

support a cause for debarment under section 800(a) until the court signs the Judgment, Commitment or Probation Order (or its equivalent). The proposed rule sought to address this definition so that agencies would be free to conclude debarment proceedings where a defendant enters a guilty plea or a guilty verdict is returned but judgment is withheld, delayed, or diverted pursuant to an alternative sentence or disposition. Accordingly, the proposed rule expanded the definition to focus on the practical reality of the criminal proceeding's conclusion, rather than the technical requirement that a judgment be "entered."

While acknowledging the legitimacy of the Government's desire to finalize debarment proceedings in criminal matters concluded under special terms without the benefit of a formal entry of judgment, the ABA-PCL expressed concern that the proposed definition, as written, is so broad that it would capture dispositions that are not the functional equivalent of a finding or pronouncement of guilt. It observed that the contexts for such alternate dispositions vary from case to case, and from jurisdiction to jurisdiction, and that failure to add some boundaries to the expanded definition might discourage resolution of some cases in a way that is beneficial to the Government and the affected person. The ABA-PCL suggested that the phrase "or any other resolution" in the proposed definition be subject to some limitation reflective of an admission or finding of guilt before being treated as a ground for debarment. We believe the ABA-PCL's concern is appropriate. Accordingly, the definition of "conviction" in the final rule is revised to provide that an alternative disposition to a criminal entry of a judgment will be treated as the functional equivalent of a judgment if it occurs with the participation of the court; or in a case that involves only an agreement with the prosecutor, if it occurs in the context of an admission of guilt. In making this assessment, the debarring official should consider the entire context of the disposition or resolution, including the nature of the obligations imposed on or accepted by the person, and any official statements made regarding the alternate disposition. Where a person is suspended upon commencement of criminal proceedings which are later held in abeyance to satisfy the terms of an alternative disposition, and the alternative disposition does not qualify as the functional equivalent of a conviction, the suspension may

continue until the criminal matter is concluded under NCR section 760(a).

Person. The ABA-PCL also questioned whether it is practical to continue including a "unit of government" within the definition of person for the purpose of taking suspension or debarment actions. The commenter notes that units of government often have a unique status in Federal agency programs that make their suspension or debarment impractical. We acknowledge that there is often a unique relationship between the governmental organizations that might dissuade a Federal agency from choosing to debar a governmental body from Federal nonprocurement transactions. However, that is not true for all Federal transactions, or for all units of government. Federal suspending and debarring officials have sufficient discretion and options available when dealing with units of government or their employees that allow the official to consider all relevant factors. We do not believe that the Federal Government's interest in protecting its nonprocurement programs would be enhanced by eliminating all units of government from the definition of "person." Such an approach would, in effect, create an exemption from coverage and create a void of oversight and accountability for many special bodies of government that receive Federal funds and benefits. Therefore, the definition of "person" remains unchanged in the final rule.

Principal. The ABA-PCL also expressed concern that the definition of the term "principal" in proposed section 995(b)(3) is so broad as to potentially result in making it impossible for an individual to find employment in their given field. Proposed section 995(b)(3) includes any person who "occupies a technical or professional position capable of influencing the development or outcome of an activity that affects a covered transaction." The ABA-PCL suggests that this should be narrowed to cover an employee who "occupies a technical or professional position capable of *directly and substantially* influencing the development or outcome of an activity *required under* a covered transaction." We agree that the definition of "principal" in proposed section 995(b)(3) should be narrowed in an effort to cover critical non-supervisory/managerial positions. However, use of the term "directly" may confuse the reader to believe that the exclusion will apply only to positions that are charged as a direct cost to the covered transaction. As noted in the 1988 preamble to the NCR, the

Government rejects the direct/indirect cost analysis as being a valid basis upon which to apply the exclusion. In addition, the ABA-PCL's suggested phrase "required under a covered transaction" could be read to require that the product or service must be specifically mentioned in the award, agreement or transaction. It is the intent of this rule to cover any important service or product that is required to perform the award, whether or not it is directly specified in it. Accordingly, we altered the definition of "principal" in section 995(b)(3) of the final rule to apply to any person who " * * * Occupies a technical or professional position capable of *substantially* influencing the development or outcome of an activity *required to perform* the covered transaction." (Emphasis added.)

Fundamental concepts that still apply under this rule. In addition to addressing the comments raised during the comment period in this rulemaking, we identified important concepts that were addressed in the preamble to the original NCR, or that evolved since its publication, that still apply under this final rule. They are being restated here to preserve them and to provide useful guidance on the interpretation and application of this rule.

Protection not punishment. Suspension and debarment are administrative actions taken to protect the Government's business interests. It should not be used to punish persons for past misconduct or to coerce a respondent to resolve other criminal, civil or administrative matters. While suspension and debarment will frequently occur as a result of, or at the same time as other proceedings, and may even be highly dependent upon the resolution of those other proceedings, suspension and debarment are not alternatives for using traditional means of resolving matters in the appropriate forum. Notwithstanding this precaution, the suspending and debarring official may resolve any matter *otherwise appropriate for suspension or debarment* under the terms of a comprehensive or global agreement that addresses criminal, civil, enforcement, audit, contract dispute, or other proceeding collateral to it when in the best interest of the Government to do so.

It is important for suspending and debarring officials to use balance and sound business judgment in ascertaining whether to use suspension and debarment to address a matter. Where other administrative remedies are available, such as disallowing costs or recovery of sums by set-off, filing of civil claims, or various contractual or