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¶ 132 FEATURE COMMENT: Debarment Or Suspension Based On A DEI Program? Let's Think It Through

Suspension and debarment are powerful administrative tools that the Government uses to exclude from federal contracting entities that are not "presently responsible." These exclusions can be lengthy, effectively shutting debarred or suspended contractors out of the lucrative federal marketplace for years. Even after the period of exclusion ends, disclosure requirements in connection with proposal submissions and teaming arrangements make it difficult for a previously debarred or suspended contractor to shed the stain of a prior exclusion. Because of these severe consequences, contractors shape their compliance programs, organizational cultures, and conduct to minimize the risk of creating cause for debarment or suspension.

As directed by EO 14398, the FAR Council amended FAR Part 9 to add "failure to comply with the requirements of the clause at 52.222-90" as a cause for both debarment, based on a preponderance of the evidence, FAR 9.406-2(b)(1)(viii), and suspension, based on adequate evidence, FAR 9.407-2(a)(11). But can a contractor actually be debarred or suspended based on diversity, equity, and inclusion (DEI) activities? There appear to be several practical, procedural, and legal barriers to this, and in fact, such an exclusion could be ripe for legal challenge.

Overview of FAR-Based Debarment and Suspension—The FAR recognizes that the Government's discretion to debar or suspend a contractor must be wielded with restraint and proportionality: "The serious nature of debarment and suspension requires that these remedies be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures in this subpart." FAR 9.402(b). This means that even if cause exists, a Suspending and Debarring Official (SDO) cannot automatically debar or suspend a contractor. Rather, the SDO must consider multiple factors, including the extensive list of aggravating and mitigating factors in the FAR, and any decision to impose either exclusion can be challenged in district court under the Administrative Procedure Act. See 5 USCA § 706(2)(A).

Debarment—Debarment is an exclusion of approximately three years that the SDO can impose after affording the contractor notice of the proposed action and an opportunity to submit information and argument in opposition. FAR 9.406-3(c); 9.406-4. If material facts are in dispute, the contractor may request a fact-finding proceeding in which it can present evidence and confront witnesses. FAR 9.406-3(b)(2)(i).

The FAR states that SDOs should consider 17 specifically enumerated factors (mitigating and aggravating) when determining whether debarment is warranted. FAR 9.406-1(a). These include whether the contractor has instituted new or revised internal controls or remediation training; whether the contractor's management recognizes the seriousness of the misconduct and has adopted practices to prevent recurrence; whether the contractor has a pattern or prior history of wrongdoing; the frequency of incidents and/or duration of the wrongdoing; the actual or potential harm or impact that results, or may result, from the wrongdoing; whether the wrongdoing was pervasive within the contractor's organization; and whether the contractor's principals tolerated the offense.

Suspension—Suspension is a temporary exclusion that can be imposed when "immediate action is necessary to protect the Government's interest," usually pending the outcome of an investigation or legal proceeding. FAR 9.407-1(b)(1). The SDO has "wide discretion" and "may infer the necessity for immediate action to protect the Government's interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government." FAR 9.407-1. If legal proceedings are not initiated, a suspension must generally be terminated after 12 months and cannot exceed 18 months unless legal proceedings have been initiated. FAR 9.407-4(b). Because suspension is a response to an immediate need to protect the Government's interests, the affected contractor is not entitled to prior notice before suspension takes effect.

Consequences of Debarment and Suspension—An excluded contractor is immediately listed in the System for Award Management and is ineligible to receive new federal contract awards, including orders under existing indefinite-delivery vehicles. Options on existing contracts cannot be exercised, and extensions are barred. FAR 9.405(a). Existing contracts may be terminated, subject to the contracting officer's discretion. FAR 9.405-1(a). The exclusion also extends to subcontracting in that prime contractors are prohibited from entering into subcontracts exceeding $35,000 with excluded entities. FAR 52.209-6(b), (c). These consequences apply across the entire Federal Government, not just with the initiating agency. FAR 9.401. Beyond this direct preclusion, an entity that has been suspended or debarred may be required to disclose this fact in future bids, on responsibility questionnaires, and to potential teaming partners.

EO 14398 and FAR 52.222-90—On March 26, 2026, President Trump signed Executive Order 14398, establishing that agencies "should not do business with contractors that engage in any racially discriminatory diversity, equity, and inclusion (DEI) activities." EO 14398 directed the FAR Council to issue a deviation and interim guidance to implement a new contract clause within 60 days.

On April 20, 2026, the FAR Council issued model deviations and implementation guidance, including a new clause at FAR 52.222-90, also entitled "Addressing DEI Discrimination by Federal Contractors." The clause defines "racially discriminatory DEI activities" as "disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity's resources." The clause defines "program participation" as "membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor."

Under FAR 52.222-90, contractors agree not to engage in racially discriminatory DEI activities and must furnish information and reports as required by the CO for purposes of ascertaining compliance with the clause. The clause must be flowed down to subcontracts at any tier, including those for commercial products and commercial services, for any subcontract where the place of delivery or performance is in the U.S. Moreover, the clause also requires contractors to report any of their subcontractors' known or "reasonably knowable" conduct that "may violate" the clause, and to inform the CO if a subcontractor legal challenge involves the clause. The clause also states that in the event of noncompliance, "the Contractor or subcontractor may be declared ineligible for further Government

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contracts." Notably, this clause language does not track the FAR's suspension and debarment procedures, under which exclusion is imposed by an SDO through a formal process with defined thresholds and procedural protections, not by a contracting officer's "declaration" of ineligibility.

As directed by EO 14398, the FAR Council amended FAR pt. 9 to add "failure to comply with the requirements of the clause at 52.222-90" as a new cause for both debarment (FAR 9.406-2) and suspension (FAR 9.407-2). This action underscores the administration's maximalist enforcement posture where contractor DEI programs are concerned. Arguably it was not necessary to add noncompliance with FAR 52.222-90 as a specific cause for debarment or suspension given that the FAR already includes a "catch-all" basis for both debarment and suspension whereby a contractor may be debarred or suspended for "any other cause of so serious and compelling a nature" that it affects the contractor's present responsibility. FAR 9.406-2(c); FAR 9.407-2(c). If a contractor's DEI activities were so plainly and objectively egregious as to call into question the contractor's fitness to hold Government contracts, an SDO could presumably invoke the catch-all without the need for a specific regulatory amendment. The fact that the FAR Council deemed it necessary to enumerate noncompliance with FAR 52.222-90 as a distinct cause suggests that the connection between a contractor's DEI program and its present responsibility is not self-evident, and that the amendment was needed to put SDOs on notice that the administration views these activities as bearing on contractor responsibility in a way that warrants potential exclusion.

It bears noting that "failure to comply with the requirements of the clause at 52.222-90" is not limited to engaging in racially discriminatory DEI activities. The clause imposes several distinct obligations, including furnishing records and information to the CO upon request, reporting known or "reasonably knowable" subcontractor conduct that "may violate" the clause, informing the CO of subcontractor litigation challenging the clause, and flowing down the clause to all domestic subcontracts at any tier. A contractor's failure to comply with any of these requirements could, in theory, serve as a basis for debarment or suspension. These procedural obligations present a more objectively verifiable basis for action than the contested question of whether a contractor's DEI program constitutes "racially discriminatory DEI activities," and an SDO who is disinclined to make that substantive determination may find firmer footing in a contractor's refusal to provide requested records or its failure to flow down the clause as required. That said, the same proportionality concerns, mitigating factors, and APA constraints discussed below would apply with equal force to a proposed exclusion on these grounds.

Will Contractors Actually Be Debarred or Suspended for "Racially Discriminatory DEI"?—With the regulatory architecture now in place, the question becomes whether the Government will use debarment and suspension to enforce the EO's prohibition on "racially discriminatory DEI activities," and whether such an action would survive a legal challenge. While the Government could technically pursue this path, significant obstacles exist at nearly every stage.

Suspension Appears Highly Unlikely: Suspension requires the SDO to find an immediate need for action to protect the Government's interests. FAR 9.407-1(b)(1). This suggests that there must be an emergency circumstance so urgent that the contractor cannot be afforded prior notice and an opportunity to be heard. Suspension is ordinarily triggered by events such as a criminal indictment, active fraud, or other ongoing conduct posing an immediate risk of harm *to the Government*.

It appears unlikely that a contractor's DEI program offerings would constitute the type of immediate, urgent threat to the Government that would justify suspension. A DEI program is fundamentally different in nature from typical triggers for suspension, such as fraud schemes, bribery, or ongoing criminal conduct. Even if a DEI program potentially involves disparate treatment based on race, these programs are typically internal contractor workplace initiatives that do not present an acute, time-sensitive risks of harm to the Government's business interests, or affect the delivery of products or services under a Government contract. Unlike the criminal conduct, active fraud schemes,

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or contract performance failures that have historically justified the emergency measure of suspension, the alleged harm here is that the contractor's internal workforce practices do not conform to a newly articulated regulatory standard whose scope and constitutionality remain contested. Whatever the merits of the underlying allegation, this is not the type of urgent, concrete threat to the Government's business interests for which suspension was designed. Moreover, the Government can readily investigate these types of concerns through less drastic mechanisms such as pre-notice letters, CO inquiries, or requests for compliance information under the clause itself, and it retains other means of enforcing antidiscrimination law entirely outside the debarment and suspension framework, including through EEOC investigations and Department of Justice enforcement actions, without resorting to the extraordinary remedy of immediate exclusion.

Debarment Faces Substantial Procedural and Substantive Hurdles: Debarment, while perhaps more plausible than suspension, faces its own considerable challenges. The due process protections embedded in the FAR's mandated procedures ensure that a contractor will have an opportunity to explain why it should not be debarred.

If a contractor receives a notice of proposed debarment or a pre-notice letter alleging that it has engaged in "racially discriminatory DEI activities" in violation of FAR 52.222-90, the contractor likely would respond in one of two ways, both of which would militate strongly against debarment. First, the contractor could demonstrate that its program does not, in fact, involve disparate treatment based on race as defined in the clause. Because the definitions of "racially discriminatory DEI activities" and "program participation" remain broad enough to encompass a wide range of workplace initiatives, many of which are plainly lawful, a contractor could find that it has considerable room to argue that the challenged activities fall outside the scope of the prohibition. Second, even if some element of the contractor's activities were problematic, the contractor could remedy the issue by immediately revising its program to eliminate prospectively any noncompliant components. The FAR's mitigating factors expressly consider whether the contractor has "instituted or agreed to institute new or revised review and control procedures, ethics training, or other relevant training programs," whether the contractor's "management recognizes the seriousness of the misconduct" and has "adopted practices to prevent recurrence." FAR 9.406-1(a)(8), (10).

Because debarment and suspension are forward-looking determinations of present responsibility and cannot be used to punish past conduct, a contractor that has identified and corrected a problematic practice has in fact underscored its present responsibility. FAR 9.402(b). An SDO may find it challenging to justify a debarment as nonpunitive when the contractor was willing to remedy the alleged noncompliance.

It is possible that the prospect of exclusion may prompt contractors to discontinue DEI activities that are lawful but not aligned with the administration's preferences. Given the devastating business consequences of exclusion, and the fact that even a notice of proposed debarment issued under the FAR triggers immediate ineligibility for new awards, a contractor may conclude that the path of least resistance is to eliminate any program that could even conceivably be characterized as "racially discriminatory DEI activities," regardless of the lawfulness of the activity. If this occurs, the debarment and suspension framework will have been repurposed from a tool for protecting the Government against irresponsible contractors into a mechanism for compelling contractors to conform their internal practices to the administration's policy preferences. That outcome would raise serious questions about whether the exclusion authority is being wielded "for the Government's protection" or for an impermissible punitive or coercive purpose. Conversely, a contractor that refuses to capitulate and is ultimately excluded would have strong grounds for an APA challenge if the administrative record does not support a finding that the contractor lacks present responsibility, or if the exclusion appears disproportionate to any genuine risk the contractor poses to the Government's interests.

The Risk of Arbitrary and Capricious Action: In a district court challenge of a debarment or suspension, a court will assess whether the exclusion decision was "arbitrary, capricious, an abuse of discre-

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tion, or otherwise not in accordance with law." 5 USCA § 706(2)(A). A court could find that this standard is met if an SDO debars or suspends a contractor based on alleged "racially discriminatory DEI activities" where the activity in question appears to fall outside of the FAR 52.222-90 definition, where the contractor has already revised its practices to comply with the clause, or where the severity of the exclusion is disproportionate to the nature of the alleged noncompliance and any actual risk posed to the Government's interests.

Uncharted Territory and Definitional Uncertainty: A debarment or suspension based on "racially discriminatory DEI activity" would be the first of its kind. Unlike many commonly seen causes for debarment or suspension, the definition of prohibited conduct in EO 14398 is not anchored in an existing statute with a developed body of case law. The concept of "racially discriminatory DEI activities" is a newly minted regulatory concept that lacks a body of judicial precedent construing what falls within or outside of this definition. SDOs may be reticent to take an action as drastic as rendering a contractor ineligible for federal awards based on a first-impression legal question in the absence of a court having ruled on the question, particularly if the allegedly "discriminatory DEI activities" of the contractor have not had any effect on the contractor's delivery of goods or services under its federal contracts.

Pending Litigation Challenging EO 14398: The legal landscape is further complicated by the fact that EO 14398 itself is currently being challenged in court. On April 20, 2026, the National Association of Diversity Officers in Higher Education, the American Association of University Professors, the National Association of Minority Contractors, and other plaintiffs filed a complaint for declaratory, preliminary, and permanent injunctive relief in the U.S. District Court for the District of Maryland, challenging the EO as unconstitutional. *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 8:26-cv-01532 (D. Md. filed Apr. 20, 2026). The plaintiffs specifically allege that the EO violates the First Amendment's protections of free speech and free association by penalizing constitutionally protected expression on topics related to race and ethnicity, including by "threatening... suspension of contracts, debarment from contracting, and liability under the False Claims Act." The complaint further alleges that the EO's definition of "racially discriminatory DEI activities" is "both overbroad and imprecise" and reaches "a vast swath of contractor and subcontractor expression and activities... even if those activities are justified, legal, and constitutionally protected."

This pending litigation is significant for the debarment and suspension analysis. An SDO contemplating a debarment or a suspension action based on alleged noncompliance with FAR 52.222-90 may wait before rendering a contractor ineligible for federal awards based on a legal framework whose constitutionality is under active judicial review. Moreover, debarring or suspending a contractor while EO 14398 is being actively challenged may result in the excluded contractor mounting its own legal challenge.

Career Officials, Novel Legal Questions, and the Limits of the SDO's Role: There is a final, practical consideration. SDOs are not judges, and allegations of racially discriminatory DEI activities as defined in EO 14398 and FAR 52.222-90 are not part of an SDO's typical caseload. Moreover, SDOs are career Government officials who occupy non-political positions that do not change from one presidential administration to the next. Their job is to assess whether a contractor is presently responsible for purposes of being generally eligible for federal contracts, and to protect the Government from being harmed by contracting with entities that are not presently responsible. Accordingly, SDOs are accustomed to focusing on issues of integrity, ethics, contract performance, and compliance with applicable laws.

Expecting SDOs to find that a contractor has engaged in "racially discriminatory DEI activities" casts them in the role of a tribunal of first impression on a novel, unsettled, and politically charged legal question that no court has yet resolved in the context of EO 14398. Some SDOs may not feel it is appropriate to make such a determination in the first instance, particularly absent a predicate judicial or enforcement finding. They may well defer action until a court has upheld the constitutionality of the prohibition as articulated in EO

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14398 and determined that the specific contractor engaged in the prohibited conduct. This would be consistent with SDOs' established practice of relying on indictments, convictions, civil judgments, and findings by other investigative or adjudicative bodies as the basis for their actions. To be sure, the FAR permits SDOs to initiate fact-based actions without a predicate judicial finding. But fact-based actions require the SDO to independently evaluate whether the contractor's conduct meets the regulatory standard, and they are most commonly used in cases involving relatively straightforward factual questions such as whether a contractor failed to perform, failed to disclose known violations, or engaged in well-established categories of misconduct. Whether a contractor engaged in "racially discriminatory DEI activities" would require the SDO to apply a newly created regulatory definition in a context that implicates constitutional rights, lacks any established body of precedent, and is sufficiently contentious to provoke immediate litigation. It remains to be seen whether any SDO will want to take on this role.

Conclusion—The administration has made clear its intention to use the levers of federal procurement policy to address what it views as "racially discriminatory DEI activities" by federal contractors. The addition of FAR 52.222-90 and the corresponding amendments to the causes for debarment and suspension represent a meaningful expansion of the regulatory framework. Yet the actual deployment of debarment and suspension based on a contractor's DEI activities remains fraught with legal and practical challenges. Debarment requires due process that will afford a contractor ample opportunity to demonstrate compliance or self-correct if necessary. Suspension requires an emergency-level justification that a contractor's DEI activities are unlikely to present. SDOs may not view it as their role to wield the immense power of excluding contractors from the federal marketplace in furtherance of the administration's views about DEI, particularly when the EO prohibiting "racially discriminatory DEI activities" is currently being challenged as unconstitutional. Any exclusion that appears motivated by punishment or coercion rather than a bona fide, forward-looking assessment of present responsibility will be vulnerable to reversal under the APA. Contractors should certainly take the new clause seriously, review their programs for compliance, and be prepared to respond to inquiries. But they should also understand that while it remains possible for an SDO to debar or suspend a contractor based on alleged "racially discriminatory DEI activities," such an action would be unprecedented, and a contractor facing exclusion on this basis would have potentially strong grounds to challenge the action and seek restoration of its eligibility for federal awards.

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