



Agencies Adopt Changes to Rules Excluding Debarred and Suspended Persons from Grant Transactions and Requiring Drug-free Workplaces

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Twenty-nine federal agencies¹ issued final changes to the rule excluding persons and entities whom the federal government has determined are not responsible parties from receiving or participating in government grants. The rule, called the government-wide non-procurement debarment and suspension common rule (NCR), was issued in an effort to ensure the integrity of federal programs. The NCR applies to non-procurement transactions that originate with the federal agencies, such as grants, cooperative agreements, and loans, as well as certain lower-tier transactions entered into by the grantees. Changes from the prior NCR include narrowing the mandatory coverage of the rule for procurement contracts entered into by grantees, removing the certification requirement, and revising the procedure and criteria used by agencies in debarments and suspensions. Minor changes to the associated rule concerning drug-free workplace (DFW) requirements were also made.² The new rules became effective on November 26, 2003.

Lower Tier Coverage

As revised, the NCR continues to apply to all levels and all dollar amounts of non-procurement transactions entered into by federal grantees. For example, if a Head Start grantee enters into an agreement with a delegate agency, the grantee must ensure that neither the delegate agency, nor its principals, are debarred or suspended persons. If the delegate agency then enters into an agreement with another organization to perform part of the substantive program (i.e., a subgrant), the delegate agency would also have to ensure compliance with the debarment and suspension procedures. The same principle would generally apply if a federal grant passes through a state agency.³ Grantees at each level also need to ensure, through contract language or otherwise, that the lower level grantee will require the next lower-level grantees to comply.

There are different rules for procurement contracts entered into by grantees, however. In entering into these contracts, for goods or services not performed as part of the substantive work of the grant, the situations in which grantees are required to exclude debarred and suspended persons are now more limited. Only primary tier procurement contracts over \$25,000 are required to be covered by the NCR, except that if the federal agency requires consent to the procurement contract, the NCR will apply to all levels of procurement contracts of any amount. In addition, each federal agency has the option of extending coverage to lower-tier procurement contracts over \$25,000 if an agency deems its non-

procurement activities vulnerable to misconduct, poor performance or abuse at levels lower than the first procurement by adding agency-specific language to its regulations implementing the NCR.⁴ All contracts for federally required audit services are also covered by the NCR.

Certification Not Required

The prior version of the NCR, including the subpart for DFW regulations, required agencies and participants to obtain written certifications from grantees or individuals with whom they entered into covered transactions. Applicants, including Community Action Agencies, seeking grants from federal agencies were required to certify, among other things, that neither the organization nor its principals were debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or agency. Subawardees were required to make the same certifications to the grantee. In an attempt to reduce administrative red tape, the revised NCR eliminates the certification requirement, allowing federal agencies and grantees the flexibility to use other means to enforce compliance. For example, they may insert award conditions in the grant contracts, check the General Services Administration's new Excluded Parties List System (EPLS) (www.epls.gov), or continue to require certifications.

Changes to the Drug-Free Workplace Requirements

The final rules establish a separate part for the DFW requirements, which were previously at the end of the NCR. The only substantive change made to the DFW regulations is elimination of the certification requirement. The previous rule required all grantees of any federal agency to certify to that agency that they would maintain a drug-free workplace or, in the case of grantees who are individuals, certify to the agency that their conduct of grant activity would be drug free. The revised rule requires federal agencies to obtain assurances from grantees regarding compliance with drug-free workplace requirements, but does not require certification.

¹ Among the twenty-nine agencies are: Department of Energy; Department of Commerce; Department of Housing and Urban Development; Department of Labor; Department of Education; Department of Health and Human Services; Corporation for National and Community Service, and Department of Transportation. In addition, several other agencies, including the Treasury and Justice Departments, have implemented the rule on an interim final basis.

² See 68 FR 66534 (November 26, 2003).

³ The grantee should check the grant terms and conditions, the agreement entered into with the funding source, and/or the regulations governing the program, to determine whether the NCR applies. Grants involving federal funds are likely to require compliance with the NCR, but block grants may have different rules.

⁴ Primary tier transactions are those between a federal agency and a grantee. Lower tier transactions are those between a grantee in a covered transaction and another person or entity. A covered transaction is any non-procurement transaction except those in which the grantee is wholly or substantially owned by a foreign government.