

OFFICE OF ASSISTANT GENERAL COUNSEL FOR FINANCE AND LITIGATION (OAGCFL)
SUSPENSION AND DEBARMENT GUIDANCE/RECOMMENDATIONS

A. Period of Debarment

Explanation: While the referral or other parts of the Administrative Record may contain recommendations regarding how long a party should be debarred, the SDO should not make a decision on the matter until after consideration of all factors and in accordance with the process set forth in the debarment regulations. FAR § 9.406-1 and 9.406-3; 2 C.F.R. §§ 180.845 and 180.860. Included among the factors the SDO must consider under the debarment rules is information provided by the party when contesting a proposed debarment.¹ As such, it would be inappropriate to pre-judge the period of time a party may be debarred prior to potentially receiving all relevant information, and the record should reflect the bases for the debarring official's determination as to the period of debarment.

1. Referral or Consideration Memoranda that recommend that a proposed debarment be for other than three years should explain the rationale for that referral and the SDC should inquire of the referring entity if that explanation is missing or incomplete.
2. As to the period or duration of debarments Notices of Proposed Debarment should state only: "Debarment generally is for a period not to exceed three (3) years however, regardless of whether you contest this action or respond to this Notice, debarment may be imposed for a lesser or a longer period as the circumstances warrant."
3. Only the Decision Memorandum should state the period of time for which the party is being debarred.²

¹ The debarring official may upon reconsideration reduce the period or extent of debarment based on: (1) newly discovered material evidence; (2) a reversal of the conviction or civil judgment upon which the debarment was based; (3) a bona fide change in ownership or management; (4) elimination of other causes for which the debarment was imposed; or (5) other reasons the debarring official deems appropriate. FAR § 9.406-4(c); 2 C.F.R. § 180.880.

² As a general rule, debarment shall be for a period not exceeding 3 years. FAR § 9.406-4; 2 C.F.R. § 180.865(a). Exceptions include debarment for violations of provisions of the Drug-Free Workplace Act of 1988 (period not to exceed 5 years) (FAR § 9.406-4; 2 C.F.R. § 180.865(c)) and violations of the employment provisions of the Immigration and Nationality Act employment provisions (one year debarment, but may be extended) (FAR § 9.406-4). In determining the period of debarment the SDO may consider the aggravating and mitigating factors. 2 C.F.R. § 180.865(b). If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period. FAR § 9.406-4(a)(2); 2 C.F.R. § 180.865(b).

4. The Administrative Record should clearly demonstrate the basis for debarment official's decision as to the period of debarment, particular if it is for a duration other than three years.

B. Aggravating and Mitigating Factors

Aggravating and mitigating factors must be taken into account when deciding whether to debar an entity or individual, and it is important that the record in every case reflect that they were. FAR 9.406-1 and 2 C.F.R. §180.860. Our processes are designed so that in any particular case the Memorandum in Support of a Proposed Debarment to the greatest extent possible can provide the template and basis for a Determination Memorandum to debar. The manner in which the SDO should document such aggravating and mitigating circumstances depends on the documentation being prepared.

1. The SDC should ensure that all Consideration or Referral Memoranda include discussion of aggravating and mitigating factors. See DOC, Suspension and Debarment Handbook, Section VI.A.4.a.
2. All Notices of Proposed Debarment should state: "Before making any debarment decision, the Debarring Official will consider the existence or nonexistence of any aggravating or mitigating factors or any remedial measures. FAR § 9.406-1 or 2 C.F.R. § 180.860, (as appropriate)." Note this is a change from the Handbook which provides that: "To the extent possible, a Notice of Proposed Debarment should set forth the bases for debarment with sufficient particularity to demonstrate consideration of all known aggravating and mitigating circumstances. DOC, Suspension and Debarment Handbook, Section VI.C.4.
3. Memoranda in Support of Proposed Debarment should identify all then known aggravating and mitigating factors, preferably in a separate section. If no mitigating or aggravating factors are present, this section is unnecessary
4. All Determination Memoranda should specifically discuss in a separate section the mitigating and aggravating factors that informed the SDO's decision, if any, including in particular those that effected the SDO's determination to debar for a period other than three years.
5. The Administrative Record should document that the SDO in fact considered all mitigating and aggravating circumstances. OGCF&L recommends that each record include a checklist of mitigating and aggravating circumstances as set forth in the DOC Suspension and Debarment Handbook, Section VI.G., to be completed and initialed by the SDO indicating their presence, absence, or inapplicability in the particular case. See attached.