

ALERT

New Suspension and Removal Rules for the Affordable Connectivity Program To Have Major Impact on Participating Providers

March 17, 2022

On March 16, 2022, the vast majority of the new rules for the Affordable Connectivity Program (ACP) – the successor program to the Emergency Broadband Benefit (EBB) Program created by Congress last year to help offset the cost of broadband subscription and broadband-capable devices for qualified low-income consumers – became effective after the rules’ publication in the Federal Register on February 14, 2022.^[1]

One of the biggest differences between the pre-existing rules for the EBB Program and the new rules for the ACP is the adoption of new involuntary removal rules modeled after the Office of Management and Budget (OMB) Guidelines to Agencies on Government Debarment and Suspension.^[2] For the EBB Program, the Federal Communications Commission (FCC or Commission) had extended the current suspension and debarment rules for Universal Service Fund programs to participating providers, which permit suspension and debarment only upon conviction of civil judgment for statutorily defined offenses associated with the existing universal service programs.^[3] However, citing the size of the ACP, the “expected longer-term of the program, the significant financial benefits available to providers, and the program’s goal of connecting a vulnerable, low-income population to internet services,” the Commission felt the need and urgency to adopt additional tools to be able to promptly remove providers for program rule violations to “protect the public interest, preserve program funds, and protect both participating households and prospective consumers from bad actors.” The Commission thus adopted the additional rules and procedures first proposed in the

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2019 Modernizing Suspension and Debarment Rules proceeding, which were based on the OMB Guidelines but have not yet been finalized and adopted in that proceeding.^[4]

Under the new suspension and removal rules for the ACP, a participating carrier could be subject to a suspension or removal proceeding by the FCC not only for violations of the rules or requirements of the ACP or its predecessor EBB Program, but also the Lifeline program, the Emergency Connectivity Fund (ECF) Program or successor programs, as well as any of the Commission's Universal Service Fund programs. In addition to a conviction or civil judgement arising out of activities related to ACP, EBB, ECF, or any of the Commission's USF programs, the Commission may suspend or remove a participating carrier for "any action that indicates a lack of business integrity or business honesty that seriously and directly affects the provider's responsibilities" under the ACP, that "undermines the integrity" of the ACP, or that "harms or threatens to harm prospective or existing program participants, including without limitation fraudulent enrollments."^[5] The standards for these offending actions appear to be undefined. The ACP Order seems to defer determination of conduct that indicates "a lack of business integrity or business honesty," "undermines the integrity" of the program, or "harms or threatens to harm" participating consumers to the discretion of the Chief of the Wireline Competition Bureau or Enforcement Bureau. Such causes for removal seem to depart from the OMB Guidance, which provides that a federal agency may debar a person for actual *convictions of or civil judgement for* offenses indicating "a lack of business integrity or business honesty."

Furthermore, in adhering to the OMB Guidelines, the new rules provide that the FCC may only make a removal determination and issue an order based on a "preponderance of the evidence" and after giving the provider an opportunity to respond. The agency can, however, direct the Universal Service Administrative Company (USAC) to temporarily suspend the participating provider's ability to enroll or transfer in new subscribers, as well as to place a funding hold on the provider based upon "adequate evidence" of willful misconduct and after determining that immediate action is necessary to protect the public interest. OMB Guidelines define "adequate evidence" as "information sufficient to support the reasonable belief that a particular act or omission has occurred" – a relatively low standard that is easy for the agency to meet, and the suspension may be imposed first – prior to giving the suspended carrier notice and an opportunity to contest the suspension. Importantly, it is not clear whether the new suspension and removal rules replace the current *de facto* suspension process employed by USAC, whereby it routinely delays or suspends administrative processing and fund disbursement, sometimes indefinitely, for entities suspected of a rule violation.

Given that there are over 1,200 participating providers in the ACP, and that the OMB Guideline departs from existing suspension and removal procedures for USF program participants in a few significant ways, all participating providers of ACP should review the new rules carefully to understand their potentially far-reaching impact and ensure ongoing compliance with the program requirements.

[1] See *Affordable Connectivity Benefit*, WC Docket No. 21-450, Report and Order and Further Notice of Proposed Rulemaking, FCC 22-2, ¶ 59 (rel. Jan. 21, 2022) (ACP Order).

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[2] See Office of Management and Budget, Guidance for Governmentwide Debarment and Suspension (Nonprocurement), 71 Fed. Reg. 66431 (Nov. 15, 2006) (final guidance) and 70 Fed. Reg. 51863 (Aug. 31, 2005) (interim guidance), *codified at* 2 CFR pt. 180 (“OMB Suspension and Debarment Guidelines”).

[3] 47 CFR § 54.8(c).

[4] See Modernizing Suspension and Debarment Rules, GN Docket No 19-309, Notice of Proposed Rulemaking, FCC 19-120, 34 FCC Rcd 11348 (2019).

[5] 47 CFR § 54.1801(e)(2)(ii).