

those engaged in joint ventures. Paragraph (a) of that section refers to imputing conduct from individuals to organizations. Paragraph (b) addresses imputing conduct from organizations to individuals. Paragraph (c) addresses imputing conduct between businesses linked by some form of limited joint venture or agreement.

Many agencies have operated with the understanding that the phrase “or similar arrangement” contained in section 325(b)(3) of the current NCR allows agencies to impute conduct between a subsidiary and its parent company. The proposed rule did not alter the current language of the NCR. However, after reviewing the proposed language, and comments requesting that we redraft this section using plain language (see General comments on plain language format above), we revised section 630 of this final rule to make clear that, for the purpose of suspension or debarment, Federal agencies may impute misconduct from individuals to organizations, from organizations to individuals, from individuals to other individuals, and from organizations to organizations, where appropriate. Section 630(c) of the final rule covers imputing misconduct from any linked organizations, including those linked by a parent-subsidiary relationship. This revised format and style of section 630 will help eliminate ambiguity existing under the current NCR language and make it more understandable to the general public.

We also note that this rule retains the *reason to know* standard as the appropriate standard for imputing misconduct to individuals under section 630(b). The Circuit Court of Appeals for the DC Circuit, in *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991), noted that the *reason to know* standard was not defined in the FAR. Using an analysis of that standard at common law, the Court reasoned that this standard is not one of strict liability or a *should have known* standard that can be met merely because of an individual's position as president of a corporation. We agree with that interpretation. We also note, as did the Court, that the debarring official in that case had other information in the record, the nature of which could have reasonably supported imputation under the *reason to know* standard under the right circumstances. Under this rule, if a person in a position of control, influence or authority over a business activity acquires information that suggests misconduct and fails to take action to prevent the misconduct from occurring, or to mitigate the injurious consequences of the misconduct once it has occurred,

imputation under the *reason to know* standard of section 630(b) is appropriate. If a person in authority over a business activity can be shown to have deliberately avoided acquiring information about misconduct that would otherwise reasonably be expected to come to their attention in the ordinary course of performing their duties, they may be deemed to have *reason to know* of the misconduct under section 630(b).

The *reason to know* standard of section 630(b) applies to all situations where conduct is to be imputed to an individual. It applies the same standard for imputing conduct between spouses or relatives as it does between an organization and an individual or between unrelated individuals. This section does not authorize imputing conduct from one individual to another in a business activity solely upon the existence of a family or marital relationship between two individuals. Other factors, such as age, experience in the business, education, financial capacity, and organizational or operational independence should be considered along with the relationship before determining that one individual had *reason to know* of the misconduct of the other. Where no other factors are present to support imputing conduct to a related individual, that individual may still be subject to action as an affiliate, if the appropriate degree of control can be established.

Another commenter suggested that we delete from section 630 the word “scope” to describe application of the imputed conduct provisions and we use the term only with regard to the subject matter addressed in section 625. We agree with that clarification and have revised the initial sentence in section 630 accordingly.

That commenter also suggested that the final rule substitute the words “may be” for the word “is” in the final sentence of paragraphs (a) and (c) of section 630 of the proposed rule. The commenter believed such a change would clarify that acceptance of benefits derived from the conduct in question alone does not create a conclusive presumption upon which to impute conduct. We agree that the mere acceptance of benefits alone would be an insufficient basis upon which to conclude that a person had knowledge of, approved of, or acquiesced in the conduct where evidence suggests otherwise. However, agencies under the Governmentwide debarment and suspension system have always used acceptance of benefits as one indicator of knowledge, approval or acquiescence. A suspending or debarring official, or an

official conducting fact-finding in a suspension or debarment action, may weigh the fact of receipt of benefits derived from the conduct against other information available in the record to determine whether a person knew or approved of, or acquiesced in, the conduct in question. Therefore, the language in the proposed rule is accurate and remains in the final rule.

Subparts G and H

One Federal debarring official noted that the language of section 700(a) of the proposed rule generally requires adequate evidence to suspect that a cause for debarment exists as the first part of a two-part test to support a suspension. He observed that the adequate evidence test makes sense so long as the reader applies it to any ground under section 800 other than section 800(a). A cause for debarment under section 800(a) requires the matter to have already progressed to a conviction or judgment. While the language in the proposed rule has existed under the NCR for years without apparent confusion, we agree that either section 800(a) should be stated more generally such as “commission of criminal offense or liability for a civil matter” or section 700 should distinguish between suspensions based on causes under section 800(a) and those based on causes under sections 800(b) through (d). To keep the causes for debarment under the FAR and this rule consistent, we elected not to alter the language of section 800(a) in this final rule. But to improve the clarity with respect to suspensions for actions that have not yet progressed to a judgment or conviction, we divided proposed section 700(a) into two paragraphs (a) and (b). Section 700(a) of the final rule relates to suspensions based upon indictment, complaint or other adequate evidence to support criminal or civil matters that may ultimately fall under section 800(a). Section 700(b) of the final rule relates to adequate evidence of any other cause for debarment. Proposed section 700(b) becomes section 700(c) in this final rule.

Fact-finding proceedings versus presenting matters in opposition. A few commenters found proposed rule sections 740 and 835 confusing because while these sections address meetings held with the suspending or debarring official to present matters in opposition, the final sentence of each section relates to taking witness testimony and conducting cross-examination. These matters apply to fact-finding proceedings, not presentation of matters in opposition. Fact-finding proceedings are addressed in sections 745 and 840.