final procedures do not increase the paperwork requirements under the PRA and regulations of the Office of Management and Budget.

### **C. Executive Order 13132**

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the

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<sup>2</sup> 44 U.S.C. 3507(d).

executive order to adhere to fundamental federalism principles. These final procedures will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has determined that the final procedures do not constitute a policy that has federalism implications for purposes of the executive order.

**D. Assessment of Federal Regulations and Policies on Families**

The NCUA has determined that these final procedures will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

By the National Credit Union Administration Board on August 2, 2018.

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Gerard Poliquin

Secretary of the Board

For the reasons discussed above, the Board adopts the following NCUA Suspension and Debarment Procedures:

### **NCUA Suspension and Debarment Procedures**

#### **A. Purpose**

The purpose of these suspension and debarment procedures is to establish an administrative process to protect the Government's interest in only doing business with presently responsible contractors. The NCUA<sup>1</sup> shall only solicit offers from, award contracts to, and consent to subcontracts with presently responsible contractors. These procedures implement the NCUA's policies for suspension and debarment and establish administrative proceedings for contractors subject to the policies.

#### **B. Authority**

The NCUA's suspension and debarment authority derives from the Federal Credit Union Act 12 U.S.C. 1751 *et seq.*, and 12 U.S.C. 1766(i)(2), specifically. The NCUA is not required to follow the Federal Acquisition Regulation but uses the principles therein for best practice guidance. The Federal Acquisition Regulation (FAR) section on suspension and debarment is located at 48 CFR Part 9, Subpart 9.4. The NCUA also has its own Acquisition Policy Manual.

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<sup>1</sup> Throughout these procedures, unless otherwise noted, the "NCUA" refers the NCUA in its agency capacity and also to the NCUA Board as conservator or liquidating agent for an insured credit union. Legal services contracts the NCUA enters into in any capacity, through the Office of General Counsel, are not subject to these suspension and debarment procedures.

### **C. Definitions**

1. Action Referral Memorandum (ARM). The investigative report developed and compiled by an NCUA office recommending that the Suspending and Debarring Official (SDO) take a suspension or debarment action against a contractor.
2. Administrative Agreement. Administrative Agreements are usually entered into in lieu of suspension or debarment actions. Typically the agreements include acceptance of responsibility, voluntary exclusion by the contractor, some provision of restitution, any contractor responsibilities with respect to codes of conduct, training, and the contractor's promise to report progress to the NCUA, and generally include consequences for breach of the agreement. The terms of the Administrative Agreement and contents will be determined on a case-by-case basis.
3. Administrative Record. The entire record of information and proceedings. This includes all information considered by the SDO that is the basis of the final decision.
4. Affiliates. Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (1) either one controls or has the power to

control the other, or (2) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor that has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

5. Civil Judgement. A judgement or finding of a civil offense by a court of competent jurisdiction.
6. Contractor. Contractor means any individual or other legal entity that: (1) directly or indirectly (for example, through an affiliate), submits offers for, or is awarded, or reasonably may be expected to submit offers for, or be awarded, a Government contract or a subcontract under a Government contract; or (2) conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative or another contractor.
7. Debarment. A final decision made by the SDO to exclude a contractor from Government contracting and Government-approved subcontracting or covered transactions for a reasonable, specified period (usually not exceeding three

years). A contractor is first proposed for debarment and afforded an opportunity to present its defenses and mitigating factors.

a. Fact-Based Debarment. The cause for the debarment is based on factual circumstances (for example, history of poor performance or willful misconduct). The NCUA must be able to prove the action by a “preponderance of the evidence.” Preponderance of the evidence means that the fact(s) at issue are more likely than not (over 50%) to be true. A contractor, based upon a preponderance of the evidence, can be debarred for any of the following:

i. Violation of the terms of a Government contract or subcontract so serious as to justify debarment, such as:

1. willful failure to perform in accordance with the terms of one or more contracts; or
2. a history of failure to perform, or of unsatisfactory performance of, one or more contracts.

ii. Violations of a Drug-Free Workplace, as indicated by:

1. failure to comply with the requirements of a Drug-Free Workplace; or
2. such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to

make a good faith effort to provide a drug-free workplace.<sup>2</sup>

- iii. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States.<sup>3</sup>
- iv. Commission of an unfair trade practice.<sup>4</sup>
- v. Delinquent Federal taxes in an amount that exceeds \$3,500. Federal taxes are considered delinquent for purposes of this provision if the *tax liability is finally determined (i.e. assessed) and the taxpayer is delinquent in making payment.*
- vi. Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of:
  1. violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations<sup>5</sup>;
  2. violation of the civil False Claims Act<sup>6</sup>; or

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<sup>2</sup> 41 U.S.C. Chapter 81.

<sup>3</sup> Section 202 of the Defense Production Act; Public Law 102-558.

<sup>4</sup> Section 201 of the Defense Production Act; Public Law 102-558.

<sup>5</sup> Title 18 U.S.C.

<sup>6</sup> 31 U.S.C. 3729-3733.

3. significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments.
  - vii. A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, not in compliance with Immigration and Nationality Act employment provisions.<sup>7</sup> Such determination is not reviewable in the debarment proceedings.
  - viii. A contractor has miscertified its status as a minority- and/or women-owned business.
  - ix. Any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.
- b. Conviction-Based Debarment. A debarment action based on a conviction or civil judgement. A contractor can be debarred for a conviction or civil judgement based on one or more of the following circumstances:
- i. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.

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<sup>7</sup> Executive Order 12989, as amended by Executive Order 13286.

- ii. Violation of Federal or State antitrust statutes relating to the submission of offers.
- iii. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property.
- iv. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States.<sup>8</sup>
- v. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

8. Imputation. Attributing the misconduct of an individual or organization to another individual or organization by virtue of the latter’s knowledge or implied knowledge of the misconduct. An agency may impute the basis of a suspension or debarment through the following relationships: individual to organization; organization to individual; individual to individual; and joint ventures.

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<sup>8</sup> Section 202 of the Defense Production Act; Public Law 102-558.

9. Indictment. An indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense is given the same effect as an indictment.
  
10. Presentation of Matters in Opposition (PMIO). The contractor may submit matters in opposition to the suspension or proposed debarment. The contractor may submit matters in person, in writing, or through a representative. The contractor may also use a combination of those methods.
  
11. Present Responsibility. A contractor is presently responsible if the contractor is ethical, honest, competent, and has not acted in any way that reveals a lack of business integrity or business honesty, or an inability to satisfactorily perform Government contracts.
  
12. System for Award Management (SAM). SAM is the exclusion database that applies across the Executive Branch. SAM is an official U.S. Government system.
  
13. Suspension. A suspension is an immediate, but temporary (usually 12 months), measure imposed by the SDO, rendering a contractor ineligible to

receive new Government contracts or subcontracts, pending the outcome of a legal proceeding or investigation that could give rise to a debarment.<sup>9</sup>

- a. Adequate Evidence for Suspension. The NCUA must have adequate evidence and an immediate need to suspend a contractor. Adequate evidence is information sufficient to support a reasonable belief that a particular act or omission has occurred. A contractor can be suspended upon adequate evidence of one or more the following:
  - i. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.
  - ii. Violation of Federal or State antitrust statutes relating to the submission of offers.
  - iii. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property.
  - iv. Violations of a Drug-Free Workplace, as indicated by:
    1. failure to comply with the requirements of a Drug-Free Workplace; or

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<sup>9</sup> If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests an extension, in which case it may be extended for six months. Suspensions cannot extend beyond 18 months unless legal proceedings have been initiated within that period. The NCUA shall notify the Department of Justice of the proposed termination of the suspension, at least 30 days before the 12-month period expires to give the Department of Justice an opportunity to request an extension.

2. Such a number of contractor employees convicted of violations of criminal drug statutes occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace.<sup>10</sup>
- v. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States, when the product was not made in the United States.<sup>11</sup>
- vi. Commission of an unfair trade practice.<sup>12</sup>
- vii. Delinquent Federal taxes in an amount that exceeds \$3,500. Federal taxes are considered delinquent for purposes of this provision if the *tax liability is finally determined (i.e. assessed) and the taxpayer is delinquent in making payment.*
- viii. Knowing failure by a principal, until three years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of:
  1. violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations;<sup>13</sup>

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<sup>10</sup> 41 U.S.C. Chapter 81.

<sup>11</sup> Section 202 of the Defense Production Act; Public Law 102-558.

<sup>12</sup> Section 201 of the Defense Production Act; Public Law 102-558.

2. violation of the civil False Claims Act;<sup>14</sup> or
  3. significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments.
- ix. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

An indictment for any of the foregoing will be considered adequate evidence for suspension.

#### **D. Responsibilities**

1. NCUA Executive Director. The Executive Director has the authority to approve the award of a contract or subcontract to an ineligible contractor for compelling reasons. Decisions to award a contract or subcontract to ineligible contractors must be documented in writing in advance of an award.
2. The Suspending and Debarring Official (SDO). The Deputy General Counsel serves as the SDO. The SDO decides whether to impose a suspension and debarment action. The decision whether to suspend or debar is a business

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<sup>13</sup> Title 18 U.S.C.

<sup>14</sup> 31 U.S.C. 3729- 3733.

decision and, unless mandated by statute or executive order, is discretionary. The SDO decides whether to send out a Notice of Suspension or a Notice of Proposed Debarment, issue a Show Cause Letter, or take no action. Upon commencing a formal action, the SDO reviews the ARM, considers any PMIO submitted or presented by the contractor, and determines whether a fact-finding proceeding is necessary. The SDO may negotiate an Administrative Agreement with the contractor. The SDO's final decision is based on the ARM and the entire Administrative Record.

3. Office of the General Counsel (OGC). OGC provides legal advice regarding the suspension and debarment program to the NCUA. OGC reviews the ARM, any other notices and correspondence, the Administrative Record, the SDO decision, any Administrative Agreement and other documents for legal sufficiency. OGC also reviews and concurs in any decision from the OCFO, to terminate or void contracts held by suspended, debarred, or proposed-for-debarment contractors.
4. SDO Admin. The SDO Admin is a procurement attorney in OGC. The SDO Admin receives referral packages and coordinates with the OCFO, the SDO, and other interested NCUA parties. The SDO Admin also coordinates suspension and debarment actions with other agencies and enters ineligible contractors into SAM. The SDO Admin coordinates with the OIG, when necessary and appropriate.

5. Office of the Chief Financial Officer (OCFO). OCFO contracting officers shall evaluate the responsibility of prospective contractors before award, to include checking SAM. Contracting officers shall also ensure contractor compliance with contract terms and conditions and shall coordinate appropriately with any NCUA office and the SDO Admin on a suspension and debarment action.
  
6. Office of Inspector General (OIG). The OIG's work may form the basis for a referral for suspension or debarment. The OIG shall raise any matters of concern resulting from audits, evaluations and investigations. Other NCUA offices may refer areas of concern to the OIG for investigation.
  
7. All NCUA Offices. All NCUA offices must report misconduct that may give rise to a suspension and debarment action to the NCUA contracting officer and the SDO Admin upon any indication of a cause for suspending and debarring contractors. Situations that involve possible criminal or fraudulent activities must also be referred to the OIG. Along with more specific bases for debarments and suspensions listed in Section C, the following general matters may be grounds for suspension and debarment and should be referred: contractor fraud, dishonesty, or unethical behavior; repeated or severe contract

performance issues; unmitigated or undisclosed conflicts of interest; and improper invoicing and/or questionable costs.

**E. Effect of Listing<sup>15</sup>**

1. Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and the FAR provides that agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines there is a compelling reason for such action. Subject to any exceptions in this policy, the NCUA shall not award new contracts, place orders exceeding the guaranteed minimum on indefinite delivery contracts, place orders under schedule contracts, add new work, exercise options, or extend the duration of a contract with any contractor debarred, suspended, or proposed for debarment. Except as otherwise provided in applicable law, a suspension and debarment action taken by the NCUA will exclude the contractor from all awards of other contracts within the Executive Branch.

- a. Current contracts. Any NCUA decision to terminate or void a current contract shall be subject to review and concurrence by OGC.

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<sup>15</sup> The nonprocurement common rule is a model rule published in the *Federal Register* and used by agencies to suspend, debar, or exclude contractors from participation in nonprocurement activities. Nonprocurement activities include grants, cooperative agreements, scholarships, fellowships, loans, loan guarantees, subsidiaries, insurance, payments for specified use, and donation agreements. FAR and NCR-based suspension and debarment actions are recognized equally by agencies regardless of which regulations they follow.

- b. Restrictions on subcontracting. When a contractor debarred, suspended or proposed for debarment is proposed as a subcontractor for any subcontract subject to NCUA consent, contracting officers shall not consent unless the Executive Director states in writing the compelling reasons to do so.<sup>16</sup>

#### **F. Procedures for Referring Matters to the SDO**

1. General. The referring office shall provide any and all facts and information giving rise to the possible suspension and debarment, including any available documentation to the SDO Admin. Conviction-based debarment matters should be referred within 10 working days of discovery and, to the extent practicable, all other matters should be referred within 30 calendar days. The referring office shall submit an ARM to the SDO Admin. The SDO Admin will coordinate the ARM with the SDO, the NCUA contracting officer and any other necessary party.
2. Contents of the ARM. The ARM must include the following information, if applicable:

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<sup>16</sup> Also, contractors shall not enter into any subcontract in excess of \$35,000, other than a subcontract for a commercially available off the-shelf item, with a party that is debarred, suspended, or proposed for debarment.

- a. Information on the contractor:
  - i. Identity of respondents (contractors/affiliates/business entities).
  - ii. Position(s) held by individuals within the business entity.
  - iii. Fictitious names or aliases.
  - iv. Current mailing addresses of named parties and/or last known business address.
  - v. Current telephone and fax numbers for named parties.
  - vi. Dun and Bradstreet identifier and/or the Commercial and Government Entity Code.
  - vii. SSN and/or birthdates of individuals.
  - viii. Listing of subsidiaries, affiliates, and parent companies.
  
- b. Pertinent Documents.
  - i. NCUA-affected contract numbers and copies of the contract(s).
  - ii. Listing of any other contracts the entity has with other Government agencies.
  - iii. Invoices and other cost and pricing information.
  - iv. Any indictment, legal documents, sentencing transcripts or memoranda, any judgement and conviction, settlement agreement or final order.
  - v. Explanation of current business corporate structure, if known.
  - vi. Any business-related documents (articles of incorporation).



- a. Upon receipt of a referral, the SDO Admin will ensure that the file has all of the required elements. The SDO Admin will coordinate with the referring office, the OIG, the NCUA contracting officer and any other necessary party if more information is needed. The SDO Admin will coordinate any proposed action with the Interagency Suspension and Debarment Committee (ISDC). The ISDC is an organization composed of suspension and debarment representatives from agencies and coordinates lead agency status among agencies. The lead agency is usually the agency with the highest amount of contracting dollars with the vendor.
  
- b. The SDO Admin will then forward the ARM to the SDO. Upon the receipt of a referral, the SDO will decide the appropriate action to take. After consultation with OGC, the SDO may take any of the following actions:
  - i. Reject the ARM and take no action. The SDO may determine there is not enough evidence to initiate an action. The SDO will document the decision not to take action and tell the SDO Admin. The SDO Admin will coordinate this decision within the NCUA. Continuous monitoring of the contractor may be recommended.
  
  - ii. Issue a Show Cause Letter. The SDO may issue a Show Cause Letter to the contractor rather than initiating a formal suspension or

debarment action. The SDO Admin will send the Show Cause Letter to the contractor through USPS certified mail, return receipt requested, and forward a copy to the NCUA contracting officer and the OIG if necessary. The letter must include all of the following:

1. A description of the alleged misconduct.
2. Notice that the misconduct may form the basis for a suspension and debarment action.
3. A request for the contractor to admit, deny, or explain the alleged misconduct.
4. A time for a contractor to respond (no more than 30 calendar days from the date of receipt).
5. Notice of consequences for failure to respond to the letter or adequately address the allegations of misconduct.

iii. Issue a Notice of Suspension or Notice of Proposed Debarment.

The SDO may begin formal proceedings by issuing a Notice of Suspension or a Notice of Proposed Debarment. Issuance of either, immediately renders the contractor (and any named affiliates) ineligible to receive Executive Branch contracts and the SDO Admin will enter the contractor's name into SAM. Notice

shall be sent by USPS certified mail, return receipt requested to the last known address of the contractor.

1. Notice of Proposed Debarment. The notice shall inform the contractor (and any named affiliates):
  - a. that it is being considered for debarment;
  - b. of the reasons/causes for the proposed debarment;
  - c. of the effect of the proposed debarment;
  - d. of the potential effect of a debarment (including scope of ineligibility);
  - e. that the contractor has 30 calendar days from receipt of the notice to respond with its PMIO in person, in writing, or through a representative with information and arguments opposing the proposed debarment; and
  - f. that the NCUA may conduct a fact-finding proceeding.

A copy of the ARM will be sent with the notice. A copy of the entire Administrative Record will be made available to the contractor upon request, unless applicable law or parallel proceedings warrant the SDO's partial or complete redaction or withholding of the Administrative Record.

2. Notice of Suspension. The notice shall inform the contractor (and its affiliates) of the following circumstances:
- a. that it has been suspended;
  - b. whether the suspension is based on indictment or other adequate evidence that the contractor has committed misconduct warranting immediate action;
  - c. that the suspension is for a temporary period, pending the completion of an investigation (if the suspension is based on indictment there is no time limit);
  - d. the cause(s) for imposing the suspension;
  - e. the effect of the suspension (including the scope of ineligibility);
  - f. that the contractor has 30 calendar days from receipt of the notice to respond with its PMIO in person, in writing, or through a representative with information and argument opposing the suspension;
- and

- g. that the NCUA may conduct a fact-finding proceeding if the SDO finds that material facts are in dispute.

A copy of the ARM will be sent with the notice. A copy of the entire Administrative Record will be made available to the contractor upon request, unless applicable law or parallel proceedings warrant the SDO's partial or complete redaction or withholding of the Administrative Record.

iv. Contractor's PMIO

After receiving notice of a suspension or debarment, the contractor has 30 calendar days from receipt of the notice to respond with its PMIO in person, in writing, or through a representative with information and argument opposing the proposed suspension or debarment. There is no set format for how the PMIO must be submitted. The contractor may request a meeting with the SDO. The SDO will decide whether to transcribe meetings and conference calls on a case-by-case basis. The PMIO should raise all contractor defenses, contested facts, admissions, remedial actions taken and any mitigating factors. Mitigating factors can include explaining whether the contractor (a) has effective

standards of internal control systems or adopted of such controls; (b) brought the misconduct to the attention of the NCUA in a timely manner; (c) internally investigated the misconduct; (d) cooperated fully with any NCUA investigation; (e) paid or agreed to pay restitution; (f) took appropriate disciplinary actions against individuals responsible for misconduct; (g) implemented or agreed to implement new remedial measures; (h) instituted or agreed to issue new training or ethics programs; (i) has had adequate time to eliminate the circumstances in the organization that led to the misconduct; and (j) whether management recognizes the seriousness of the misconduct and has implemented programs to prevent recurrence. The SDO must consider all matters in the PMIO in rendering a final decision. A contractor's failure to respond to the notices sent by the SDO shall be deemed an admission of the existence of the cause for suspension or debarment. In that case, the SDO may proceed to a final decision without further proceedings.

A fact-finding proceeding occurs if actions are not based upon a conviction or civil judgement and when, after receipt of the PMIO, the SDO determines there is a genuine dispute over material fact(s). A fact-finding proceeding is called to consider the fact(s). A fact-finder can be any individual appointed by the SDO to

oversee the proceeding. The contractor shall be afforded the opportunity to appear with counsel, submit documentary evidence and confront agency witnesses. The proceeding shall be transcribed unless otherwise mutually agreed upon, and the contractor can obtain a transcript of proceedings at its request and at its cost. The SDO shall attempt to schedule this proceeding within 60 calendar days of the PMIO. If there are numerous grounds for suspension and debarment, the proceeding can be limited to the grounds in dispute having a genuine issue of material fact. The disposition of the fact-finding proceeding will be documented by the SDO. The standard of proof for determining the disputed facts is preponderance of the evidence.

- c. Compiling the Administrative Record. During the process, the NCUA shall maintain and document all information considered by the SDO to include the ARM, the PMIO (including mitigating factors) and transcripts of any fact-finding proceedings. This is the Administrative Record. The following records, in addition to any other similar materials, shall also be included if considered by the SDO: emails; notes; contract documents; newspaper articles; and summaries of oral briefings and contractor submissions. Any information not relied on by the SDO should not be included. Once the SDO issues a final decision, the contractor may request a copy of the Administrative Record. The SDO may deny the

request or withhold or redact part of the Administrative Record if warranted under applicable law or because of parallel proceedings.<sup>17</sup> In any circumstance where the SDO redacts or withholds all or part of the Administrative Record, the SDO will provide the reasons for doing so to the contractor in writing.

d. Final Decision. The SDO shall issue a written final decision based on the Administrative Record. The SDO shall issue a conviction-based debarment within 30 working days after closing the Administrative Record and within 45 working days of closing the Administrative Record for a fact-based suspension or debarment. The SDO has discretion to extend these deadlines. The Administrative Record will be deemed closed when the SDO Admin submits all evidence to the SDO for a final decision. The SDO Admin will advise the contractor in writing promptly after the Administrative Record has been closed, including the date it was closed. All correspondence shall be sent USPS certified mail, return receipt requested, by the SDO Admin. The SDO can take the following actions in a final decision:

i. Not Debar the Contractor. The SDO may decide not to debar the contractor. The decision shall include, if applicable, referral to the

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<sup>17</sup> Parallel proceedings occur when two or more contemporaneous legal actions are initiated by different Government entities against the same contractor, and involving the same material facts. Often these arise when an agency has suspended or proposed a contractor for debarment and the Department of Justice is investigating or prosecuting the contractor for the same misconduct.

Notice of Proposed Debarment; a summary of proceedings; the identities of affiliates or imputed conduct; and the reasons for not debarring (for example, an Administrative Agreement; mitigating factors; or remedial measures taken by the contractor). The decision shall notify the contractor that it may request a copy of the Administrative Record and give notice of the effective date of the decision. The SDO Admin will remove the contractor's name from SAM.

- ii. Terminate the Suspension. The SDO may decide to terminate the suspension. The decision shall include, if applicable, referral to the Notice of Suspension; a summary of proceedings; the identities of affiliates or imputed conduct; and the reason for terminating the Suspension (for example, an Administrative Agreement; mitigating factors; or remedial measures taken by the contractor). The decision shall notify the contractor that it may request a copy of the Administrative Record and give notice of the effective date of the decision. The SDO Admin will remove the contractor's name from SAM.

- iii. Debar the Contractor. The SDO may decide to debar the contractor. This decision must be based on the preponderance of the evidence. The decision shall include, if applicable, referral to

the Notice of Proposed Debarment; a summary of proceedings; identities of affiliates or imputed conduct; the information considered by the SDO; the reasons for debarment; the scope of ineligibility; the consequences of debarment (application across the Executive Branch); and the effective dates of debarment. The decision shall notify the contractor that it may request a copy of the Administrative Record. The SDO Admin will enter the debarred contractor into SAM.

iv. Enter into an Administrative Agreement. At any time during the proceedings, the SDO may negotiate an Administrative Agreement with the contractor. An Administrative Agreement applies across the Executive Branch when entered into SAM. The terms of the Administrative Agreement and contents of the Agreement will be determined on a case-by-case basis.

e. Contractor's Remedy. After a decision is made, a suspended or debarred contractor may seek judicial review. OGC (in coordination with the Department of Justice, as appropriate or required) will work with the referring office, the SDO, and OCFO to litigate these claims.

**H. NCUA Action after a Decision.** If a suspension or debarment is imposed, NCUA offices must take steps to ensure the contractor does not receive any new

contracts. Upon the effective date of SAM listing, the NCUA must not solicit offers from, award contracts to, or consent to contracts with ineligible contractors. Suspended or debarred contractors may continue performing current contracts (unless those contracts are terminated or voided) but cannot (a) add new work, exercise options, or otherwise extend the duration of the contract or order; (b) issue task orders exceeding the guaranteed minimum under indefinite quantity contracts; or (c) place orders under blanket purchase agreements or basic ordering agreements. The NCUA must review any current contracts held by the contractor to determine whether to terminate or void those contracts. A decision to terminate or void a contract requires OGC concurrence.