

Therefore, we moved the language relating to witness testimony and cross-examination from sections 740 and 835 of the proposed rule to sections 745 and 840, respectively, in this final rule. In addition, in response to another agency comment, we clarified the provisions under those sections so that it is clear that fact-finding privileges of presenting witnesses, evidence and other information, or cross-examination of any witnesses, or confrontation of evidence and information presented, is equally available to respondents and the government representatives at those proceedings.

One commenter requested that we revise sections 740(b) and 845(c) to permit the suspending or debarring official to refer both disputed facts and issues of law to another official for resolution. The Governmentwide suspension and debarment provisions under the FAR and the NCR provide only for submitting material facts genuinely in dispute to another official for resolution. In some agencies, the debarring official is in the Office of General Counsel, in other cases, the General Counsel's Office may review the decision before issuance or may advise the debarring official on legal matters while the matter is pending. Each agency has the discretion to decide, and must determine for itself, how it will handle legal issues in the context of debarment or suspension actions. We believe it is in the best interest of the Government to continue that practice. Furthermore, changing the proposed language in accordance with this request would place the NCR at odds with the requirements for suspension and debarment under the FAR. Accordingly, we made no change.

One commenter suggested that the final rule clarify whether disputes over mitigating or aggravating factors would entitle a respondent to a fact-finding proceeding. The current interpretation and practice of the agencies in suspension and debarment actions under both the FAR and NCR is that a respondent is entitled to a fact-finding proceeding on material facts in genuine dispute only with regard to establishing a cause for debarment or suspension. As a practical matter, the regulation does not preclude a suspending or debarring official from using a fact-finding proceeding to address aggravating or mitigating factors in dispute if he or she finds it helpful in reaching a final decision. We left the final rule unchanged to avoid creating an appearance of differing standards for fact-finding between the NCR and the FAR.

Time limits for decision. One commenter suggested that we amend sections 755 and 870 to require that the suspending or debarring official make a final decision within 45 days of closing the official record, even in cases where fact-finding is conducted. Currently under the NCR, the 45-day time limit for the suspending or debarring official's decision only applies to cases in which no fact-finding is required. The proposed rule did not alter that requirement. However, since the suspending or debarring official does not close the record in any case until after he or she receives the needed information, including the fact-finder's findings, there is no reason for the suspending or debarring official to treat these cases differently. Accordingly, sections 755 and 870(a) have been revised to set a 45-day period for final decision in all cases, subject to extension for good cause.

Petitions for reconsideration. One commenter recommended that either section 875 or 880 incorporate a minimum six month waiting period before a debarred person may petition the debarring official for reconsideration of its period or scope of debarment. We believe there are many reasons that may justify an adjustment of the period or scope of a debarment within six months of issuance of the initial decision. For example, the debarring official may have overlooked important information in the record, or the debarred person may be able to establish present responsibility shortly after a debarment is issued. Unlike the 45-day time limit imposed upon the debarring official in rendering the initial determination, no such time limit is imposed in handling requests for reconsideration under these sections. The debarring official has significant discretion in, and control over, handling requests for reconsideration. Debarment officials can use that discretion in dealing with reconsideration requests, including frivolous requests, without minimum waiting periods. In a close case, a minimum waiting period could discourage a debarring official from imposing a debarment if a company has made an incomplete demonstration of present responsibility. In addition, it can have a harsh result on the company that addresses Government concerns promptly. Most agencies do not appear to have experienced significant problems handling reconsideration requests. Accordingly, the final rule does not include a mandatory minimum waiting period for reconsideration.

Subpart I

Define "procurement". One commenter recommended adding a definition of the term "procurement" in Subpart I to clarify which lower tier transactions are covered transactions. The commenter suggested defining "procurement" as the acquisition of supplies and services by contract with a commercial entity, to help distinguish lower tier procurement transactions from subawards made by research institutions to collaborating research organizations.

We understand the importance of distinguishing procurement transactions, which are covered transactions at lower tiers only if they meet the criteria under section 220 of the rule, from nonprocurement transactions that are more broadly covered under section 210. Adding a definition of the term "procurement" to this rule would be warranted if confusion was prevalent among Federal agencies or participant communities about the distinction between procurement and nonprocurement. However, we do not believe this is the case. The definition of "subgrant" and "subaward" in Federal agencies' implementation of OMB Circulars A-102 and A-110, respectively, provide an adequate basis for most agencies and participant communities to make the distinction. Specifically, a lower tier transaction is a nonprocurement transaction subject to section 210 if the transaction's purpose is to have the lower tier participant perform any part of the substantive program from the Federal agency's primary tier transaction. If it meets this criterion, the lower tier transaction is a nonprocurement transaction even if the higher tier participant calls the transaction a "contract." In contrast, the lower tier transaction is procurement subject to section 220 if its purpose is the acquisition of goods or services needed by a performer, at any tier, of the substantive program. While we do not believe that adding a definition of "procurement" is necessary in this Governmentwide rule, any Federal agency may add clarifying language in its own rule if it judges that doing so is warranted for its programs. Also, a participant may seek guidance from the awarding Federal agency if necessary.

Conviction. One commenter requested clarification of the term "entry" of judgment as it relates to the definition of "conviction" in section 925. Under Rule 32 of the Federal Rules of Criminal Procedure, a conviction is not final until the entry of a final order. Therefore, a criminal conviction does not exist to