

certifications said that certifications provide the best means of obtaining accurate and updated information about a person's eligibility. That commenter noted that the Office of Federal Procurement Policy retained the suspension/debarment certification when the Clinger-Cohen amendments were implemented for Federal procurement contracts.<sup>1</sup> Another comment in support of retaining certifications suggested that a certification is the best way for a participant to provide information about itself and its principals, as required by proposed rule section 330 (now section 335 in the final rule), to the Federal agency with which it is about to engage in a covered transaction.

We understand and appreciate these views. However, Federal award officials can now rely on the electronic *EPLS* which is available worldwide on the Internet, as opposed to the printed version that could be six weeks out of date by the time some awarding officials receive them. New technology has eliminated any need to require Federal agencies to obtain suspension/debarment certifications, although the rule still makes certifications available as an option for any agency with circumstances that justify their continued use. In their agency-specific preambles accompanying the **Federal Register** notice of proposed rulemaking, only a few agencies proposed to use certifications in their covered transactions. This suggests that many agencies see alternative methods as an opportunity to reduce burdens on participants without reducing compliance with the rule's requirements. Therefore, the final rule does not require Federal agencies to obtain certifications.

#### Subpart E

*Identity confirmation by date of birth.* The Federation of American Hospitals suggested that section 515 of the rule include a field for birth date entries on the *GSA List* (now called the *EPLS*). The Federation observed that birth dates are currently available in company employee databases and are used in other Federal programs to assist in matching identities. The ISDC has been studying the use of birth dates as a

potential data entry into the *EPLS* to confirm the identity of individuals. The collection, use, and dissemination of personal identifier information, such as social security numbers and birth dates, is widely practiced in private and commercial settings. However, when Federal agencies desire to do so, the issue is more complex. Certain statutes designed to protect privacy must be considered. We believe that this suggestion has merit and should be considered as an enhancement to the current system at a later date.

#### Subpart F

*Confirmation of receipt of notice by e-mail.* The ABA-PCL expressed general support for expanding the options for delivery of action notices under sections 615, 725, 820 and 975. It noted that e-mail notification, unlike notification by facsimile, is still in an evolutionary stage and may lack the level of certainty that the notice reaches the intended recipient in a timely manner. It suggested that the regulation should require that e-mails be followed up by notice via regular mail, or that the respondent provide the sender with a confirmation of e-mail receipt.

While still an evolving technology, e-mail is not inferior to traditional mail or facsimile as a means to deliver notice. Even current mail with return receipt options does not guarantee that the mail reaches the intended recipient. Many return receipts are returned to the sender as undeliverable or unclaimed. Some are signed by a person whose signature is not legible. The legal system accepts, as legally sufficient, constructive notice to bring a matter to conclusion—knowing that actual receipt by the intended recipient is not guaranteed. This has been equally true in the world of suspension and debarment. Agencies are occasionally faced with claims by respondents who have been debarred that they did not see the notice or decision, or that the facsimile notice was mis-delivered. The current NCR and FAR debarment rules assume receipt if the notice is sent to the last known address. Because the rules allow any debarred person to petition for reinstatement at any time, a person who makes a case for non receipt of notice is not deprived of an opportunity to contest an action or have its status changed. Requiring duplicate mailings or other cumbersome procedures will not significantly increase the chance of actual receipt. It would only lengthen the notification process and deprive the agencies of the ability to take prompt protective action and to conduct business efficiently.

Therefore, we did not change this in the final rule.

*Scope of action with regard to subsidiaries.* The ABA-PCL requested that proposed section 625 be amended to address uncertainty about whether an organization's suspension or debarment automatically covers wholly owned subsidiaries. The 1988 preamble to the NCR contained a detailed explanation of the treatment to be accorded all subsidiaries of a corporation with regard to the scope of a debarment or suspension. See 53 FR 19169 (May 26, 1988). The 1988 NCR, when proposed, would have included subsidiaries automatically within the scope of a suspension or debarment action taken against the parent company. As a result of comments received in 1988, the final NCR removed the term "subsidiaries" from the automatic scope of a suspension or debarment against a parent company. This was, in part, because separately incorporated entities may have different shareholder interests involved that may not be notified of the action. Also, a subsidiary corporation may receive an award in its own name. Procurement and nonprocurement award officials must rely on the *EPLS* to determine the eligibility status of a potential contractor or participant. There is nothing in the award process that will inform the award official that any potential contractor or participant is, or may be, a subsidiary of another excluded entity—even if all the subsidiary's stock is owned by the excluded entity. Apart from cases where a subsidiary's name may include part of the parent's name, there may be nothing in the *EPLS* that will cause an award official to associate the potential subsidiary contractor or participant with an excluded parent. For these reasons, the original nonprocurement suspension and debarment final rule elected to treat all subsidiaries as "affiliates." This means that all entities with a distinct legal identity, including wholly-owned subsidiaries, must be provided with a notice of action, an opportunity to contest, and written determinations. The subsidiary will appear with its own listing to assure that the Government may effectively enforce the *EPLS*. Parts of a business entity that do not enjoy a separate legal standing, such as unincorporated divisions and branches, are included within the scope of the action against the entity.

*Imputing conduct.* One commenter observed that a technical reading of section 630 of the proposed rule does not adequately describe imputing conduct from a subsidiary to its parent company or between separate corporate or other business entities other than

<sup>1</sup> Section 4301(b)(2)(iii) of the Federal Acquisition Reform Act of 1996 (Pub. L. 104-106), prohibits Federal agencies from imposing non-statutory certifications on contractors or offerors unless the Federal Acquisition Regulatory Council provides written justification to the Administrator for Federal Procurement Policy, and the Administrator approves the certification requirement in writing. This justification must include a determination that there is no less burdensome means for administering and enforcing the agency regulation.