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# Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement

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in Procurement**

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# Suspension and Debarment in the U.S. Government: Comparative Lessons for EU's Next Steps in Procurement

*Christopher Yukins\* and Michał Kania\*\**

## ABSTRACT

Governments may exclude vendors from procurement awards for many reasons, including poor performance and corruption. Excluding a vendor, whether from a particular procurement (deciding that the vendor is not qualified for award) or from an entire procurement system (suspending or debaring the vendor), calls for a complex assessment of the performance and reputational risks posed by that vendor, and of the costs of exclusion. As the EU's Member States shape their exclusion systems consistent with the EU's procurement directives, the Member States may wish to draw on U.S. strategies for managing risks in contractor qualification: requiring that contractors establish strong internal controls, centralizing the management of vendor exclusions, and using administrative agreements and independent monitors which allow agencies to mitigate risks even as they, and their vendors, avoid the disruption that suspension and debarment may cause. These U.S. strategies align well with the EU procurement directives, and in many cases reflect a natural extension of strategies that EU Member States are already using to address the risks posed by bad or corrupt contractors.

All over the world, public procurement systems seek to maximize efficiency in public spending. To frame a goal for efficient procurement, the legal regimes governing public procurement sometimes use the terms *best value* or *value for money*, and there are a number of legal constructs used to further that ambitious goal. These constructs include, among others, regulations on competition, transparency and integrity, on different solicitation methods, on evaluation criteria for award, on e-procurement mechanisms and contract administration, and on complaints or protests about the procurement process. Most importantly for our purposes here, those constructs generally include qualification requirements for

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vendors – qualification which may be denied when a contractor is excluded from a particular contract (typically by an individual contracting official), and broader exclusion (which we will treat here as *suspension* or *debarment*) which can bar a vendor from participating at all in a procurement system. Contractors may be excluded for any number of reasons, including of course rank corruption.<sup>1</sup>

This question of qualification and exclusion – of selecting vendors that are responsible and appropriately prepared to perform, and excluding those that are not – can be addressed through qualification criteria and, more broadly, through exclusion criteria which often build on those same qualification criteria. While the EU’s main procurement directive, Directive 2014/24/EU,<sup>2</sup> seems to divide these two questions of qualification and exclusion, the U.S. government bundles the two into one concept: an assessment of the *responsibility of the vendor*. If a vendor is not responsible, it is not qualified and cannot be awarded a contract; by the same token, once a vendor is confronted with proof of its prior misconduct, if the vendor cannot show that it is “presently responsible” it generally will be excluded from federal procurement.<sup>3</sup> The term *present responsibility* refers to business ethics, integrity, honesty and competence.<sup>4</sup> The modifier *present* plays a pivotal role in the U.S. federal exclusion regime, because a vendor may show that notwithstanding *past* troubling conduct, at *present* that risk has been mitigated or eliminated, and that therefore exclusion is unnecessary.<sup>5</sup>

Various sources of information are used by U.S. government agencies to assess contractors’ qualifications – including direct inquiries, market surveys, past performance data, and certifications submitted to the government<sup>6</sup> -- to ensure that federal agencies deal only with responsible vendors that are prepared to fulfill their legal and contractual obligations<sup>7</sup>. Those firms that do not meet high standards of responsibility under the primary principles of the U.S. public procurement system

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<sup>1</sup> See generally Sope Williams-Elegbe, *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures* (Bloomsbury 2012).

<sup>2</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, *OJ L 94* (March 28, 2014), p. 65–242 (*hereinafter* “Directive 2014/24/EU”).

<sup>3</sup> For a discussion of the history of this concept of “responsibility,” see, e.g., Robert F. Meunier & Trevor B. A. Nelson, *Is It Time for A Single Federal Suspension and Debarment Rule?*, 46 *Pub. Cont. L.J.* 553, 556 (2017).

<sup>4</sup> FAR 9.103 (b); see also Christopher Yukins, Cristiana Silva & Mariana Avelar, *A Comparative View of Debarment and Suspension of Contractors in Brazil and in the USA* (2017), 66 *Admin. & Constit. L. Rev.* 61 (2016), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3080396](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080396).

<sup>5</sup> See Robert T. Rhoad & David Robbins, *Fraud, Debarment and Suspension*, in Thomson Reuters’ Government Contracts Year in Review Conference – covering 2018, Conference Briefs 2019, pp. 15–24.

<sup>6</sup> See, e.g., FAR 9.105-1(c).

<sup>7</sup> See Kate M. Manuel, Congressional Research Service, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* (Nov. 19, 2008), available at <https://fas.org/sgp/crs/misc/RL34753.pdf>.

are excluded from winning federal contracts, consistent with Steven Schooner's observation that bribery, favoritism and unethical behavior have no place in a successful procurement system.<sup>8</sup>

The question, then, is whether the U.S. government's approach to contractor qualification and exclusion can be integrated successfully into an international public procurement market. There is political support for closer trade relations between the United States and the EU, and those closer relations presumably would include more tightly integrated procurement markets, both between the United States and the EU and globally.<sup>9</sup> With this in mind, both business exchanges and regulatory cooperation require a sound understanding of the main legal and economic constructs on both sides of the Atlantic. More specifically, issues of qualification and exclusion probably will prove central to successful integration of procurement markets, as qualification and exclusion (if handled incorrectly) can raise serious barriers to cross-border procurement. Rather than integrating and converging, however, qualification and exclusion have diverged in troubling ways in the U.S. and EU regimes.

In this paper, the starting point for our comparative analysis will be the U.S. government's Federal Acquisition Regulation,<sup>10</sup> most importantly its provisions regarding exclusion and debarment<sup>11</sup>. Our main argument builds on a groundbreaking assessment of debarment internationally by Sope Williams-Elegbe,<sup>12</sup>

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<sup>8</sup> See generally Steven Schooner, *Desiderata: Objectives for a System of Government Contract Law*, (2002) 11 Public Procurement Law Review 103.

<sup>9</sup> See, e.g., Christopher Yukins & Hans-Joachim Prieß, *Breaking the Impasse in the Transatlantic Trade and Investment Partnership (TTIP) Negotiations: Rethinking Priorities in Procurement*, 56 Gov. Contr. 1, 3-7 (July 23, 2014), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2471653](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2471653). There have been serious attempts to foster transatlantic cooperation in the last few years. One result was the intensive work done on the Transatlantic Trade and Investment Partnership (TTIP) from 2010 to 2016. Even though TTIP has been largely suspended during the Trump administration, the gradual globalization of public procurement markets means that there is an ongoing, and serious, need for better integration of the two public procurement regimes. For a discussion of the current levels of cross-border procurement trade between the EU and the United States, see Christopher R. Yukins, *International Procurement Developments in 2018 – Part IV: The United States in International Procurement: Understanding a Pause in the Trump Administration's Protectionism*, 2019 Gov't Contracts Year in Rev. Br. 6 (available on Westlaw).

<sup>10</sup> <https://www.acquisition.gov/browse/index/far>. For a thorough introduction to the U.S. suspension and debarment regime, see, e.g., John Pachter, Christopher Yukins & Jessica Tillipman, *U.S. Debarment: An Introduction* (Feb. 24, 2019) (draft chapter for forthcoming volume, Cambridge U. Press (D. Daniel Sokol & Benjamin van Rooij, eds.)), available at <http://publicprocurementinternational.com/wp-content/uploads/2019/02/2019-02-24-Draft-Debarment-Compliance-Handbook-Chapter-John-Pachter-Chris-Yukins-Jessica-Tillipman-1.pdf>.

<sup>11</sup> This paper will not make a close review of exclusion and debarment in "nonprocurement" matters (such as grants by the federal government), or in state and local governments in the US, which have independent procurement systems.

<sup>12</sup> Sope Williams-Elegbe, *supra* note 3.

a pivotal comparative paper by Sati Harutyunyan,<sup>13</sup> and a series of papers and presentations given at a March 2019 symposium at King's College, London,<sup>14</sup> that policy makers in the EU may wish to look to some of the solutions for exclusion and debarment that have developed over many years in the U.S. federal procurement system. Drawing on lessons from the U.S. experience may ease cooperation in cross-border trade, and may help the EU Member States advance their own systems for exclusion and debarment, which are being developed under the broad mandates of the EU's 2014 procurement directives.<sup>15</sup>

Sharing lessons across the Atlantic may be easier than it seems, because the two systems – U.S. and EU – in fact have a great deal in common. Both systems focus first on effective public spending in procurement (the “*value for money*” norm discussed above).<sup>16</sup> In both systems, common principles such as competition, integrity and transparency play key roles.

There are also, though, several basic differences between the two systems. Unlike the U.S. federal system, which relies heavily on multilateral competitive negotiations for more complex procurements, Member States in the EU tend to rely much more heavily on open procedures (most analogous to price-based

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<sup>13</sup> While this paper argues that elements of the U.S. suspension and debarment model could be accommodated within the structure set by the EU procurement directives, Sati Harutyunyan went a step further and argued that the directive itself should be reformed to call for debarment systems in the EU Member States. See Sati Harutyunyan, *Risk and Expectation in Exclusion from Public Procurement: Understanding Market Access and Harmonization Between the European Union and the United States*, 45 Pub. Cont. L.J. 449, 476 (2016) (“A debarment structure stipulated in the Directive . . . may provide a solution to the sufficiency assessment in the EU system because it would allow Member States to identify the party responsible for that decision. Identifying a party responsible for assessing whether self-cleaning is sufficient would add transparency to the EU exclusion system and provide contractors with more guidance of government expectations.”).

<sup>14</sup> <http://publicprocurementinternational.com/2019/01/14/kings-college-london-gwu-law-school-annual-symposium-exclusion-and-debarment-18-march-2019/>.

<sup>15</sup> For an extended history of qualification and exclusion under the EU procurement regime, see Sope Williams-Elegbe, *supra* note 3, at 38-47.

<sup>16</sup> One of the central goals of U.S. acquisition reform in the 1990s was efficiency. See, e.g., Steven Schooner, *Desiderata: Objectives for a System of Government Contract Law*, (2002) 11 Public Procurement Law Review 103. For recommendations on implementing efficiency, see Christopher Yukins & Steven Schooner, *Public Procurement: Focus on People, Value for Money and Systemic Integrity, Not Protectionism* (Mar. 9, 2009), in *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20*, Chapter 17 (Richard Baldwin & Simon Evenett, eds., A VoxEU.org Publication), available at <https://ssrn.com/abstract=1356170>. At the same time, the trajectory of reform in the EU the approach has been shaped much more by the promotion of core Single Market principles – competence, transparency and equal treatment, and the achievement of efficiency supported by these basic principles. See, e.g., Sope Williams-Elegbe, *supra* note 3, at 38-47 (discussing EU approach to qualification and exclusion).

“sealed bids” in the United States).<sup>17</sup> The U.S. federal system includes a number of mature and aggressive socioeconomic initiatives; procurement under the EU procurement directives, in contrast, is only now beginning to embrace socioeconomic goals, often under the rubric of “sustainability” in public procurement.<sup>18</sup> And while the EU’s Member States make extensive use of the competition exception for “in-house” procurement (procurement by one public agency through another, subsidiary agency),<sup>19</sup> this issue of “in-sourced” procurement between agencies has played a far smaller role in U.S. federal procurement.<sup>20</sup> These types of differences do not, however, preclude useful comparison between the U.S. and EU approaches to exclusion and debarment; indeed, as the discussion below shows, these differences in other quarters point up structural parallels in the two systems and thus make it easier to see how the two systems can cooperate in exclusion and debarment.

The analysis below proceeds in several parts. Part 1 reviews the roles of exclusion and debarment in any procurement system. Part 2 discusses why and how exclusion and debarment occur in the U.S. federal procurement system and the path forward for exclusion and debarment under the 2014 EU procurement directives. In Part 3, important aspects of the U.S. system will be examined and compared to the EU regime: a requirement for internal contractor controls (known as “corporate compliance” in the United States), the role of a suspension and debarment official in the U.S. federal system, and how U.S. officials may resolve concerns regarding a contractor’s qualifications through administrative agreements, sometimes supported by an independent monitor. As the conclusion in Part 4 notes, many of these aspects of the U.S. system are echoed in the emerging EU regime, and the U.S. experience could be useful in improving exclusion and debarment in the EU (and elsewhere), and in facilitating cross-border procurement in the years to come.

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<sup>17</sup> Compare Christopher R. Yukins, *The U.S. Federal Procurement System: An Introduction*, Upphandlingsrättslig Tidskrift 2017 p. 69, p. 81-83 (citing study of Umer Chaudhry showing that multi-lateral competitive negotiations are used in roughly 60 per cent of federal procurements), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3063559](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063559), with European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, *Measurement of Impact of Cross-Border Penetration in Public Procurement* (2017) (competitive dialogue (analogous to U.S. competitive negotiations) used in approximately 5000 procurements versus open tendering (analogous to U.S. sealed bidding) used in approximately 2.5 million procurements, i.e., in roughly 2 per cent of EU procurements).

<sup>18</sup> See, e.g., Max V. Kidalov, *Small Business Contracting in the United States and Europe: A Comparative Assessment*, 40 Pub. Cont. L.J. 443 (2011).

<sup>19</sup> See, e.g., European Commission, *Public Procurement Reform Provides Explicit Rules on Public-Public Cooperation* (Mar. 21, 2016), [http://ec.europa.eu/growth/content/public-procurement-reform-provides-explicit-rules-public-public-cooperation-0\\_en](http://ec.europa.eu/growth/content/public-procurement-reform-provides-explicit-rules-public-public-cooperation-0_en).

<sup>20</sup> See, e.g., Wojciech Hartung & Katarzyna Kuzma, *In-House Procurement -- How It Is Implemented and Applied in Poland*, 13 EPPPL 171 (2018).

## 1 Exclusion and Debarment in Public Procurement: Roles and Aims

At the heart of any public procurement system is the government's obligation to spend public funds prudently. Public procurement, if done imprudently, presents at least kinds of risks: *reputation* risk (the risk that the government's reputation will suffer if, for example, it contracts with a disreputable vendor), *performance* risk (the risk that an unqualified vendor will not perform), and *fiduciary* risk (the risk that funds entrusted to a public agency will not be spent as intended).<sup>21</sup> While those in the private sector typically focus on performance risk, governments also develop complex rules systems to mitigate reputational risks. Thus, for example, while a private consumer will focus on whether a vendor will perform a contract when assessing that vendor's qualification, a public customer also will consider the reputational risks that the vendor poses to the government. As a threshold matter, therefore, two risks – performance and reputational – play vitally important roles in how a government qualifies, or excludes, a prospective contractor.

Exclusion and debarment of vendors that pose special performance or reputational risks are thus the threshold means of protecting the public's interest. In the U.S. federal system, qualification and debarment promote this aim by precluding agencies from entering into new contracts with vendors, for example, that have previously violated the law, or have failed to perform on prior contracts. In the U.S. perspective, those prior failures suggest that the vendor lacks adequate internal controls, and thus is *nonresponsible* (to use the U.S. term of art).<sup>22</sup> At the same time, both the data that public officials draw upon in making qualification decisions and exclusion itself may serve as early warnings for other procurement systems that seek to avoid these same vendors.<sup>23</sup> As a result, exclusion and debarment for unqualified vendors serve to protect the public interest, not only in the procuring state but also more broadly among governments and institutions that share information regarding contractor qualification.

Given these goals, the issues that arise around exclusion and debarment in public procurement tend to fall into several common categories. The first involves the question *why vendors may be excluded or debarred*. As the discussion below reflects, the EU procurement directives and the U.S. federal procurement rules take different approaches to this threshold question, in part because the EU, vitally concerned with ensuring that vendors are not excluded as a result of national bias in the

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<sup>21</sup> See, e.g., Jesper Stenberg Johnson, *The Basics of Corruption Risk Management* (2015), available at <https://www.u4.no/publications/the-basics-of-corruption-risk-management-a-framework-for-decision-making-and-integration-into-the-project-cycles.pdf>.

<sup>22</sup> See Kate M. Manuel, *supra* note 9, at 8.

<sup>23</sup> See Johannes S. Schnitzer & Christopher Yukins, *Combating Corruption in Procurement: Debarment Present and Future*, in *Future-Proofing Procurement* 26-27 (UNOPS 2016), available at <http://www.bhrinlaw.org/documents/2015-asr-supplement.pdf>.



Member States, fosters slightly differing approaches to vendor qualification. Second, there is the question of *who should disqualify* – should it be the contracting official in charge of a specific procurement, or should a higher-level official (or agency) make more general decisions to exclude vendors across an entire procurement system? Third is the question of *rehabilitation and controls* – of the circumstances under which a wayward vendor will be allowed to reenter a public procurement market. As the discussion below reflects, while both the EU and the U.S. government may allow a vendor to return to public markets if the vendor institutes internal controls (“self-cleans,” in the EU term), the U.S. government tends to approach exclusion not as a matter of rectifying (or “cleaning”) specific failures, but rather as part of a broader effort to manage the risks posed by unqualified contractors.

## 2 Exclusion and Debarment Under the U.S. Federal Acquisition Regulation

### 2.1 General Remarks

The U.S. federal procurement market is one of the largest in the world. According to USASpending.gov, the U.S. government’s leading website on federal procurement data, the federal government spends roughly US\$500 billion on contracts every year – slightly less, for example, than the annual gross domestic products of Sweden or Poland.<sup>24</sup> Because the U.S. government’s procurement market is highly attractive to vendors from all over the world, this market is competitive, but also very demanding. It requires not only that contractors provide very high-quality goods and services, but also that they adhere to high ethical standards. These robust expectations for contractors are reflected in many ways, including the large numbers of contractors and individuals suspended and debarred each year. The coordinating committee for federal suspension and debarment officials from across the federal agencies, the Interagency Suspension and Debarment Committee (ISDC), reported that in 2017 a total of 604 contractors and individuals were suspended (exclusion on a temporary basis, for example while an investigation proceeds), 1613 were proposed for debarment (a process which, under U.S. rules, normally triggers *de facto* debarment), and 1423 were proposed for debarment or debarred (exclusion across all federal agencies, generally for a term of years), for a

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<sup>24</sup> <https://datalab.usaspending.gov/contracts-over-time.html>.

total of 3640 actions.<sup>25</sup> The suspending and debarring officials in the Department of Defense were the leaders, probably because defense procurement represents by far the largest portion of U.S. federal procurement. As noted, these suspension and debarment decisions, though issued by a lone suspension and debarment official in a specific agency, apply across the federal government; thus, if an agency suspension and debarment official determines that a contractor is not presently responsible, that decision will have government-wide effect, and may have collateral effects if other governments, or institutions, rely on that decision.

Although the concept of contractor responsibility can be traced to the earliest days of the republic during the Revolutionary War,<sup>26</sup> one of the first formal recognitions of debarment came in 1928 when the U.S. Comptroller General recognized that in some instances “the interests of the United States” may necessitate debarment<sup>27</sup>. With the passage of the Buy American Act of 1933, Congress expressly authorized debarment based on a statutory violation for those contractors that sold goods in violation of the Act.<sup>28</sup> Two laws from the 1940s, the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949, laid the groundwork for what in the early 1980s became the Federal Acquisition Regulation, which governs procurement across all the agencies of the executive branch of the U.S. government. In 1982, the Office of Federal Procurement Policy issued Policy Letter 82-1, which established temporary uniform guidelines for suspension and debarment.<sup>29</sup> Two years later, the FAR and its provisions regarding exclusion, debarment and suspension became effective.<sup>30</sup> Since that time, many rulings clarifying the scope and meaning of the FAR guidance on exclusion and debarment have been issued.

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<sup>25</sup> See *The Interagency Suspension and Debarment Committee Report FY 2017*, at 2 (2018), available at <https://www.acquisition.gov/isdc-reporting>. The Interagency Suspension and Debarment Committee reports to Congress annually on the status of the federal suspension and debarment system, pursuant to Section 873 of Public Law No. 110-417. Per Section 873, the reports describe the government’s progress in improving suspension and debarment, and provide a summary of each agency’s suspension and debarment activities for the fiscal year. *Id.*

<sup>26</sup> See, e.g., Capt. Shawn T. Gallagher, *Due Process Standards and Considerations Regarding Suspension and Debarment*, at 2-3 (Judge Advocate General’s School, 1988) (discussing history), available at <https://apps.dtic.mil/dtic/tr/fulltext/u2/a451526.pdf>.

<sup>27</sup> For more general histories of the U.S. federal procurement system, see, e.g., James Nagle, *A History of Government Contracting* (2d ed. 2012); Christopher R. Yukins, *supra* note 19.

<sup>28</sup> Buy American Act of 1933, Public Law No. 428, 72d Cong., 2d Sess., ch. 212, title III, sec. 3(b), 47 Stat. 1489, 1520 (March 3, 1933), available at <http://legisworks.org/congress/72/publaw-428.pdf>.

<sup>29</sup> The temporary debarment guidance, which was to expire in 1984 (the year the FAR took effect), was reproduced at 41 Code of Federal Regulations, Appendix (1982).

<sup>30</sup> See Joseph D. West, Timothy J. Hatch, Christyne K. Brennan & Lawrence J.C. VanDyke, *Suspension and Debarment*, 06-9 Briefing Papers 1, 2 (Thomson West, Aug. 2006), available at <https://www.gibsondunn.com/wp-content/uploads/documents/publications/WestHatch-SuspensionDebarmentBriefingPaper.pdf>.

The current U.S. provisions concerning exclusion and debarment are gathered in Part 9, *Contractor Qualification*, of the Federal Acquisition Regulation, at Title 48 of the Code of Federal Regulations.<sup>31</sup> Subpart 9.1 addresses contractor responsibility – what it takes for a contractor to be qualified for award of a federal contract, and how that question of contractor responsibility is to be determined by the contracting officer – and Subpart 9.4 addresses suspension and debarment, i.e., how those not “presently responsible” will be barred from U.S. procurement.<sup>32</sup> *Debarment* in the U.S. federal system<sup>33</sup> is generally understood as “an action taken by a debarring official . . . to exclude a contractor” from U.S. government contracting “for a reasonable, specified period,” typically for a period of years<sup>34</sup>; *suspension* means “action taken by a suspending official . . . to disqualify a contractor temporarily” from government contracting and government-approved subcontracting. The standards for contractor qualification (responsibility) are similar to, but not identical with, the standards for suspension and debarment. The differences are not surprising, for responsibility standards define which vendors *can* be awarded a contract, and suspension and debarment standards define which cannot. That said, both sets of standards – responsibility and suspension/debarment – can be read of a piece, as related guides for officials in assessing the performance and reputational risks posed by prospective contractors. Indeed, the Federal Acquisition Regulation itself knits together the concepts of responsibility and suspension/debarment in FAR 9.402(a), where it notes as a matter of policy that agencies are to award contracts only to responsible contractors, and that debarment and suspension, as “discretionary actions . . . are appropriate means to effectuate this policy”.

Both sets of standards are designed to protect the government’s interests from potential harm posed by individuals or firms which present a lack of business honesty or integrity, or have a history of seriously poor performance.<sup>35</sup> Precisely because the U.S. rules regarding exclusion and debarment regulation aim to reduce the government’s reputational and performance risks, the rules in effect encourage vendors to invest in themselves for future work with government. Contractors know that their future awards depend upon contracting officers

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<sup>31</sup> <https://www.acquisition.gov/content/part-9-contractor-qualifications>.

<sup>32</sup> As noted above, there is a separate rule for debarment regarding federal spending outside the procurement process, such as grants, loans, and other forms of government assistance; that rule is known as the “Nonprocurement Common Rule” (NCR), which similarly provides for governmentwide nonprocurement suspension and debarment. There is discussion in the federal procurement community of consolidating the procurement and nonprocurement rules under a single, uniform rule regarding suspension and debarment, which would be applicable across the federal government. *See, e.g.,* Robert Meunier & Trevor Nelson, *supra* note 5.

<sup>33</sup> Definitions of terms used throughout the regulation are set forth at FAR 2.101.

<sup>34</sup> *See* FAR 9.406-3.

<sup>35</sup> *The Interagency Suspension and Debarment Committee Report FY 2017, supra* note 27, at 2; *see* FAR 9.402(a).

finding them responsible at the time of award, and that their businesses can collapse – debarment is often termed the “death penalty” for contractors – if a suspension and debarment official finds them not “presently responsible.” Beyond the impact in the federal procurement market, suspension or debarment may in effect mean that a firm cannot bid in state or local procurement markets, and “a sudden contraction of bank credit, adverse impact on the market price of listed shares, if any, and critical uneasiness of creditors generally, to say nothing of a ‘loss of face’ in the business community”.<sup>36</sup>

Because exclusion and debarment are tools to reduce the U.S. government’s risks in contracting, a logical corollary is that exclusion and debarment are *not* meant to punish wayward contractors or individuals, for punishment bears only an indirect relationship to the government’s risk posture. The U.S. government leaves punishment and deterrence largely to civil and criminal measures, such as the severe penalties imposed for contractor fraud by the U.S. False Claims Act.<sup>37</sup> “The serious nature of debarment and suspension,” notes FAR 9.402, “requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment”.<sup>38</sup>

Debarment means disqualification from federal contracting for a specified period, typically three years for firms, but longer if there are serious circumstances.<sup>39</sup> Although suspended or debarred contractors are excluded from receiving contracts, an agency head may for “compelling reason” override that ban. Contractors suspended or debarred also may not conduct business with the U.S. government as agents or representatives of other contractors.<sup>40</sup>

What is more, a party precluded from participating in federal contracts is also excluded from receiving grants, loans, and other forms of federal assistance.<sup>41</sup>

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<sup>36</sup> *Gonzalez v. Freeman*, 344 F.2d 570, 574 (D.C. Cir. 1964).

<sup>37</sup> See, e.g., U.S. Department of Justice, *The False Claims Act: A Primer* (2011), available at [https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf).

<sup>38</sup> For background on the policy issues presented by U.S. debarment, see the collected essays by Professor Steven Schooner, U.S. Senator Susan Collins, Richard Bednar (former Army suspending and debarment official (SDO)), Steven Shaw (then the Air Force SDO), Danielle Brian (director of a watchdog group, the Project on Government Oversight (POGO)), James McCullough and John Pachter (senior practitioners), Professor Christopher Yukins, Jennifer Zucker (then a U.S. Army officer) and Abram Pafford, *Suspension and Debarment: Emerging Issues in Law and Policy*, Public Procurement Law Review, Vol. 13, 2004, available at <https://ssrn.com/abstract=509004>.

<sup>39</sup> See, e.g., U.S. General Services Administration, Suspension and Debarment Division, *Suspension and Debarment: Frequently Asked Questions*, [www.gsa.gov/about-us/organization/office-of-governmentwide-policy/office-of-acquisition-policy/gsa-acq-policy-integrity-workforce/suspension-debarment-division/suspension-debarment/frequently-asked-questions-suspension-debarment](http://www.gsa.gov/about-us/organization/office-of-governmentwide-policy/office-of-acquisition-policy/gsa-acq-policy-integrity-workforce/suspension-debarment-division/suspension-debarment/frequently-asked-questions-suspension-debarment).

<sup>40</sup> FAR 9.405.

<sup>41</sup> The U.S. Office of Management and Budget, in the White House, has issued guidelines to agencies on government-wide debarment and suspension in “nonprocurement” matters (such as grants), at 2 C.F.R. Part 180. As noted, see *supra* note 34, there is a policy initiative underway to unify these two sets of rules, in “procurement” and “nonprocurement” matters.

Suspensions and debarments apply governmentwide – one agency’s action precludes all executive agencies from doing business with the excluded party.<sup>42</sup> Notwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time of the action unless the agency head directs otherwise.<sup>43</sup> Suspension and debarment can be applied to both firms and individuals, and can be extended to a firm’s affiliates, as well.<sup>44</sup>

Both actions – suspension and debarment – result in reputational harm to the affected individual or firm, through listing in the System for Award Management ([www.sam.gov](http://www.sam.gov)), a central repository of qualification and performance information operated by the U.S. General Services Administration. Listing at [sam.gov](http://sam.gov) is how those outside the government typically learn of suspensions and debarment. The information available in the [sam.gov](http://sam.gov) database is used by contracting agencies and prime contractors when evaluating prospective vendors and subcontractors, and by financial institutions and others outside the government – and outside the United States.

With all this in mind, it should be highlighted that suspension and debarment are commonly seen as some of the last measures to be used by contracting agencies, and as measures that should be used sparingly.<sup>45</sup> Before undertaking a suspension or debarment, an agency will often undertake other, less extreme measures, such as the administrative agreements discussed further below.<sup>46</sup> Agencies in the U.S. government use suspension and debarment cautiously because they recognize that suspension and debarment can narrow competition dramatically, and can be economically devastating to the affected contractor or individual. Because of that serious impact and the need to ensure due process, the affected individuals and firms can seek judicial review under the Administrative Procedure Act (APA). While that review is generally deferential – the judge will be looking for a reasonable basis in the record for the suspension or debarment decision – the prospects of that review and possible reversal do make suspension and debarment officials proceed cautiously. And those officials often proceed cautiously because they are keenly aware that suspension and debarment, as noted, can disrupt the supply chains on which agencies rely, and (by eliminating one or more prospective competitors) can

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<sup>42</sup> See Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 *Geo. Wash. Int’l L. Rev.* 233, 233-34 (2013); see also U.S. Government Accountability Office, *Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved*, GAO-11-739, at 4 (Aug 31, 2011).

<sup>43</sup> FAR 9.405-1; 2 C.F.R. § 180.415.

<sup>44</sup> FAR 9.406-1.

<sup>45</sup> For a very useful economic analysis of the costs and benefits of debarment, see Emmanuelle Auriol & Tina Soreide, *An Economic Analysis of Debarment*, 50 *Int’l Rev. L. & Econ.* 36 (2017).

<sup>46</sup> See, e.g., Robert T. Rhoad & David Robbins, *Fraud, Debarment and Suspension – Part II: Suspension and Debarment*, 2019 Gov’t Contracts Year in Review Briefs 26 (Thomson Reuters 2019).

radically reduce the competition available for a customer agency. A suspension and debarment official can approach the problem as one of balancing risk: while the government's performance and reputational risks may weigh in favor of suspension or debarment, the contractor may be able to present assurances that it can mitigate those risks (through remedial compliance measures which parallel the "self-cleaning" contemplated by the EU procurement directives), and the risks of losing a competitor and judicial reversal (for an unsupported action) may weigh in favor of other approaches, short of suspension or debarment, such as an administrative agreement.

Because these risks and their resolution are inherently subjective and potentially quite serious for the government, a suspension and debarment official (especially in the larger customer agencies) is frequently a senior, respected official (and often an attorney) with substantial experience in procurement. Furthermore, because of the complicated nature of these proceedings, which may involve complex misconduct, an extended investigation and layers of remedial measures, these suspension and debarment officials (depending on the agency) may be supported by a dedicated staff of subordinate officials, themselves often with training in procurement and the law. The suspension and debarment officials can exercise enormous authority, and the function is treated quite seriously in the U.S. federal procurement community.

## 2.2 Grounds for Suspension and Debarment Under the FAR

While the process for discretionary debarment leaves a great deal of authority to the suspension and debarment official, the system is not wholly discretionary, for (similar to the EU regime under Article 57 of the directive) there are mandatory grounds for debarment as well, typically based on violations of certain statutes.<sup>47</sup>

Discretionary suspensions and debarments – our focus here – are framed by standards set forth in the FAR. Those standards, as noted, in many ways echo the standards for responsibility and indeed are found in sister provisions in FAR Part 9. Under those standards,<sup>48</sup> it is the debarring official's responsibility to determine whether debarment is in the government's interest<sup>49</sup>. The FAR says that agencies *may* – but need not *of* – suspend or debar a contractor when grounds for exclusion exist, such as fraud, tax evasion, corruption, or criminal behavior, a failure to disclose a serious violation (such as fraud or bribery), or on "*any other cause of so serious or compelling a nature that it affects the present responsibility* the

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<sup>47</sup> See, e.g., Buy American Act (41 U.S.C. §§8301-8305); Clean Air Act (42 U.S.C. § 7401); Walsh-Healey Public Contracts Act (41 U.S.C. § 6501-6511).

<sup>48</sup> By design, the grounds for discretionary suspension and debarment in the FAR are substantially similar. Compare FAR 9.406-2 (grounds for debarment) with FAR 9.407-2 (grounds for suspension).

<sup>49</sup> FAR 9.406-1. For a discussion of parallels between grounds for debarment under the FAR and the EU procurement directives, see Sati Harutyunyan, *supra* note 13, at 461.

contractor.”<sup>50</sup> This last ground, commonly referred to as the “catch-all” provision, affords the suspending and debarment enormous discretion, and renders the other grounds for suspension and debarment more illustrative than exclusive.

The suspension and debarment official’s discretion is redoubled because (as noted) he or she *need not* take action, if for example the contractor can remedy the apparent performance and reputational risks.<sup>51</sup> In practice, that broad authority *not* to take action, and the informal process for suspension and debarment (discussed below), mean that some suspension and debarment officials may exert quiet pressure on the contractor to undertake remedial measures in other quarters – a controversial practice<sup>52</sup> that is likelier to emerge under a broader strategy for a “coordination of remedies” (as coordinated enforcement is known in the U.S. Department of Defense rules)<sup>53</sup>. The officials’ broad discretion and the relatively informal procedures discussed below also raise a risk of corruption, which helps explain the institutional practice (discussed above) of generally appointing senior officials to serve as suspension and debarment officials, the availability of judicial review grounded in the administrative record, and the procedural protections further outlined in the following section.

### 2.3 Procedural Aspects of U.S. Suspension and Debarment

The informality of the discretionary U.S. federal suspension and debarment process may be explained, in part, by its provenance: the process, which can exclude a contractor from all federal procurement, apparently evolved from a contracting officer’s largely informal responsibility determination to exclude a contractor from a particular procurement. In both cases the contractor is being disqualified because of perceived performance and reputational risks, and the government’s assessment of those highly variable risks – and the government’s assessment of whether it can tolerate those risks – lend themselves to a more informal process with relatively unstructured exchanges with the contractor.<sup>54</sup>

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<sup>50</sup> See Kate M. Manuel *supra* note 9, at. 11.

<sup>51</sup> For a discussion of suspension and debarment as risk mitigation tools, see, e.g., Transparency International UK, *Suspension and Debarment: Strengthening Integrity in International Defence Contracting* (2015), available at <http://ti-defence.org/wp-content/uploads/2016/03/150507-Suspension-and-Debarment.pdf>.

<sup>52</sup> See, e.g., Andy Liu & W. Stanfield Johnson, *Fraud, Debarment and Suspension – Part II: Suspension and Debarment*, 2014 Gov’t Contract Year in Rev. Br. 21 (Thomson Reuters 2014) (discussing initiative to recover program funds).

<sup>53</sup> See 32 C.F.R. Part 516, Appendix D, *Department of Defense Directive 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities*.

<sup>54</sup> See, e.g., Pascale Helen Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank’s Sanctions System*, U. Chi. L. For., Vol. 2012, Iss. 1, Art. 10, available at <http://chicagounbound.uchicago.edu/uclf/vol2012/iss1/10>.

The U.S. suspension and debarment process advances through stages intended to give the suspension and debarment official a sound understanding of the contractor's misconduct and remedial efforts. The suspension and debarment official may receive information on contractor misconduct from any number of sources, including investigators, prosecutors, competitors and the press. While different agencies have established very different suspension and debarment procedures (a point of some continuing controversy<sup>55</sup>), agencies as a general matter are to "establish procedures governing the debarment decisionmaking process that are as informal as is practicable, consistent with principles of fundamental fairness"<sup>56</sup>. Those procedures are to "afford the contractor (and any specifically named affiliates) an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment"<sup>57</sup>.

The provisions at FAR Subpart 9.4 describe the steps to be followed in those cases where suspension or debarment is not supported by the conclusive evidence of a criminal conviction or a civil judgment (civil fraud, for example). In those cases, the agency is give written notice of a proposed action to the contractor, with a statement of reasons, an explanation of the agency's procedures, and an opportunity to respond. If the facts submitted by the contractor in opposition to the evidence of misconduct cited by the agency raise a "genuine dispute over facts material to the proposed debarment," the agency is to afford "the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents," in a transcribed proceeding. The suspension and debarment official's decision is to be in writing, based on the facts as found, together with any other information submitted by the contractor and in the administrative record. Another official may be tasked to make findings of fact, which the suspension and debarment official may reject "only after specifically determining them to be arbitrary and capricious or wholly erroneous." Suspension or debarment ultimately must be based upon a preponderance of the evidence, with findings and the effects of the action described in a written notice to the contractor.

While the FAR provisions describing the process are not terribly precise or prescriptive (which explains the significant variance in agency procedures), the FAR does carefully frame the heart of the process – the decision to suspend or debar. The factors set forth in the FAR confirm that this is indeed a risk-based decision by the agency, which must carefully weigh the remedial measures the contractor has taken that mitigate the performance and reputational risks that

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<sup>55</sup> See, e.g., American Bar Association, Section of Public Contract Law, *Anatomy of a Debarment Action*, at 37-38 (Annual Meeting, Aug. 2, 2018, Chicago, IL), *available at* [https://www.cov.com/-/media/files/corporate/publications/2018/08/suspension\\_and\\_debarment\\_update.pdf](https://www.cov.com/-/media/files/corporate/publications/2018/08/suspension_and_debarment_update.pdf).

<sup>56</sup> FAR 9.406-3(b)(1).

<sup>57</sup> *Id.*



the contractor's misconduct raises for the government. Before arriving at any suspension or debarment decision, the SDO should consider factors such as the following:<sup>58</sup>

- *Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment, or had adopted such procedures prior to any government investigation of the activity cited as a cause for debarment.* This factor clearly assumes that contractors will have internal controls – corporate compliance systems – in place *before* any misconduct occurs, as called for by FAR 52.203-13.
- *Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate government agency in a timely manner.* This factor relates directly to contractors' obligation, under a "mandatory disclosure" rule, to report (to the contracting officer and the agency's inspector general) if the contractor discovers "credible evidence" of civil or criminal fraud, bribery or gratuities, or significant overpayments by the government. This "mandatory disclosure" obligation stems from the corporate compliance system required by the same clause, FAR 52.203-13; if a contractor has an effective compliance system in place (goes the reasoning), misconduct will be brought to the attention of corporate principals who should, in turn, report the most serious matters to the government.
- *Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.* This factor links back to a separate obligation under FAR 52.203-13 – an assumption that the contractor will undertake an internal investigation in cases where there are allegations of fraud or criminal misconduct, and if the contractor finds "credible evidence" of covered conduct (e.g., fraud or bribery), the contractor will make a mandatory disclosure to the government. The regulators made it clear that the legal privileges that normally cover an internal investigation of this type will be respected,<sup>59</sup> and that disclosure can be deferred to allow a reasonable time for the internal investigation<sup>60</sup>.
- *Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.* This factor can be read against the backdrop of the U.S. Sentencing Commission's *Sentencing Guidelines*, which were an early foundation for corporate compliance standards now adopted worldwide, and ultimately for the contractor compliance requirements

<sup>58</sup> See, e.g., FAR 9.406-1 (factors that should be considered for debarment).

<sup>59</sup> 73 Fed. Reg. 67064, 67077 (Nov. 12, 2008).

<sup>60</sup> 73 Fed. Reg. at 67073 ("credible evidence" standard implies "that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government").

under FAR 52.203-13.<sup>61</sup> The *Sentencing Guidelines* say that criminal sentences for private firms can be reduced if they cooperate with government investigations, as part of a normal system of corporate controls.<sup>62</sup>

- *Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.* This factor, which calls for payment and restitution, reflects the “coordination of remedies” discussed above – a coordinated enforcement effort, to ensure that the government is compensated for its losses.<sup>63</sup> Notably this factor does *not* explicitly call for victim compensation. In contrast, Article 57 of the EU’s procurement directive *does* require that a contractor, excluded because of serious misconduct, has “paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct,” before that contractors will be readmitted to the EU public procurement markets.<sup>64</sup>
- *Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.* This factor shows that these factors are, in many ways, simply a restatement

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<sup>61</sup> See, e.g., Christopher R. Yukins, *Feature Comment: U.S. Contractor Compliance Rules Likely to Expand*, 50 *Gov. Cont.* ¶ 147 (Apr. 23, 2008) (discussing evolution of corporate compliance rules), available at <https://ssrn.com/abstract=1125068>.

<sup>62</sup> See, e.g., U.S. Sentencing Commission, *Guidelines Manual 2018*, Ch. 8 – Organizational Sentencing Guidelines, at 1 (2018) (“The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility.”), available at <https://www.uscc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN>.

<sup>63</sup> See *supra* note 49 and accompanying text.

<sup>64</sup> Paragraph 6 of Article 57, Directive 2014/24/EU, spells out the remedial measures that excluded contractors must undertake before they can be readmitted to the covered public procurement markets:

Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.

of compliance system requirements from around the world, for rules governing compliance systems – which are largely identical worldwide -- regularly require precisely this type of disciplinary action.<sup>65</sup> Indeed, Article 57 of Directive 2014/24/EU similarly calls for “concrete . . . personnel measures that are appropriate to prevent further criminal offences or misconduct,” as part of the “self-cleaning” demanded of contractors that seek to rejoin public procurement markets.<sup>66</sup>

- *Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.* As with Article 57 of Directive 2014/24/EU, discussed above, this factor looks to the contractor’s efforts to “self-clean” (to use the EU term) by implementing stronger remedial measures. This factor should be read in conjunction with the first factor, above: under the U.S. system, the contractor’s remedial measures will not be new, but instead will likely build on (and improve upon) a prior system of controls, based upon any lessons learned from the misconduct of the contractor’s agents. The factor also reflects a practical reality in U.S. debarment actions: they often follow on a protracted period of investigation and review by other enforcement authorities, an extended process of iterative exchanges between government officials and the contractor, during which the government officials will often provide very direct advice on remedial measures the contractor should undertake.
- *Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.* This factor follows on the prior one, and looks to core elements of a normal corporate compliance program: effective procedures and training.<sup>67</sup>
- *Whether the contractor has had adequate time to eliminate the circumstances within the contractor’s organization that led to the cause for debarment.* While this factor *appears* to favor the contractor, in fact it may be used by a suspension and debarment official to extend a review, if it appears the contractor has not been quick or aggressive enough in “eliminating the circumstances” – e.g., replacing personnel or revamping control systems – that helped cause the prior misconduct. The factor reflects the highly engaged back-and-forth that can occur between the contractor and the suspension and debarment official, an important distinguishing aspect of the U.S. system.

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<sup>65</sup> See, e.g., U.S. Department of Justice & U.S. Securities & Exchange Commission, *FCPA Guidance*, at 56 & n. 309 (2016) (describing parallel compliance system requirements in legal regimes worldwide), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

<sup>66</sup> See *supra* note 61.

<sup>67</sup> See, e.g., Christopher R. Yukins, *U.S. Justice Department Issues New Corporate Compliance Guidance* (May 1, 2019) (linking to parallel compliance requirements in United States and internationally), <http://publicprocurementinternational.com/2019/05/01/u-s-justice-department-issues-new-corporate-compliance-guidance/>.

- *Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.* In very practical terms, this is often the most important part of the suspension and debarment process in the U.S. system: the contractor's senior management must convince the suspension and debarment official that management understands the firm's errors, and will remedy them going forward. (Because an individual facing debarment can point to no formal "compliance system" – the focus of the prior mitigating factors – to steer his or her behavior, this may be the *only* factor that an individual can reasonably rely on in arguing against his or her debarment.<sup>68</sup>)

These factors set forth in the FAR are only illustrative, but they confirm important aspects of the U.S. suspension and debarment system. The factors confirm that the U.S. system is not designed for punishment; nowhere do the factors ask about how rank or immoral the contractor's misconduct was, or whether that conduct merits proportionate punishment. Instead, the factors (and the U.S. rules in general) treat misconduct as a risk, and they assume that the contractor – typically an established actor in a mature procurement system – can be relied upon to mitigate that risk by making internal adjustments to its control systems and organization. The factors also open the door to other forms of risk mitigation, short of suspension or debarment.

Probably the most prominent alternative to suspension or debarment is an administrative agreement. Under these agreements, a contractor and the government will agree to specific remedial measures that the contractor must undertake, and the administrative agreement will be posted by the government online.<sup>69</sup> As noted, the FAR specifically contemplates that a contractor found to have engaged in misconduct may nevertheless conclude an administrative agreement under which the company will implement new control measures, in return for being allowed to remain a federal contractor.<sup>70</sup> Because an administrative agreement leaves the government at a severe informational disadvantage – it cannot afford to monitor the contractor on a regular, ongoing basis – the government may insist

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<sup>68</sup> See generally Kara Sacilotto, *One Is the Loneliest Number: A Case for Changing Suspension and Debarment Regulations to Better Address Potential Exclusion of Individual Suspension and Debarment*, 47 Pub. Cont. L.J. 479 (2018), available at [https://www.americanbar.org/groups/public\\_contract\\_law/publications/public\\_contract\\_law\\_jrnl/v47-n4/suspension/](https://www.americanbar.org/groups/public_contract_law/publications/public_contract_law_jrnl/v47-n4/suspension/); Daniel E. Schoeni, *Personal Debarment for Non-Distributive Corporate Misconduct: On the Efficacy of Debarring the Individual from Government Contracts for Collective Wrongdoing*, 46 Pub. Cont. L.J. 51 (2016).

<sup>69</sup> See generally Jessica G. Willard, *Balancing Goals: FAPIIS's Effect on Administrative Agreements*, 43 Pub. Cont. L.J. 105, 118-19 (2013).

<sup>70</sup> FAR 9.406-3(e)(1) ("If the contractor enters into an administrative agreement with the Government in order to resolve a debarment proceeding, the debarring official shall access the website (available at <https://www.cpars.gov>, then select FAPIIS) and enter the requested information.").

that a corporate monitor be part of the administrative agreement. Although corporate monitors are controversial (in no small part because they are expensive),<sup>71</sup> standards have been developed<sup>72</sup> to help ensure monitors' professionalism and objectivity, and monitors remain an important part of resolving suspension and debarment actions in the U.S. government<sup>73</sup>.

### 3 Comparative Lessons from the U.S. Suspension and Debarment System

As was noted above, future transatlantic cooperation in public procurement will turn in part on a shared understanding of both the U.S. and EU procurement laws. Coordinating these legal regimes, which play such an important part in shaping their markets, will make it easier for vendors to provide essential competition on both sides of the Atlantic. That coordination is especially important with regard to exclusion and debarment, because the issue at the heart of those doctrines – contractor qualification – can raise insurmountable barriers to trade if mishandled. Conversely, because governments around the world face similar types of reputational and performance risks, being able to share information on contractor qualification – between loosely similar systems will make it easier for governments on both sides of the Atlantic to control the performance and reputational risks presented by wayward contractors.

The good news is that the grounds for contractor qualification (and conversely, exclusion) in the U.S. and EU systems are generally very similar, as the discussion above reflected. The challenge comes in the mechanics: as the discussion above also showed, as an operational matter the two systems sometimes approach contractor qualification and exclusion in starkly different ways. Fortunately, those differences arise in part because the EU system is still filling in gaps (questions of which official should handle exclusion, for example) which the U.S. system resolved some time ago. By sharing lessons learned from the U.S. experience, it may be possible to draw the two legal regimes onto parallel paths, to the benefit of both.

To that end, the discussion below reviews three key issues in suspension and debarment, problems for which EU Member States may find solutions in lessons

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<sup>71</sup> The Trump administration has cautioned Justice Department prosecutors that corporate monitors should be used selectively, not presumptively, in resolving criminal cases. See Memorandum from U.S. Assistant Attorney General Brian A. Benzckowski, *Selection of Monitors in Criminal Division Matters* (Oct. 11, 2018), <https://www.justice.gov/criminal-fraud/file/1100366/download>.

<sup>72</sup> See American Bar Association, *Monitors Standards*, available at [https://www.americanbar.org/groups/criminal\\_justice/standards/MonitorsStandards/](https://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandards/).

<sup>73</sup> See generally John S. Pachter, *Independent Monitors: What They Do and How to Avoid the Need for Them*, *The Clause*, Vol. XXIV, No. 2, at 17 (Board of Contract Appeals Bar Association, June 2014), available at [https://bcaba.org/wp-content/uploads/2014/06/BCABA\\_The-Clause\\_Mar-2014.pdf](https://bcaba.org/wp-content/uploads/2014/06/BCABA_The-Clause_Mar-2014.pdf).

learned in the United States. (It appears that each of these lessons could be adopted without violating the broad framework for procurement regulation laid out by the EU procurement directives.) First, in keeping with a broad anti-corruption trend inside and outside the EU, EU Member States may wish to require that all contractors establish corporate controls, not only to “self-clean” when something goes wrong, but from inception, as an integral part of their qualifications as contractors. Second, following models from the United States (and Germany and Hungary), EU Member States may wish to use the flexibility explicitly left them by the EU procurement directives and “centralize” the debarment function in senior officials. Third, Member States may wish to consider the use of administrative agreements as a means of resolving exclusion issues; it seems that this would not contradict the EU procurement directives, but instead would allow for formalization of the “self-cleaning” contemplated by the EU procurement directives. Each of these options is considered below.

### 3.1 Requiring Contractors to Establish Controls

As was discussed above, while U.S. federal procurement rules require *all* covered contractors to have internal controls in place shortly after the inception of a covered contract,<sup>74</sup> the EU procurement directives calls for such controls – for “self-cleaning” – only *after* certain corporate misconduct has occurred.<sup>75</sup> Under Article 57 of the Directive 2014/24/EU, when a contractor has been found to have engaged in certain serious classes of misconduct, such as participation in a criminal organization or corruption, the contractor is to be barred from EU public procurement competitions unless it engages in “self-cleaning.” Article 57 of Directive 2014/24/EU defines that self-cleaning to mean “measures that are appropriate to prevent further criminal offenses or misconduct,” and describes precisely the very same sorts of corporate controls (such as technical, organizational and personnel measures) that would normally be required under the U.S. procurement rules. (In fact, these are precisely the same sorts of corporate

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<sup>74</sup> The federal contract clause which requires a corporate compliance system, FAR 52.203-13, is triggered when the contract is expected to exceed \$5.5 million in value and the performance period is expected to exceed 120 days, per the provision at FAR 3.1004. A contractor covered by the clause must develop a corporate code of conduct (within 30 days), and establish a business ethics awareness and compliance program and internal control system (within 90 days). FAR 52.203-13(b)-(c).

<sup>75</sup> See paragraph 6 of Article 57 of Directive 2014/24/EU, quoted *supra* note 66; see also Hermann Pünder, Hans-Joachim Prieß & Sue Arrowsmith, *Self-Cleaning in Public Procurement Law* (Carl Heymanns Verlag, Köln 2009); Sarah Schoenmaekers, *Self-Cleaning and Leniency: Comparable Objectives but Different Levels of Success?*, 13 EPPPL Rev. 3 (2018).

controls that would be required under many nations' laws, as corporate compliance requirements are largely the same the world over.<sup>76</sup>)

Thus, although both the EU and the U.S. regimes call for corporate controls to address contractor misconduct, the EU procurement directives calls for them only *after* misconduct emerges, which is in sharp contrast with the U.S. approach and with general requirements under Member State law. The United Kingdom's Bribery Act, for example, assumes that *all* firms will have controls in place – not only those that engage in misconduct -- for the Act makes such controls the only available affirmative defense if an agent of a firm engages in bribery.<sup>77</sup> French law (the "Sapin II" law) similarly calls for *all* large French firms to put corporate controls in place.<sup>78</sup> Moreover, a growing number of nations worldwide now require contractors to have compliance systems as place, as part of a broader trend toward requiring corporate compliance systems.<sup>79</sup>

The EU procurement directives thus appears to stand apart from an emerging international trend because it requires "self-cleaning" (corporate compliance) measures only from those firms that have actually engaged in misconduct. The EU procurement directives narrower approach may have resulted from an idiosyncratic policy goal that the EU procurement directives seeks to address: the need to foster adequate competition across the EU by re-admitting those contractors, otherwise excluded, that engage in self-cleaning.<sup>80</sup> That goal, grounded in competition policy and EU integration, is divorced from the anti-corruption goals which normally inform governments' requirements that private firms establish internal controls.

The U.S. experience, and the experience of other nations inside and outside the EU, suggest that EU Member States may wish to take a broader approach and call for contractor controls from all firms, as part of an integrated effort at controlling risk in the procurement process. Notably, the EU procurement directives appears to leave that possibility open, for Recital 102 of Directive 2014/24/EU provides "for the possibility that economic operators can adopt compliance measures aimed at . . . preventing further occurrences of . . . misbehavior," including "personnel

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<sup>76</sup> See U.S. Department of Justice & U.S. Securities & Exchange Commission, *FCPA Guidance*, *supra* note 62, at 56 & n. 309.

<sup>77</sup> Bribery Act 2010, ch. 23, § 7, available at <http://www.legislation.gov.uk/ukpga/2010/23/section/7>; Nick Kochan, *The UK Bribery Act – Britain's New Legal Landscape*, Crim. Just., Fall 2013, at 46.

<sup>78</sup> See, e.g., Stephane Bonifassi, *The New "Sapin II" French Anti-Corruption Law*, 33 Int'l Enforcem. L. Rep. 21 (2017).

<sup>79</sup> See Claire Martin, *Integrity Pacts and Corporate Compliance Programmes: Contrary or Complementary?*, 14 EPPPL Rev. 16, 17 & Table 1 (2017) (reviewing nations' requirements).

<sup>80</sup> See, e.g., Roman Majtan, *The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes*, 45 Geo. Wash. Int'l L. Rev. 291, 346 (2013) ("The proponents of the self-cleaning theory argue that every firm or individual has a right to apply for public contracts based on the principle of free movement and that requiring suspension or debarment would not be proportionate because it would go beyond what is necessary to achieve the objectives of the procurement process under the principle of equal treatment.").

and organisational measures such as the . . . the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules.” The Court of Justice for the EU has cautioned that qualification requirements that overly narrow competition may violate EU procurement requirements.<sup>81</sup> But a requirement such as the U.S. requirement – a requirement that a compliance system be put in place only after award – would seem less likely a cause of concern, especially since some Member States are now effectively requiring that *all* corporations (or at least all large corporations) have such compliance systems in place, and the same Recital 102 of Directive 2014/14/EU says that, with regard to self-cleaning, “it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases”.

### 3.2 Establishing a Centralized Exclusion Function

Another important aspect of suspension and debarment in the U.S. government, as noted, is its reliance on a senior official in an agency – a suspension and debarment official -- who is responsible for assessing contractors for suspension or debarment. (Notably, the World Bank has also made a central suspension and debarment officer part of its sanctions system.<sup>82</sup>)

The EU procurement directives, in contrast, calls for the exclusion decision to be made by individual contracting authorities and entities on a contract-by-contract basis. Article 57 of Directive 2014/24/EU provides that it is the contracting authority that shall exclude an economic operator from participation in a procurement procedure. This may raise serious issues in practice, for contracting entities – specifically, the contracting officials making decisions for those authorities – may lack the experience and knowledge necessary to assess the reputational and performance risks posed by a wayward contractor.

The U.S. approach suggests that exclusion and debarment decisions are complex and require a specially authorized, senior official. In the U.S. federal procurement system, the suspension and debarment official (SDO) serves a broader public interest in assessing contractors for their present responsibility. The SDO must have a keen understanding of the legal regulation concerning government acquisition, and also must be able to discern the future reputational and performance risks that a vendor may pose. The SDO must be able to assess the

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<sup>81</sup> See, e.g., SIGMA Programme, OECD, *Implementing the EU Directives on the selection of economic operators in public procurement procedures*, at 181-187 (SIGMA Paper No. 56, 2018) (reviewing Court of Justice decisions), available at <http://www.sigmaweb.org/publications/Selection-of-economic-operators-in-public-procurement-procedures-SIGMA-Paper-56-September-2018.pdf>.

<sup>82</sup> See generally Christopher R. Yukins, *Rethinking the World Bank's Sanctions System*, 55 *Gov. Contractor* 1 (Nov. 13, 2013), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2357691](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2357691).



seriousness of the contractor's acts or omissions, in terms of both performance and reputational risks to the government, and must be able to assess the contractor's remedial measures and other factors, such as the economic impact of barring the contractor from future awards. The SDO's authority extends to all phases of a suspension and debarment procedure, including the gathering of evidence, the exchanges with the affected contractor, the application of the decision, and a possible administrative agreement.<sup>83</sup>

The EU procurement directives leaves open the possibility that Member States will appoint a higher level official, analogous to an SDO, to oversee exclusion and debarment. Recital 102 of Directive 2014/24/EU states that Member States should, in particular, "be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments *or to entrust other authorities on a central or decentralised level with that task*".

In a 2018 study, the SIGMA Programme at the Organization for Economic Cooperation and Development (OECD) concluded, based upon a survey of best practices across Europe, that a centralized approach was a sounder one. The SIGMA report noted that, because (per the recital quoted above), in "implementing requirements on self-cleaning measures, Member States have the discretion to determine the exact procedural and substantive conditions that will be applicable," EU Member States "are free to decide whether to allow the individual contracting authority to carry out the relevant assessment or to entrust another authority, on a central level (see the example of Hungary . . . ) or a decentralised level, with this task."<sup>84</sup> Citing specifically to Hungary's experience with a centralized function, the SIGMA Programme reported:

The 2014 Directive introduced "self-cleaning" measures. Despite the existence of one or more relevant grounds for exclusion, self-cleaning measures allow economic operators to rehabilitate themselves on the basis of strict conditions and take part in procurement procedures. *An interesting way of transposing this new mechanism has been chosen by Hungary, which opted for centralised management of self-cleaning decisions. A decision-making process that is carried out centrally enables the uniform application throughout the national procurement*

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<sup>83</sup> FAR 9.406-1(a).

<sup>84</sup> SIGMA Programme, *supra* note 79, at 50.

*system, ensures legal protection and a higher level of legal certainty compared to decision making at the level of an individual contracting authority.*<sup>85</sup>

While the Hungarian approach is not, strictly speaking, precisely like the U.S. approach – the U.S. system consolidates control of system-wide exclusion in a senior debarring official, while the Hungarian approach centralizes only the approval of self-cleaning measures which will allow excluded contractors to compete again – the practical effect is largely the same: the Hungarian system, like the U.S. system, centralizes responsibility for admitting or excluding vendors from a broader procurement system, at a higher administrative level than the procuring entity.

Germany has also adopted a centralized approach to exclusion, similar to Hungary's. Under recently developed German rules, the German Competition Authority (*Bundeskartellamt*) has the power to rule on whether firms excluded for improper behavior have undertaken sufficient "self-cleaning"; if so, the *Bundeskartellamt* will enter the firms' names in a list of approved vendors.<sup>86</sup>

Drawing on the Hungarian, German and U.S. experiences, EU Member States may wish to vest a higher, centralized authority with the power to exclude. These first steps to implement Article 57 of Directive 2014/24/EU under Hungarian

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<sup>85</sup> *Id.* at 6 (emphasis added). The SIGMA report explained the reasoning behind a centralized approach, at pages 52-53:

In Hungary. . . the model introduced on 1 November 2015 by the new [Hungarian law] does not give freedom to contracting authorities, but instead delegates the decision on self-cleaning to the Public Procurement Authority (PPA) in a centralised manner. The legal practice of self-cleaning is evolving gradually. In the interest of legal certainty, the decision was made to transfer, through the [law], the powers related to self-cleaning to the PPA. Thus the [law] does not entrust contracting authorities with decision making related to the evaluation of the reliability of the economic operator concerned. The PPA or the court, in the event of a judicial review, may declare that the measures taken by the economic operator meet the conditions prescribed by law and accordingly serve as verification of the economic operator's reliability. If the economic operator has been self-cleaned, it cannot be excluded from a procurement procedure in the future, even if grounds for exclusion exist. The contracting authority has no opportunity of expressing a different viewpoint, since it must accept the decision of the PPA.

<sup>86</sup> The German approach was summarized as follows by Pascal Friton & Christopher Wolters:

In summer 2017, the way was paved for the Register centralising existing registers at [a] national level. It follows the approach of the US debarment system and the Financial Regulation and enables contracting authorities to decide on exclusions more efficiently and with a higher degree of legal certainty. However, going beyond the Financial Regulation as well as the US debarment system, it also enables companies to have self-cleaning measures assessed by a central authority, which is binding for all German contracting authorities. The Register's aim is thus, on the one hand, to fight and prevent white-collar crimes and, on the other, to protect fair competition in public procurement. The RCA obliges the German Federal Cartel Office (FCO), as the responsible administrative office, to implement the Register by the end of 2020. Pascal Friton & Christopher Wolters, *The German Register of Competition and Its International Context*, 13 EPPPL 119, 125 (2018).

and German law suggest that other Member States may want to assess whether, following the U.S. model, they wish to vest a senior official – perhaps, per the U.S. model, a senior official with intimate knowledge of the competitive landscape and the procurement and reputational risks the government faces – to guide the exclusion process.

### 3.3 Administrative Agreements and Independent Monitors

Another important tool in the U.S. suspension and debarment system is the administrative agreement; as noted, a U.S. debarring official may decide not to suspend or debar a contractor, but instead to enter into an administrative agreement which specifies the remedial measures the contractor commits to undertake.<sup>87</sup> The FAR allows for the use of administrative agreements in lieu of suspension or debarment, and requires the debarring official to publish any such agreement on the Federal Awardee Performance and Integrity Information System (FAPIS).<sup>88</sup> The Interagency Suspension and Debarment Committee reported, for example, that fourteen agencies entered into a total of 64 administrative agreements in 2017.<sup>89</sup>

As a practical matter in the U.S. system, if grounds for suspension or debarment have been established but the debarring official has been assured that the entity is nonetheless presently responsible, the suspension or proposed debarment process may be settled with an administrative agreement.<sup>90</sup> These agreements are viewed as “appropriate when government officials determine that the company has made a sufficient showing of corporate responsibility and cooperation, and that the government’s interests can be adequately safeguarded by allowing the company to continue to do business with the government, subject to certain conditions, including supervision and appropriate reporting.”<sup>91</sup> Administrative agreements allow the contractor, the government and affected stakeholders – including employees, pensioners, shareholders and members of the public – to avoid the potentially severe disruption of a suspension or debarment.<sup>92</sup>

Administrative agreements can vary from one matter to another, but in general they allow contractors to reduce, suspend or avoid outright government enforcement actions, including suspension or debarment.<sup>93</sup> Among other things, an

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<sup>87</sup> These agreements are different from administrative contracts, which are recognized in some EU Member States including France and Spain.

<sup>88</sup> The Federal Awardee Performance and Integrity Information System (FAPIS) is a database that contains information to support award decisions as required by the Federal Acquisition Regulation (FAR).

<sup>89</sup> See *The Interagency Suspension and Debarment Committee Report FY 2017*, *supra* note 27.

<sup>90</sup> See Joseph D. West, Timothy J. Hatch & Christyne K. Brennan, *supra* note 32, at 9.

<sup>91</sup> See John Pachter, *supra* note 75, at 18.

<sup>92</sup> *Id.*

<sup>93</sup> See Kate M. Manuel, *supra* note 9, at 1.

administrative agreement can help sustain future competition, when a debarment could cripple competition by eliminating a key competitor.<sup>94</sup>

In an administrative agreement, the contractor will typically admit its wrongful conduct, and may agree to pay damages or restitution, to fire or reassign employees, to implement more rigorous compliance measures or to allow increased auditing, or to undertake other remedial measures.<sup>95</sup> Administrative agreements can be concluded with both firms and individuals.<sup>96</sup>

Concluding an administrative agreement sometimes requires the appointment of an independent monitor. As an independent third party, relied upon as the impartial “eyes and ears” of the government, the monitor should not be an employee of the contractor or the government. If a monitor is appointed, the contractor can work collaboratively with the monitor to strengthen and improve the company’s ethics and internal controls, and the monitor should have access to all records and individuals. A monitor typically will assess the company’s conformance with the terms of the administrative agreement, including the effectiveness of the company’s compliance program, and will then make recommendations for improvement in a report to the agency.<sup>97</sup>

Although the EU procurement directives makes no direct references to administrative agreements or monitoring, Recital 102 of Directive 2014/24/EU, as noted, does explicitly leave it to the Member States to determine how contractors should undertake “self-cleaning”<sup>98</sup> – precisely, it seems, the issues that would fall within an administrative agreement and a monitoring arrangement.

Nor does Directive 2014/24/EU bar these practices, and Transparency International has long supported these types of cooperative efforts between contractors and government agencies through “Integrity Pacts,” which have been used across

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<sup>94</sup> See *The Interagency Suspension and Debarment Committee Report FY 2017*, *supra* note 27, at 4.

<sup>95</sup> See Kate M. Manuel *supra* note 9, at 12.

<sup>96</sup> For a discussion of administrative agreements entered into with individuals who otherwise faced suspension or debarment, see Warren Bianchi, *Equality in Exclusion: Empowering Individuals in the Suspension and Debarment System*, 45 Pub. Cont. L.J. 79, 90 (2015).

<sup>97</sup> See John Pachter, *supra* note 75.

<sup>98</sup> Recital 102 states, in relevant part:

Allowance should, however, be made for the possibility that economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour. Those measures might consist . . . of personnel and organisational measures such as . . . the implementation of reporting and control systems . . . Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined. However, it should be left to Member States to determine the exact procedural and substantive conditions applicable in such cases.

the Continent.<sup>99</sup> Member States, drawing on this history and the U.S. experience, and relying on the flexibility left by the EU procurement directives, may decide to call for the use of administrative agreements and monitoring to control residual performance and reputational risks among contractors that previously engaged in wrongdoing, but seek to reenter public procurement markets.

## 4 Conclusion

As the foregoing shows, future transatlantic coordination in procurement markets will require a close understanding of the legal regimes on both continents. One especially important area of coordination will involve contractor qualification, both because of the potential barriers to trade and because of governments' common need to share information. The main challenge in contractor qualification – and exclusion – is to balance, on one hand, the need to contain the reputational and performance risks that bad contractors may pose, against on the other the deep disruption that barring a contractor may cause. To effect that balance, the EU Member States implementing the recent EU procurement directives may wish to look to U.S. strategies for exclusion and debarment, strategies which are deeply grounded in a risk-based approach.

The three strategies discussed in this paper – a broader reliance on corporate compliance among contractors, centralizing authority over the exclusion of contractors, and the use of administrative agreements and independent monitors as an alternative to debarment – have been used reliably in the United States, and seem to fit comfortably within the broad mandates of the EU procurement directives. Two of the strategies – corporate controls and centralized authority over exclusions – are already widely used in EU Member States, and administrative agreements and independent monitors are logical extensions of the “corporate self-cleaning” that the directives contemplate for sloppy or corrupt contractors. Adopting these strategies would seem to follow the trajectory plotted by the directives, and would help draw both systems, U.S. and EU, toward a common path.

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<sup>99</sup> See for example M. H. Wiehen, *Der Flughafen Berlin-Brandenburg in Schönefeld und der Transparency International Integritätspakt*, Transparency International Deutschland (Berlin, 2013); Dirk Westphal, *Der Flughafen BER Ist Eine Saubere Bau*, Berliner Morgenpost, Mar. 5, 2012, <https://www.morgenpost.de/flughafen-BER/article106042074/Der-Flughafen-BER-ist-eine-saubere-Baustelle.html>. For a discussion of how Integrity Pacts sponsored by Transparency International can be integrated into modern compliance systems, see Claire Martin, *supra* note 78.