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Suspension And Debarment: FY 2018 By The Numbers

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Suspension and debarment data for fiscal year 2018 is available in the System for Award Management. As usual, the data presents a treasure trove of trends and data points about the current state of the government's suspension and debarment tendencies. Tracking the information year-over-year also presents fascinating insights into the nature and quality of suspension and debarment cases flowing through individual federal departments and agencies. This article presents relevant fiscal year 2018 suspension and debarment data points as they concern federal government contractors as well as longer-term trends observable over years of tracking this data.

The data presented here differs markedly from the data that is generally published in the Interagency Suspension and Debarment Committee report to Congress. For comparison, the ISDC recently published the fiscal year 2017 report.[1] The ISDC report lists total numbers of suspensions, debarments and proposed debarments by agency, which is a measure of the number of times an agency put "pen to paper" across the fiscal year. But that information tells us nothing about the number of companies or individuals that were subjected to exclusions. Nor does it tell us anything about the types of entities against which the government directed its exclusionary authority. Unless and until government reporting on suspension and debarment activity changes, this sort of analysis is only possible when using SAM data itself. (To compare FY 2017 SAM data to the FY 2017 ISDC data, revisit our FY 2017 SAM analysis.)

As usual, there are caveats and assumptions that accompany the data.

- This information is gleaned directly from SAM by searching for exclusions entered over a specific fiscal year (e.g., Oct. 1, 2017, through Sept. 30, 2018, for fiscal year 2018). This analysis relies on the accuracy of the information within SAM and may be impacted by SAM's idiosyncrasies.

- Agencies that have not been historically active in the discretionary suspension and debarment space are omitted. For example, SAM shows that the U.S. Department of Homeland Security has a single exclusion entered by the headquarters suspension and debarment official. In recent years, they have had none. With the expectation that this number will rise in the future, DHS is included in this year's summary table.

- Agencies whose suspension and debarment efforts are focused on entities other than government contractors (e.g., Department of Homeland Security's Immigration and Customs Enforcement, or U.S. Department of Health and Human Services) are also excluded from the chart. To be clear, both ICE and HHS have active programs, but because the programs do not focus on government contractors, they are also excluded from this analysis.

- The analysis of whether or not a business is small is as much an art as it is science. This year more than previous years, open-source business intelligence tools like Manta.com meaningfully added to the analysis compared to company representations and certifications in SAM registrations. Manta.com's annual revenue estimates demonstrate that the debarred small businesses are often very small, with under $2 million in revenue according to Manta.com estimates. By contrast, the most one can learn from SAM is whether the company self-certifies as small under the relevant size standard according to one or more North American Industry Classification System codes (where tens of millions of dollars in revenue or hundreds of employees are often the threshold).

FY 2018 at a Glance

Fiscal Year 2018 System for Award Management Exclusion Data

Agency	Total Exclusions	Firms	Individuals	Special Entities	Percentage Individuals	Notes
Agriculture	34	14	19	1	56%	
AID	75	2	52	21	69%	Commonly named individuals account for 22 individuals/30 unique individuals excluded
Commerce	4	3	1	0	25%	
DoD - Air Force	48	5	40	3	83%	
DoD - Army	296	55	186	55	63%	
DoD - DLA	158	60	93	5	59%	40 commonly named individuals/53 unique individuals excluded
DoD - Navy	579	21	532	26	92%	361 commonly named individuals/ 171 unique individuals excluded
DHS	1	0	1	0	100%	
Education	14	0	14	0	100%	
Energy	23	4	19	0	83%	
EPA	176	44	101	31	57%	
GSA	181	35	107	39	59%	Abundance of auto repair and auto sales entities, and one law firm excluded
Interior	18	2	16	0	89%	
NASA	10	4	5	1	50%	
NSF	16	4	10	2	63%	
SBA	36	6	21	9	58%	
State	28	5	19	4	68%	
VA	10	3	6	1	60%	
TOTALS	**1688**	**258**	**1233**	**197**	**73%**	

SAM data reveals several interesting trends. First, the U.S. Department of the Navy's tendency to list multiple name variations for individuals is expanding to other agencies such as the United States Agency for International Development and the Defense Logistics Agency. If we remove these additional 423 aliases from the exclusion counts, the exclusions of individuals drops to 810, and the total exclusions drops to 1,265 on the fiscal year.

This double counting practice, along with the robust focus on excluding individuals, continues to raise questions about the purpose of the government's suspension and debarment authority and whether excluding individuals fits within the regulatory regime. After all, contracting officers check SAM immediately before making contract awards to ensure that contractors (e.g., companies) are not excluded. See Federal Acquisition Regulation 9.405(d)(4). But, there is no corresponding requirement for contracting officers to check for excluded individuals before making an award. While government practitioners will tell you they are wielding the exclusionary axe to protect taxpayers or to protect the government's business interest, such statements are not necessarily supported by regulatory authority.

As further example, FAR 9.402(a) announces the policy of the government is to "solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only." FAR 9.403 defines "contractor" as "any individual or other legal entity that (1) [d]irectly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract ... or a subcontract under a Government contract; or (2) [c]onducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor." While the FAR does mention the word "individual" within the definition of "contractor," that mention is qualified. The plain language indicates that individuals must also either directly or indirectly submit offers for award, or be awarded a prime or subcontract, or "conduct[ ] business" with the government. The more the government focuses on individuals — and the more the government increases the numerical counts of individuals in SAM by entering a multitude of different spellings for their names — the better the chance that an affected individual will ask a court to rule on whether the individual (and any SAM-listed alias) is in fact a "contractor" as defined in the regulations and therefore subject to government debarment authority at all.

Second, it is worth noting that among the U.S. General Services Administration exclusions are a number of auto dealers and auto repair shops. The GSA's debarment efforts rely in large measure on GSA Office of Inspector Generalreferrals, so SAM data suggests some sort of GSA OIG enforcement effort against automobile vendors and mechanics occurred in recent years. And in a curious twist, the GSA also excluded a law firm — but SAM data does not tell us why.

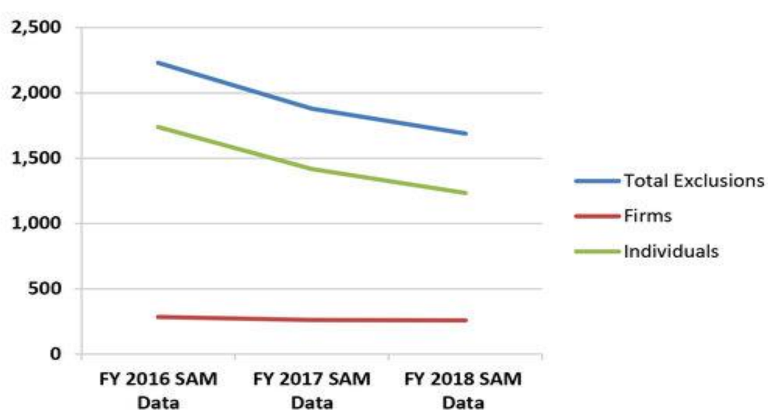
Separately, cross-referencing SAM exclusion data with available business size information shows the following about the domestic "firms" that were excluded by the government over the past two fiscal years. Note that this analysis is restricted to "firms" listed in SAM, because those entities are more likely to be traditional active government contractors rather than "special entities" that do not have normal indicia of being in the government contracts market such as a DUNS number and CAGE code. Further, the analysis is limited to U.S. entities because of the prevalence of open-source business intelligence tools about these companies. Similar information is less available for non-U.S.-based companies.

Agency	% Small 2018	% Small 2017
Agriculture	100%	88%
AID	NA	NA
Commerce	100%	NA
DoD - Air Force	100%	100%
DoD - Army	98%	62%
DoD - DLA	91%	73%
DoD - Navy	94%	94%
DHS	NA	NA
Education	NA	NA
Energy	100%	25%
EPA	98%	77%
GSA	97%	100%
Interior	50%	100%
NASA	100%	67%
NSF	100%	100%
SBA	100%	100%
State	100%	NA
VA	100%	100%

As in prior years, the probability of being excluded from government contracting by suspension, proposed debarment or debarment is inversely proportional to business size. And, in fiscal year 2018, that trend increased dramatically. One hundred percent of excluded firms in nine federal agencies are small, while 90 percent in five more federal agencies are small firms. Indeed, the only outlier is the U.S. Department of Interior with 50 percent (or, in their case, one of two) small firms.

Comparison to FY 2016 and FY 2017 Numbers

	Total Exclusions	Firms	Individuals	Special Entities
FY 2016 SAM Data	2,229	284	1,738	207
FY 2017 SAM Data	1,878	262	1,415	201
FY 2018 SAM Data	1,688	258	1,233	197



The decline in federal suspension and debarment activity year-over-year is readily apparent. The government excluded fewer contractors in every category in fiscal year 2018 compared to fiscal year 2017, and even fewer when compared to fiscal year 2016. There are fewer numbers of exclusions, including fewer firms, fewer individuals and fewer special entities excluded from the marketplace. Individuals continue to be the most likely to be excluded. And the percentage of U.S. companies that have some indicia of being engaged in government contracting (e.g., firms rather than special entities) of total actions continues to be relatively low, accounting for 13 percent of overall actions in fiscal year 2016, 14 percent in fiscal year 2017, and 15 percent in fiscal year 2018.

The reasons for this decline are many, but the heaping of additional duties on suspending and debarring officials and the reductions in governmentwide staffing for suspension and debarment efforts cannot be ignored. Neither can the lack of government oversight focus on these efforts. It is no coincidence that the high-water mark years for suspension and debarments (2013-2014, as shown in the graphs attached to the FY 2017 ISDC report)[2] coincided with a period of multiple U.S. Government Accountability Office reports,[3] a U.S. Department of Defense Office of Inspector General audit,[4] and attempt by Congress[5] to consolidate suspension and debarment functions into a single adjudicative body. Those efforts have trailed off in recent years. So too has exclusion activity. SAM data alone does not demonstrate a causal relationship between these factors, but the trend lines suggest one might exist.

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[1] https://acquisition.gov/sites/default/files/page_file_uploads/Control%20ISDC%20FY%202017%20Report_Final_07_31_2018%20-2.pdf

[2] https://acquisition.gov/sites/default/files/page_file_uploads/Control%20ISDC%20FY%202017%20Report_Final_07_31_2018%20-2.pdf

[3] GAO-11-739 https://www.gao.gov/assets/590/585277.pdf; and GAO-13-707T https://www.gao.gov/assets/660/655157.pdf

[4] Report No. D-2011-083 https://media.defense.gov/2011/Jul/14/2001712144/-1/-1/1/D-2011-083.pdf

[5] https://www.congress.gov/bill/113th-congress/house-bill/3345