**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| Modernizing Suspension and Debarment Rules | ) | Docket No. GN 19-309 |

**REPLY COMMENTS OF FUNDS FOR LEARNING, LLC**

Funds For Learning, LLC ("FFL")[1] submits these reply comments in response to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking ("*NPRM*")[2] concerning the proposed adoption of rules consistent with the Office of Management and Budget Guidelines to Agencies on Government Debarment and Suspension (the "Guidelines").[3]

FFL appreciates the Commission's dedication to safeguarding the Universal Service Fund ("USF") and protecting its programs from potential waste, fraud, and abuse. We recognize that existing suspension and debarment rules are deficient in several respects. The current rules offer limited flexibility, cover a narrow range of conduct, and preclude the Commission in some cases from timely exercising its enforcement authority. However, we express concern about certain of

[1] Funds For Learning, LLC is a national, E-rate-compliance consulting and web services firm. For the past 22 years, FFL has dedicated itself exclusively to the needs of E-rate stakeholders. Our clients include some of the country's smallest and largest E-rate applicants.

[2] *Modernizing Suspension and Debarment Rules*, GN Docket No. 19-309, Notice of Proposed Rulemaking, FCC 19-120 (rel. Nov. 25, 2019) ("*NPRM*")

[3] Office of Management and Budget, Guidance for Governmentwide Debarment and Suspension (Nonprocurement), 71 Fed. Reg. 66431 (Nov. 15, 2006), *codified* at 2 CFR pt. 180 ("Guidelines").

the Commission's proposals, many of which have been addressed in comments in response to the *NPRM*. We take this opportunity to highlight the issues we feel most important, based on our long history in the E-rate program, and to offer recommendations that will ultimately benefit all stakeholders by ensuring the new rules are effective and fair to parties subject to the rules.

## I. THE COMMISSION SHOULD ELIMINATE USAC'S *DE FACTO* SUSPENSION PROCESS AND MAKE SUSPENSION AND DEBARMENT THE EXCLUSIVE RESPONSIBILITY OF THE FCC

### A. USAC's *De Facto* Suspension Process Should Be Eliminated

We agree with the joint comments of the Schools, Health & Libraries Broadband Coalition and State E-rate Coordinators' Alliance (together, "SHLB/SECA")[4] that the Commission should use this proceeding to eliminate USAC's *de facto* suspension process.

USAC's current practice of delaying administrative processing and withholding funding commitments based on alleged violations of the Commission's rules constitutes a *de facto* suspension from participation in the E-rate program. As SHLB/SECA correctly point out, this process has been employed by the Administrator to "conduct years-long investigations, initiate endless reviews, and withhold funding from USF participants . . . while offering virtually no transparency or reasonable due process safeguards, including notice of the alleged violation or an opportunity to respond."[5]

The new suspension and debarment rules, together with the many tools available to prevent and address program non-compliance, will allow the Commission to accomplish much of what USAC has used the *de facto* process to accomplish. However, we expect the new

[4] Schools, Health & Libraries Broadband Coalition and State E-rate Coordinators' Alliance Comments, Docket No. 19-309 at 8-9 (Feb. 13, 2020) (SHLB/SECA Comments).

[5] *Id.* at 8-9.

suspension and debarment rules will be fair, transparent, and include the reasonable due process protections lacking in USAC's current practice.

### B. Suspension and Debarment Should be the Exclusive Responsibility of the Commission

We also encourage the Commission to clarify and ultimately limit USAC's role in the suspension and debarment process. FFL agrees with the comments of INCOMPAS, NTCA, and ACA Connects (collectively, the Joint Association Commenters")[6] that suspension and debarment should be the exclusive responsibility of the Commission, not USAC. We too believe this will lead to greater efficiency and fairness. As the Joint Association Commenters note, USF administrators are not governmental entities and should not be exercising inherently governmental functions, such as adjudicating a suspension or debarment.

Accordingly, and for all of the reasons outlined by SHLB/SECA and the Joint Association Commenters, the Commission should eliminate USAC's *de facto* suspension process and clarify that suspension and debarment is the exclusive responsibility of the Commission.

## II. THE COMMISSION SHOULD AVOID OR AT LEAST MITIGATE HARM TO INNOCENT THIRD PARTIES IMPACTED BY SUSPENSION AND DEBARMENT

### A. The Particular Circumstances Should Be Examined Before Rejecting the Application of a Primary Tier Participant

FFL and the Commission share the goal of removing bad actors from participation in USF programs, and the E-rate program in particular. The Commission's efforts to deter misconduct and remove participants, however, should not come at the expense of innocent third parties.

[6] INCOMPAS, NTCA-The Rural Broadband Association, and ACA Connects-America's Communications Association Comments, Docket No. 19-309 at 7 (Feb. 13, 2020) (INCOMPAS/NTCA/ACA Comments).

In the *NPRM*, the Commission observes that the Guidelines do not provide a mechanism for the rejection of a school's E-rate application if the school is utilizing an E-rate consultant who has been convicted of fraud in another program but has not yet been debarred.[7] The Commission seeks comment on whether it should adopt rules allowing it to reject a transaction based on the disclosure of unfavorable information relating to a lower tier participant.[8]

We find extremely troubling the Commission's suggestion that it would reject the application of primary tier participant, such as a school, library, or health care provider, solely because a lower tier participant with whom they do business was convicted of fraud in another program. We agree with the comments of SHLB/SECA that, under these circumstances, the Commission has an obligation to closely examine the nature of the relationship between the parties to determine what and how much undue influence or control, if any, the consultant (or contractor, advisor, etc.) may have had.[9] The school and its application may have been wholly unrelated to the consultant's misconduct – or even the government program in which the alleged misconduct occurred. Denying the application under such circumstances is fundamentally unfair and contrary to the objective of the E-rate program. Accordingly, rather than punishing a school based on who it elects to do business with alone, FFL urges the Commission to examine the particular circumstances and hold harmless any innocent primary tier participant to the transaction absent a finding that the primary tier participant violated the program rules.

[7] *NPRM* at ¶ 61.

[8] *Id.* at ¶ 61.

[9] SHLB/SECA Comments at 14-15.

### B. Participants Should be Given the Option to Receive Uninterrupted Support from a Suspended or Debarred Entity or Transition to a New Provider

The Commission notes in the *NPRM* that the Guidelines would permit USF participants to choose to continue a transaction with an excluded party if it were in existence before the party was excluded.[10] The *NPRM* seeks comment on the extent to which participants should be permitted to continue receiving services when on a month-to-month or short-term basis.[11]

FFL encourages the Commission to allow participants to receive service from a suspended or debarred entity for the duration of the USF-supported contract or to substitute a new provider, whether the services are on a fixed or on a month-to-month basis. The objective of the USF programs is to provide critical support to schools, libraries, and other program beneficiaries. Where at all possible, suspension and debarment should not interfere with the continued receipt of services to these institutions and the communities they serve. Unless it can be shown that continuing to receive services from a suspended or debarred provider presents a danger to the USF programs, participants should be afforded the option to receive services from a suspended or debarred entity or transition to a new provider.

## III. FORMAL SUSPENSION AND DEBARMENT PROCEDURES SHOULD BE USED SPARINGLY AND LIMITED TO EGREGIOUS OR SERIOUS MISCONDUCT

### A. A Less Severe Remedy Should Be Used When the Circumstances Warrant It

Suspension or debarment is a serious action with significant consequences. The measures are only two of the many tools available to the Commission. Given the severity and potentially damaging consequences inherent in exclusion from USF programs, we believe the Commission

[10] *See* 2 C.F.R. § 180.310(a).

[11] *NPRM* at ¶ 70.

should initiate formal suspension and debarment procedures sparingly and opt for less drastic remedies whenever possible.

The Commission has existing mechanisms in place to address misconduct. For instance, it can seek recovery of funds disbursed in violation of the applicable program rules. Measures also exist to deter potential violations of program rules. In the E-rate program, for example, funding applications undergo an understandably demanding but effective review process to identify potential abuse or misuse of program funds. In addition, the Administrator often conducts a review during the post-commitment process. The USF programs are also subject to a Beneficiary Contributor Audit Program to further ensure compliance with program rules. We endorse the use of these less severe measures to address whenever possible.

As the Commission suggests, FFL encourages the Commission to adopt specific rules to afford it the discretion to merely preclude a participant from entering into a transaction prior to or in lieu of suspending or debarring the participant.[12] Another option, we believe, is to allow a participant to enter into a transaction while monitoring its future activity with greater scrutiny. The Commission could also require a participant to demonstrate that it has taken steps necessary to prevent future violations, for example, by requiring that a compliance plan be put in place. We believe these less drastic remedies can accomplish much of what the Commission hopes to achieve through suspension and debarment with less harmful results to all parties.

[12] *Id.* at ¶ 60.

### B. Suspension and Debarment Should Be Limited to Serious or Egregious Misconduct

We also agree with a number of commenters that suspension or debarment should be limited to serious or egregious misconduct rather than negligent conduct or good faith mistakes.[13]

FFL acknowledges that existing suspension and debarment rules are in several respects deficient. We agree that any new rules should enhance the Commission's enforcement authority, for example, by allowing the it to more expeditiously take remedial action before the issuance of a civil judgment or conviction. However, the Commission's proposal to "significantly expand the scope of [its] suspension and debarment rules" should not be addressed using a low threshold for suspension or debarment.[14]

Many E-rate rules include no consideration of whether the responsible party made a good faith error or instead willfully attempted to evade program requirements. Program rules also tend to be vague, and participants must use their best judgment in interpreting and applying such rules. As CTIA and USTelecom note, "while providers make good-faith efforts to comply with all the Commission's rules and regulations, the rules can be complicated and technical, which means honest mistakes happen, not infrequently, and not for lack of effort."[15]

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[13] *See, e.g.*, SHLB/SECA Comments at 7-8 (urging the Commission to limit formal suspension or debarment procedures to fraud or repeated willful violations, not as a remedy for negligent conduct or mistakes); *see also* CTIA-The Wireless Association and USTelecom Comments, Docket No. 19-309 at 13-15 (Feb. 13, 2020) (proposing that suspension and debarment be focused on the most egregious misconduct) (CTIA/USTelecom Comments).

[14] *NPRM* at ¶ 79.

[15] CTIA/USTelecom Comments at 16.

The Guidelines make clear that the purpose of the suspension and debarment system is to protect the public interest; it is not to be for purposes of punishment.[16] The Commission should therefore focus its rules on deterring and addressing serious or egregious violations rather than good faith mistakes or isolated instances of non-compliance. Focusing on such misconduct allows the Commission to address serious threats to the integrity of its programs without subjecting parties to a damaging suspension or debarment based on minor infractions or mistakes.

## IV. CONCLUSION

For the foregoing reasons, FFL urges the Commission to (1) eliminate USAC's *de facto* suspension process and place responsibility for suspension and debarment exclusively with the Commission; (2) avoid, or at least mitigate, potential harm to innocent third parties impacted by the suspension and debarment; and (3) limit suspension and debarment to egregious or serious misconduct and opt for a less severe remedy when the circumstances warrant it.

Respectfully submitted,

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[16] 2 C.F.R. § 180.125(a), (c).