

**ALERT**

# FAR Council Issues Long-Awaited Final Rule to Harmonize (Almost) Procurement and Nonprocurement Suspension and Debarment Rules

January 3, 2025

**WHAT:** On January 3, 2025, the Federal Acquisition Regulation (FAR) Council published its final rule to amend the FAR to improve consistency between the procurement and nonprocurement rules on suspension and debarment. We wrote about the proposed rule [here](#). The FAR Council largely adopted the proposed rule. Notably, it declined to align the FAR and Nonprocurement Common Rule (NCR), which applies to nonprocurement transactions like grants, regarding the exclusionary effect of proposed debarment, and it clarified how certain mitigating or aggravating factors would apply to an individual facing a suspension/debarment inquiry.

**WHEN:** The final rule was published in the Federal Register at 90 Fed. Reg. 507 on January 3, 2025; it goes into effect January 17, 2025.

**WHAT DOES IT MEAN FOR INDUSTRY:** The final rule largely tracks the proposed rule, which (1) added new definitions to account for existing practices in the suspension and debarment systems that were not in the FAR; (2) aligned the FAR's mitigating factors with the mitigating and aggravating factors in the NCR; (3) acknowledged additional communication methods between the government and contractors; and (4) made administrative-type changes. Contractors should refresh themselves on those changes [here](#). Overall, the FAR changes improve the consistency of the FAR with the NCR and add much-needed updates to align the FAR with "real world" suspension and debarment practices. The final rule missed an opportunity to make proposed debarment under the FAR non-exclusionary like the

## Authors

Kara M. Sacilotto  
Partner  
202.719.7107  
[ksacilotto@wiley.law](mailto:ksacilotto@wiley.law)

## Practice Areas

Government Contracts  
Small Business Programs and  
Nontraditional Defense Contractors  
Suspension and Debarment

NCR, but the FAR Council responded to comments asking for greater clarity on how the mitigating and aggravating factors would apply to an individual, as opposed to an organization, by modifying the factors in FAR 9.406-1 to address individuals.

### **Proposed Debarment Remains Exclusionary**

Despite acknowledging that “most of the respondents” recommended that the FAR Council revise the FAR to make proposed debarment non-exclusionary as it is under the NCR, see 2 C.F.R. 180.810, the FAR Council stuck firm to its position that it should remain exclusionary. The Council’s rationale in the final rule “acknowledge[d]” the comments that outline many reasons for change but claimed that the original policy reasons from the proposed rule for retaining proposed debarment as exclusionary “remain valid.” According to the FAR Council, “[t]hese policy reasons are based on differences in the purpose of procurement contracts and grants, as well as occasional differences in comparative risk between these instruments.” The FAR Council further reasoned that neither the Interagency Suspension and Debarment Committee (ISDC), which is the designated forum for discussing suspension and debarment under both systems, nor the Council believe that retaining proposed debarment as exclusionary under the FAR leads to mis- or overuse of that tool. Finally, the FAR Council noted that the revised FAR will formally recognize alternatives to immediate exclusion, such as pre-notice letters, presumably making immediate exclusion through proposed debarment less likely.

### **Individuals are More Directly Addressed in the Mitigating and Aggravating Factors**

In response to comments that the mitigating and aggravating factors in the FAR and NCR, used to determine whether exclusion is necessary to protect the interests of the Government, are ill-suited to application to individuals facing potential exclusion, the FAR Council declined to adopt a new set of factors specific to individuals but did agree to modify the factors in FAR 9.406-1 to indicate how an individual might meet them. The Council reasoned that the definition of a “contractor” in FAR 9.403 includes individuals and thus the factors in 9.406-1 should apply to all “contractors.” Nonetheless, in the interests of increasing transparency, the Council clarified how some of the factors would apply to an individual. Thus, for example, new FAR 9.406-1(a)(3) asks the suspending and debarring official (SDO) to consider “(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment (*or the individual cooperated with the investigation*) and, if so, made the result of the investigation available to the suspending and debarring official.” Revised FAR 9.406-1(a)(8), which asks the SDO to consider whether the contractor instituted new controls or training is divided to ask (i) whether the “contractor” instituted new controls or (ii) “For an individual, whether the individual has attended relevant remediation training.” Revised FAR 9.406-1(a)(10) is similarly divided. Other revisions to address individuals are more modest, simply noting that the reference to “contractor” in the factor includes individuals. The FAR Council noted that other recommended factors specific to individuals did not need to be added to the FAR and could be considered under the added “catch-all” factor at FAR 9.406-1(a)(17). Overall, although not perfect, the revisions provide a bit more guidance to individuals on factors they may wish to address if they are faced with a suspension/debarment inquiry.

## Other Recommended Tweaks Are Rejected

The FAR Council declined several other recommended changes, opting to retain the text of the proposed rule. Among those rejected changes, the Council:

- Declined to revise Subpart 9.4 to apply to “other transaction agreements,” noting that such agreements are not subject to the FAR.
- Declined to require notices of suspension, proposed debarment, or an SDO decision to be sent by certified mail or its equivalent, to impose specific requirements to confirm mail or email addresses, or to provide that non-receipt of a notice was an express reason to reduce the period of a debarment. The Council reasoned that the revisions to its rules in FAR 9.406-3(c)(1) on how various notices can be delivered provide more options and flexibility and are consistent with the NCR, that imposing specific delivery confirmation practices would be “overly prescriptive,” and that there is already a “catch-all” consideration in FAR 9.406-4(c)(5) that could cover non-receipt of a notice.
- Rejected a recommendation not to post to the Federal Awardee Performance and Integrity Information System (FAPIS) administrative agreements resulting from a pre-notice inquiry, as opposed to from more formal suspension/debarment proceedings, reasoning that 41 U.S.C. 2313 requiring the public posting of such agreements is agnostic as to how the agreement came about.
- Rejected a call to require production of the administrative record or other compiled information with a notice of suspension or proposed debarment or pre-notice letter, opting to allow agencies to determine their own practices. The Council modified FAR 9.406-3(d)(1), however, to clarify when the administrative record closes.

## Small Business Impact Revised?

In the proposed rule, the FAR Council analyzed the impact of the proposed changes on small business using data from Fiscal Years 2017-2019 and found that 75% of exclusions on the System for Award Management (SAM) applied to small businesses. The final rule analyzes similar data for Fiscal Years 2021-2023 and finds 61% of exclusions are of small businesses. That’s a big swing, but it still provides a cautionary tale to small businesses to focus on compliance as they continue to make up more than half of the contractors that are subject to exclusion.

## Takeaways

Overall, the FAR’s suspension and debarment rules needed a refresh, and the Council, with the ISDC, had been pursuing a possible alignment of the FAR with the NCR for many years. Several aspects of suspension and debarment practice – most notably the use of “pre-notice letters” and other informal means of inquiry as well as administrative agreements – were either unmentioned or mentioned only cryptically in the FAR. Moreover, the NCR had more fulsome guidance on the factors that an SDO should consider (and that a contractor facing an SDO may wish to address). Practitioners also have long advocated for better guidance for individuals facing potential exclusion (*see, e.g.,* 47 Pub. Cont. L. J. 479 (2018)). Although the FAR’s final rule

does not completely bring the FAR and NCR into alignment or resolve all pain points in the suspension and debarment system, it is a long-awaited update that makes many needed changes.

Wiley's Government Contracts practitioners have extensive experience representing contractors of all sizes as well as individuals in suspension and debarment actions under the FAR and NCR before both defense and civilian agencies. We assist contractors with proactive outreach to suspending and debarring officials and with assessing and improving their compliance programs to reduce the risks of an exclusionary action.