

especially programs with awards to states as pass-through entities, have substantial program performance by subcontractors at lower tiers below covered nonprocurement transactions. Other programs, including many research programs, are performed by participants in the covered nonprocurement transactions. At least some programs of the first type may be particularly vulnerable to subcontractor malfeasance; agencies in those cases need the flexibility to extend coverage to lower tier subcontracts to adequately protect the Federal Government's interest. Many programs of the second type, however, do not share that vulnerability. Revising the rule to mandate extended coverage in all cases would increase administrative burdens and costs for those programs without commensurate benefits to the taxpayer. For this reason, the final rule includes the optional lower tier coverage in section 220 as the best way to afford adequate protection for the wide universe of Federal agency programs without imposing undue administrative burdens on agencies or participants.

Subpart C

Scope of action. One commenter recommended that proposed sections 300, 400, 420 and 445 be clarified to state that persons checking the *Excluded Parties List System (EPLS)*, formerly known as the List of Parties Excluded or Disqualified from Federal Procurement and Nonprocurement Programs, should look at the cause and treatment code to see if the listed person is ineligible under a statute or executive order as opposed to suspended or debarred under this rule. The cause and treatment code will reveal a scope of disqualification which may differ from a discretionary suspension or debarment. The *EPLS* includes cause and treatment codes with each listing, as well as instructions for their use, so that the user will know the nature and scope of a person's ineligibility. This is the same system as that currently in place and has worked without problems. We believe that sections 75(b), 145(b)(1) and 515 of the proposed rule already adequately address this matter. Therefore, no additional language in this regard is added to the final rule.

Participant verification of eligibility of lower tier participant. One commenter recommended that we clarify that a participant planning to enter into a covered transaction with another entity at the next lower tier must verify that the entity is not excluded or disqualified. We agree. We included a new section 300 in the final rule to more

clearly state that obligation. We renumbered the remaining sections within that series to maintain the sequence of the final rule.

Participant termination of suspended or debarred principal in existing covered transactions. One agency commenter noted that the cautionary language contained in the final sentence of section 305(a) of the proposed rule (now section 310(a) of the final rule), be modified appropriately and included at the end of proposed section 310(a) (now section 315(a) of the final rule). The language under proposed rule section 305(a) emphasized that a participant exercise caution in deciding whether to terminate covered transactions, such as subcontracts or subgrants, with persons that were already in existence at the time the person was excluded. The commenting agency noted that a participant may face the same issue with regard to one of its own employees who may be subject to an exclusion while already acting as a principal under another covered transaction. Since an agency exclusion imposed under this rule does not apply to existing awards, termination options in such situations can be legally and practically complex. Before such an action is taken, the option must be carefully analyzed and weighed. We believe the same or similar concerns apply to decisions about employees who serve as principals. Accordingly, section 315(a) of this final rule has been amended to include similar cautionary language.

Participant verification of its principals' eligibility. One commenter suggested that proposed section 315 be clarified so that the reader understands that a participant need only verify that its own principals, and not those of lower tier participants, are eligible to participate in the covered transaction. Since a participant may have a transaction both above it and below it, it is possible to misconstrue this section to obligate the participant to verify the principals of those participants above and below its own organization. The language in proposed sections 315 and 325 (now sections 320 and 330 in the final rule), was intended to require participants only to verify eligibility of its own principals in its own transactions. Participants at lower tiers will verify the principals' eligibility in their transactions. Accordingly, we amended proposed section 315 (now section 320 in the final rule), to replace the phrase "any principal" in the first sentence, with the phrase "any of your principals."

Doing business with an excluded person. The same commenter suggested

that proposed section 320 (now section 325 in the final rule), be modified by replacing the phrase "If as a participant you knowingly do business with an excluded person" with "If you as a participant do business with a person when you knew or had reason to know that the person was excluded. * * * ." The commenter believes it would make the standard consistent with that found elsewhere in the rule. However, the only place in the rule that the "reason to know" standard applies is when an agency is imputing conduct from an entity to an individual for the purpose of suspension or debarment. That standard is different from the "should have known" standard, but less than the actual knowledge standard required under proposed section 320 (now section 325). When the NCR was published as a final rule in 1988, the standard of actual knowledge was adopted to support a cause for debarment under section 305(c)(2). That final rule changed the language from what had been proposed as a "known or reasonably should have known" standard. That was done to conform the nonprocurement rule to a FAR certification proposed amendments at 52 FR 28642-46 (July 31, 1987). See also discussion at 53 FR 19167 (May 26, 1988). It was determined then, and we agree now, that actual knowledge of ineligibility should be required before an agency debar a person for doing business with an excluded or disqualified person. Therefore, the standard under this section in the final rule remains unchanged.

Certification. Three of the six comments we received on this subject, including one from the ABA-PCL, supported the proposed rule's elimination of a current requirement for certifications. The ABA-PCL also noted that the problems caused by certifications could be aggravated, rather than solved, if some agencies elected to continue using certifications, and instructions were not issued to preclude each agency from separately crafting certification language that differed from the language used by the others. We agree and note that this comment should be addressed by the joint efforts of 26 Federal grant-making agencies to implement the streamlining and simplification requirements of the Federal Financial Assistance Management Improvement Act of 1999 (Pub. Law 106-107). A stated goal of those interagency efforts is to eliminate certifications or assurances that are found to be unnecessary and establish common language for others.

One of the three commenters supporting continued use of