

**OFFICE OF PERSONNEL
MANAGEMENT****5 CFR Part 890**

RIN 3206-AD76

**Debarments and Suspensions of
Health Care Providers From the
Federal Employees Health Benefits
Program****AGENCY:** Office of Personnel
Management.**ACTION:** Final rule.

SUMMARY: The Office of Personnel Management (OPM) is amending its regulations regarding administrative sanctions of health care providers participating in the Federal Employees Health Benefits Program (FEHBP). These regulations implement the suspension and debarment provisions of section 2 of the Federal Employees Health Care Protection Act of 1998 (Pub. L. 105-266). That statute modified both the substantive and procedural requirements for FEHBP administrative sanctions. These regulations supersede interim final regulations issued in 1989 to implement the earlier sanctions legislation that was amended by Public Law 105-266. They will promote quicker, more uniform decisionmaking for suspensions and debarments, and will enhance protection against unfit providers for both the FEHBP and the individuals who receive health insurance coverage through the Program.

DATES: Effective February 3, 2003.

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SUPPLEMENTARY INFORMATION:**Background**

This rule was issued as a notice of proposed rulemaking in the December 12, 2001, **Federal Register** (66 FR 64160). During the 60-day public comment period, OPM received written comments from two professional organizations representing health care providers, an industry association of health insurance plans, and an FEHBP carrier. Oral comments were received from an FEHBP carrier and from OPM employees. This regulatory preamble addresses all of the comments from each source, many of which were incorporated into the final rule.

After the public comment period closed, we rewrote the proposed rule to improve its clarity and to reduce what we, as well as some of the commenters, believed to be the unnecessary

wordiness associated with the “question and answer” format. This resulted in wording, formatting, and structural changes in virtually every section of the regulatory text. However, in no case has the meaning or effect of any regulatory material changed simply as a function of our rewriting. Because they do not reflect substantive modifications to the proposed rule, we have not identified each individual wording or format change. However, all such changes fall into one or more of the following categories:

(1) The proposed rule was written in a “question and answer” format in which the title of each section was phrased as a question and the body of the section constituted a response to that question. However, because the regulation is intended to apply to four different groups with divergent interests—the debarring official, the presiding official, health care providers, and health insurance carriers participating in FEHBP—in many passages the format created uncertainty as to the group or groups to which the regulatory material pertained. Therefore, we converted the regulation from “question and answer” to a third-person narrative format.

(2) In the proposed rule, the pronouns “we” or “us” were frequently used to denote the U.S. Office of Personnel Management, within the context of the “question and answer” regulatory format. We have since concluded that such references were not appropriate to denote a Federal agency, and may have created uncertainty among some readers about their meaning. As rewritten, the final rule refers to the agency solely as “OPM,” except in a very few instances where the context and antecedent unambiguously support use of the pronoun “it.”

(3) As part of the “question and answer” format, the proposed rule used the pronoun “you” to denote a health care provider(s). In narrative format of the final rule, we replaced those references with “health care provider” or “provider.”

(4) We have uniformly rendered references to the United States Code as (title number) U.S.C. (section number) and references to the Code of Federal Regulations as (title number) CFR (part number and/or letter designating subpart) (section number).

(5) In the definitions section (890.1003), we deleted subsection designations ((a), (b), *etc.*). The defined terms continue to be listed in alphabetic order.

(6) We replaced every passage that consisted of a direct restatement of a statutory provision with a citation to the

applicable statutory provision. In most cases, this eliminated an appreciable amount of text and substantially shortened the regulatory provision. Because such sections had been intended simply to restate a statutory passage, there was no change of regulatory effect. Further, this type of rewriting improved the precision of the regulatory content by making it clear that the regulation intends to apply the cited statutory language exactly as written.

(7) Several sections or passages in the proposed rule contained citations to other regulatory sections as an authority for taking regulatory action. In every case where the cited regulatory passage had a direct underlying statutory authority, we have replaced the regulatory citation with a citation to the applicable statutory provision as the authority for regulatory action.

(8) In addition to rewriting the proposed rule from “question and answer” to narrative format, we attempted to simplify and shorten both the language and structure of the regulation wherever possible. We made wording changes throughout the regulation to introduce nontechnical terminology, and we sought to insure that each paragraph addresses only a single concept. In this process, we noted that the proposed § 890.1009(b) contained two distinctly separate concepts (contesting the length of a proposed debarment and requesting a personal appearance before the debarring official). Therefore, we created a new § 890.1009(c) to address the personal appearance, leaving § 890.1009(b) to address only contests of proposed debarments. Similarly, we noted that §§ 890.1013(a) and 1016(a) and (b) contained both a list of decisional factors and a statement as to how the absence of a decisional factor would be treated. Therefore, we created new §§ 890.1013(b) and 1016(c) to address the impact of an absence of decisional factors, leaving §§ 890.1013(a) and 1016(a) and (b) to contain solely a list of factors. To accommodate pre-existing sections, we renumbered the former § 890.1013(b) as 1013(c).

**Purpose and Effect of Administrative
Sanctions**

Before analyzing the public comments that focused on specific sections of the proposed rule, we want to address several generalized concerns expressed by the professional organizations regarding the overall intent and possible effect of the FEHBP administrative sanctions program. Both of the organizations indicated that their

membership would consider administrative sanctions as “punitive” measures. They further commented that the statutory sanctions authority would “perpetuate a gotcha [sic] mentality” on OPM’s part toward health care providers, leading to severe penalties for essentially innocent matters such as inadvertent billing errors or similar mistakes resulting from lack of knowledge of FEHBP program requirements.

We understand that health care providers may inevitably view administrative sanctions with some level of concern. However, there is simply no factual basis for the belief that OPM will operate any aspect of the sanctions program in a manner that would be confrontational or hostile toward providers. OPM has conducted an administrative sanctions program under the authority of the Governmentwide Nonprocurement Debarment and Suspension Common Rule (“common rule”) since May 1993. During these 9 years, OPM has debarred over 21,000 health care providers, and has maintained a professional and impartial approach to sanctions operations.

While the statutory sanctions authority being implemented by these regulations is broader than the common rule, the actual approach to sanctions decisionmaking is more objective and offers greater procedural protections to the affected health care providers. The FEHBP administrative sanctions law contains 18 bases for debarment, each involving either a previously adjudicated violation, an association between a provider and a previously-sanctioned person or entity, or specific actionable conduct by a provider. Sanctions based on conduct that has not been previously adjudicated carry a statutory requirement that the provider knew or should have known the wrongfulness of his or her actions. In this context, we believe it is clear that OPM cannot impose sanctions for *bona fide* errors or mistakes.

The sanctions that may be imposed under these regulations do not constitute punishment as that term is recognized by the law. A line of Supreme Court cases has definitively established that administrative sanctions such as debarment and civil monetary penalties are not “punitive” for Eighth Amendment or double jeopardy purposes unless the legislature intended them to be criminal measures. The leading current case in this line, *Hudson v. United States*, 522 U.S. 93 (1997), notes that even sanctions that might, “in common parlance, be described as punishment,” are

appropriately characterized as administrative in nature if Congress enacted them to be civil, rather than criminal, remedies. There is no question that the FEHBP administrative sanctions law was intended to be a civil statute, and in fact the administrative sanctions it authorizes are no more severe—and in some contexts are less stringent—than the corresponding health care provider sanctions under Medicare law.

Further, OPM’s responsibility is to implement the statute consistent with the legislative intent and purpose. In this context, OPM’s principal operating challenge—as is the case for other Federal agencies using sanctions authorities—will be to focus its efforts so as to afford an optimal level of protection to FEHBP in the most efficient manner possible. Hostile, antagonistic, or confrontational activities aimed at providers would clearly be improper, incompatible with the statute and these regulations, and detrimental to the intended protective purposes of the sanctions themselves. We expect that our implementation of these regulations will demonstrate that administrative sanctions in fact support high standards of professional conduct and ethical business practices by holding those who commit violations accountable for their actions.

Suggestions Regarding Unrelated Legislation

One of the professional organizations suggested that we rewrite the proposed regulations to incorporate the principles of the Medicare Education and Regulatory Fairness Act of 2001 (MERPA), introduced in the 107th Congress as H.R. 868 and S. 452, and reissue the resultant product as a proposed regulation for further comment. As characterized by the professional organization, MERPA would require the Department of Health and Human Services (DHHS) to emphasize educating health care providers about program requirements and to simplify “complex legal and regulatory requirements” rather than imposing “punitive enforcement actions” against providers. MERPA’s preamble indicates that many physicians are leaving the Medicare program, due to the risks of “aggressive government investigation,” thus compromising the availability of health care for Medicare patients.

We believe the professional organization’s suggestion is inappropriate in the context of these regulations. Congress enacted the administrative sanctions provisions of Pub. L. 105–266 to meet the needs of the FEHBP for an effective and efficient

means of addressing integrity issues associated with certain types of provider-related violations. We note that MERPA’s stated objectives do not appear to be germane to FEHBP operations. For example, Medicare’s regulatory and billing practices do not apply to FEHBP, and FEHBP has not experienced declining provider participation. In this context, we do not believe that MERPA’s principal “instructional” feature—a system of binding advisory opinions on the allowability of specific claims—would be necessary or relevant to providers’ relationships with the FEHBP claims system.

The remainder of the comments we received dealt with specific regulatory provisions or issues. We address each of them in the following sections of this preamble.

Informing Providers of Sanctions Action

The health care provider professional organizations suggested that the proposed § 890.1006(c)(2) and (3), authorizing OPM to issue notices of proposed debarment via facsimile transmission (fax) or e-mail, were not in compliance with the terms of 5 U.S.C. 8902a. The same commenters also remarked that the provisions of the proposed § 890.1006(e), authorizing OPM to presume that providers have received a notice 5 days after it was sent, are “irresponsible” and deprive providers of their due process entitlement to adequate notice. The commenters recommended that § 890.1006(e) be changed to require OPM to obtain actual proof that a provider has received notice before taking debarment action.

The intent of the proposed § 890.1006(c)(2) and (3) was to make communication with persons affected by sanctions actions faster and more reliable, especially as heightened security measures have slowed the delivery of postal mail to many Federal agencies. Similar electronic notification provisions appear in the proposed revision to the common rule, which was issued as a notice of proposed rulemaking in the January 23, 2002, **Federal Register** (67 FR 3266). The common rule revision was developed by the Interagency Suspension and Debarment Committee at the request of the Office of Management and Budget. However, as reflected by the commenter’s concerns, questions remain as to the acceptability of electronic media for communicating official notices. After consultation with the Interagency Suspension and Debarment Committee, we concluded

that this issue would be more appropriately determined in the Governmentwide forum of the proposed common rule. Therefore, we modified the proposed § 890.1006(c) to delete any mention of electronic transmission of notice, and we have specifically reserved a new section § 890.1006(g) to address the “e-notices” if they are ultimately adopted in the final version of the revised common rule. In the interim, we intend to continue our practice of using electronic means to communicate material other than official debarment notices when providers furnish us a fax number or e-mail address.

In regard to the comments on the proposed § 890.1006(e), presumption of receipt of official notice is a well-established aspect of Federal regulatory practice. For example, the common rule has contained such a provision since it was first issued in 1988. In addition, the Department of Health and Human Services (DHHS) relies upon 5-day presumption of receipt provisions for its official notices of provider exclusions in the Medicare program (see 42 CFR 1001.2001). Further, the burden of operating an “actual notice” system, in terms of cost, staff time, and prolonged processing timeframes for debarments, is highly problematic. Given these factors, we believe that a notice system based on regular first class mail with a regulatory presumption of receipt represents a reasonable model for transmitting debarment notices to providers. We would also point out that § 890.1006(e) should be read in conjunction with § 890.1006(f), which requires OPM to make appropriate followup efforts to secure delivery of notice if it learns that a notice cannot be delivered as originally addressed. Taken together, these provisions offer a high level of assurance that providers will receive notices in a timely manner, while permitting OPM the flexibility to implement debarments promptly.

Effective Date of Debarment Orders

The health care provider professional associations expressed concern that the proposed § 890.1009 specified that debarments taken under mandatory debarment authorities would go into effect when issued by OPM, and remain in effect during the pendency of judicial appeals. They characterized this provision as “a severe penalty” for health care providers whose debarments may be reversed on appeal, and suggested that OPM defer the effective date of debarments until after all administrative and judicial appeals have been completed.

The commenters’ concerns touch upon two separate but related issues that we believe are essential to effective implementation of the statutory debarment authorities. The first of these involves OPM’s ability to effectuate debarments in a timely manner. As noted in the “Background” section of the Supplementary Information accompanying the proposed rule (66 FR 64160), Pub. L. 105–266 amended an earlier (1988) FEHBP sanctions statute that had proved to be “costly and unworkable,” primarily because of its requirement that OPM debarment orders not go into effect until all administrative and judicial appeal avenues to challenge those debarments had been exhausted. This deprived OPM’s sanctions decisions of meaningful finality and invited delay and expense through protracted litigation. Pub. L. 105–266 addressed the problem by providing OPM with regulatory authority to establish effective dates of debarments. In implementing this authority (§ 890.1009 for mandatory debarments and § 890.1026 for permissive debarments), OPM decided to make debarments effective immediately upon completion of the administrative appeals process, or, if a provider does not file an administrative appeal, immediately upon expiration of the 30-day notice period for a proposed debarment. OPM will keep debarments in effect while providers exercise their statutory right of appeal to U.S. district court. OPM would, of course, stay the implementation of a debarment during a judicial appeal if ordered to do so by the court.

The other issue raised by this comment is whether a basis for debarment that involves a conviction is affected by a provider’s appeal of the conviction. The FEHBP debarment statute addresses this in 5 U.S.C. 8902a(a)(1)(C), which specifies that a “conviction” exists “without regard to the pendency or outcome of any appeal (other than a judgment of acquittal based on innocence) or request for relief.” The purpose of this provision is to keep a mandatory debarment continuously in effect during subsequent litigation unless a final appellate ruling reverses or vacates the conviction and there is no longer a possibility of a retrial.

As part of our overall rewriting of the regulation, we replaced the definition of “conviction” in § 890.1003, which was a direct restatement of the statutory language of 5 U.S.C. 8902a(a)(1)(C), with a citation to the statutory provision. This means that a conviction, as a basis for a mandatory debarment, comes into effect immediately upon adjudication

and remains in effect during all subsequent litigation. To reflect the impact of 5 U.S.C. 8902a(a)(1)(C) on reinstatement of a provider, we have also added a citation to this provision in § 890.1052(a).

Inasmuch as the regulatory provisions criticized by the commenters directly implement the provisions of Public Law 105–266 that authorize OPM to effectuate debarments, notwithstanding the pendency of judicial appeals, we are not adopting the commenters’ recommendations.

Aggravating and Mitigating Factors

One of the professional associations observed that a serious inequity appears to exist between the respective lists of aggravating and mitigating factors in the proposed §§ 890.1008 and 1016. The commenter stated that the aggravating factors are “open-ended,” while the mitigating factors are strictly limited to the items listed. Further, the commenter noted that neither the aggravating nor mitigating factors recognize restitution a provider may have made for incorrect, improper, or wrongful receipt of Federal funds.

The proposed § 890.1008 identifies the aggravating and mitigating factors that the debarring official must consider in determining the proposed length of a mandatory debarment. The proposed § 890.1016 contains an essentially identical list for permissive debarments. We believe the aggravating and mitigating factors identified in the regulation are equitable and appropriately recognize matters relevant to the violation for which a sanction is being proposed. In our estimation, a reasonable reading of §§ 890.1008 and 1016 simply does not support the commenter’s interpretation that the aggravating factors are broad and ambiguous while the mitigating factors are narrowly drawn. The lists of factors in each regulatory provision represent the factors that the debarring official may consider as aggravating and mitigating, respectively, in determining the proposed length of a proposed debarment. Neither list contains a “catch-all” provision to authorize consideration of other factors on an *ad hoc* basis.

It should be noted, moreover, that the final length of a debarment is not based solely on these factors. After being notified of a proposed debarment and its proposed length, the provider has the opportunity to challenge them in an administrative proceeding under the provisions of §§ 890.1022–1029. Decisions regarding the length of debarments are discretionary with the debarring official in every case, and a

provider's ability to contest the proposed length of his or her debarment is not limited in any way by the aggravating and mitigating factors listed in §§ 890.1008 and 1016.

In regard to the treatment of restitution by these regulations, the professional organization posed a hypothetical example involving restitution of amounts received by a provider because of a "billing error." This example reflects an inaccurate premise. In fact, receipt of an incorrect payment of FEHBP funds due to a *bona fide* billing error is not a sanctionable violation, and these regulations would not apply in such a situation. However, if a provider receives payments of FEHBP funds because of false, fraudulent, deceptive, or otherwise wrongful claims that form the basis for a debarment, §§ 890.1008 and 1016 authorize the debarring official to consider the resultant financial loss to the Government as an aggravating factor. Because the actual amount of the improper payments reflects the seriousness of the provider's violation, the regulations do not provide for crediting any post-violation restitution in calculating the amount of the financial loss. However, it is appropriate to recognize restitution made as part of a provider's post-violation cooperation with law enforcement authorities under the mitigating factors in §§ 890.1008(b)(3) and 1016(b)(1). To the extent that the proposed regulation may not have clearly conveyed this meaning, we have reworded both §§ 890.1008 and 1016 to reflect unambiguously that restitution is an aspect of cooperation with law enforcement authorities that may be considered mitigating for purposes of computing a proposed period of debarment.

Length of Permissive Debarments

One of the professional organizations commented that the wording of the proposed 890.1015 was inconsistent with the underlying statutory provisions, to the extent that it could restrict the discretion of the debarring official in setting the length of debarments under permissive debarment authorities. In every case based on a permissive debarment authority, Public Law 105-266 allows the debarring official full discretion to debar or not debar, and, if he elects to debar, to set the period of the debarment without limitations as to length.

While we did not intend the proposed § 890.1015 to establish a mandatory minimum debarment period for permissive debarments, nor to limit the debarring official's discretion in any other way, we agree with the

commenter's observation that the proposed wording invited such an interpretation. Accordingly, we have revised § 890.1015 to clarify that the debarring official possesses full discretionary decisionmaking authority to establish the length of permissive debarments in every case.

Matters To Be Treated as Prior Adjudications

The proposed § 890.1025 sets forth the criteria which the debarring official will use to determine if OPM must conduct a fact-finding hearing to resolve a provider's administrative appeal of a debarment. Public Law 105-266 requires that every material fact on which a debarment is based be adjudicated in an appropriate administrative proceeding. However, OPM will not readjudicate facts determined in prior due process proceedings, such as criminal or civil actions or professional licensure actions, or facts to which the provider stipulated. Both professional associations objected to the wording of the proposed § 890.1025(a)(4), which would treat settlement agreements entered into by a provider to resolve civil or administrative actions as tantamount to adjudications, even if they contain no factual stipulations or admissions. Although the commenters did not so indicate, identical language also appeared in the proposed § 890.1037(a), regarding prior adjudications in the context of administrative appeals of suspensions. We agree with the commenters that these passages are inconsistent with the current state of the law. Therefore, we have modified the final text of both §§ 890.1025(a)(4) and 890.1037(a) to indicate that settlement agreements may be deemed to be waivers of adjudication only if they contain stipulations of facts establishing that a sanctionable violation occurred.

Informing FEHBP Enrollees about Provider Debarments

The proposed § 890.1045 required FEHBP carriers to notify their enrollees who have previously obtained items or services from a debarred provider of the provider's debarment, and specified certain items of information that must be included in the notification. An FEHBP carrier and the health insurance industry association both suggested that this section be modified to require debarred providers to notify the FEHBP enrollees with whom they deal of their debarment. This would relieve the carriers of the effort and cost associated with the notification responsibility.

OPM does not have statutory authority to directly regulate provider conduct in this manner. In fact, the proposed § 890.1045 was drawn directly from 5 U.S.C. 8902a(j), which requires OPM to issue regulations placing responsibility on the FEHBP carriers for informing enrollees of provider debarments. Therefore, we are not adopting this recommendation.

As an alternate suggestion, the health insurance industry association recommended that, if carriers must inform enrollees of provider debarments, the proposed § 890.1045 be modified to permit carriers to target their notifications in some manner. The literal wording of § 890.1045 would have required carriers to notify all enrollees who had ever received items or services from a debarred provider, but the commenter suggested that such a practice would involve excessive time and expense. Instead, the industry association suggested targeting notices to enrollees who have (1) incurred claims with providers that OPM deemed to present a risk to FEHBP members or (2) recently received services from debarred providers.

We believe this comment is well-founded. Our experience under the common rule has revealed that early enrollee notification is absolutely vital to carrying out the purpose of debarments. This is even more clearly the case under these regulations, because 5 U.S.C. 8902a(j) requires enrollee claims for items or services furnished by a debarred provider to be paid by FEHBP carriers if the enrollee was unaware of the provider's debarment. Since FEHBP enrollees generally need no prior approval or clearance to obtain covered services from a health care provider, they create an obligation on the part of their FEHBP carrier to pay claims simply by receiving such services. Well-targeted notice to potential patients regarding the debarment of a provider appears to be the most efficient means of reducing the incidence of enrollee contact with debarred providers.

Of the targeting criteria suggested by the industry association, we do not believe that we would consistently have sufficient information to reliably designate certain providers as "high risk." Further, such a practice could be perceived by providers as carrying a potentially stigmatizing effect beyond the reasonable needs of the sanctions process. In contrast, notifying enrollees who have recently obtained items and services from debarred providers appears to offer a reasonable approach to diminishing FEHBP payments to those providers, without the risk of

prejudicially labeling them.

Accordingly, we have accepted this aspect of the industry association's suggestion—including the one year recency criterion—and have reworded § 890.1045 to require FEHBP carriers to notify enrollees who have obtained items or services from a debarred provider within one year prior to the provider's debarment.

The insurance industry association further suggested that we create a website to provide FEHBP carriers and enrollees with up-to-date information on provider debarments, and that we reflect this action in the proposed § 890.1044. For nearly 2 years, OPM's Office of the Inspector General has used a secure Internet webpage to make debarment data available to FEHBP carriers. We update the page regularly, according to a schedule known to the carriers. Because of the extensive amount of Privacy Act-protected information about providers that we furnish to carriers, this webpage cannot be publicly accessible. However, the function of making debarment information from all agencies available to the public in an automated, searchable format is met by the General Services Administration's Governmentwide debarment list ("GSA List"), which is on the Internet at www.epls.com. There are links directly to the GSA List from OPM's website (www.opm.gov). In its present form, § 890.1044 accurately reflects OPM's responsibilities to make debarment-related information available both to carriers and to the GSA List. Therefore, while we will not be adopting this suggestion, information about OPM debarments is readily available online for both FEHBP carriers and the public.

Authority to Issue Suspensions

One of the professional associations commented that Public Law 105–266 did not appear to provide OPM the authority to suspend health care providers. Therefore, the commenter recommended that all of the proposed provisions regarding suspension (proposed §§ 890.1030–1041) be removed from the final rule.

While Public Law 105–266 does not contain the term "suspension," it does provide authority for OPM to issue the type of sanctions that are characterized as suspensions in the proposed 890.1030–1041. We designated these actions "suspensions" because that terminology is widely used among Federal agencies—including OPM under the common rule authority—to connote sanctions with certain effects. As used in these regulations, "suspension" connotes a short-term action with the

force of a debarment that is (1) effective immediately upon issuance of notice by OPM, (2) predicated on one or more of the bases for debarment identified in Public Law 105–266, and (3) necessitated by the existence of a sufficiently serious risk to warrant removing a provider from participating in FEHBP in the most expeditious manner possible. OPM's ability to regulate in this area is based on 5 U.S.C. 8902a(g)(1)(A), authorizing the agency to set reasonable conditions regarding notice to providers and effective dates of debarments, and 5 U.S.C. 8902a(g)(1)(B), authorizing OPM to establish effective dates in advance of process if warranted by the "health or safety of individuals receiving health care services."

In drafting the sections of these regulations implementing the provider suspension authority, we attempted to incorporate existing Governmentwide practices as extensively as possible. The two most frequently used suspension models are represented by the Federal Acquisition Regulation (FAR) and the common rule. However, the FAR approach, providing for automatic and immediate suspension upon issuance of every notice of proposed debarment, is clearly beyond the scope of the authority granted by 5 U.S.C. 8902a. In contrast, the common rule approach, selectively limiting suspension to situations where there is a tangible need to protect a program or program participants, closely tracks the provisions of the FEHBP sanctions statute that authorize suspension. Therefore, §§ 890.1030 through 1041 set forth procedures which generally mirror the corresponding common rule practices for suspensions. The administrative appeal provisions of §§ 890.1035–1041 offer greater procedural protections to affected providers than those contained in the common rule. Their purpose is to assure that all suspended providers have the right to contest the suspension promptly, as required by 5 U.S.C. 8902a(h)(1), including a personal appearance before the suspending official and a separate hearing on any facts material to the suspension that have not previously been adjudicated.

Based on the commenter's observations, we have also revised the wording of § 890.1031(c) to conform more closely to the terms of 5 U.S.C. 8902a(g)(1)(B), limiting suspensions to cases of risk to the health or safety of FEHBP enrollees. However, we will construe such risk to include not only physical harm resulting from a provider's maltreatment or abuse, but also the more generalized risks inherent in receiving health care from a provider

who has committed any sort of sanctionable violations that reflect on his or her trustworthiness.

Miscellaneous Provisions Addressed by Outside Commenters

The health care provider professional associations expressed concerns that several provisions of the proposed regulations broadened the reach of OPM's administrative sanctions authority in a manner that was unfair to health care providers. The commenters suggested that these provisions be deleted from the proposed regulations.

In fact, each of the proposed regulatory sections identified by the commenters is based directly on a provision of the FEHBP sanctions statute. Collectively, their placement in these regulations is necessary to assure full implementation of the statute. Therefore, we are retaining all of these sections in the final regulation. However, our overall rewriting of the regulatory text has substantially altered their wording and format. As they appeared in the proposed rule, each of the regulatory sections cited by the commenters comprised a restatement of a statutory provision. As rewritten in the final rule, each section simply provides a citation to the corresponding section of the statute. The regulatory provisions in question are as follows:

(1) Proposed § 890.1003(e)(4), defining "conviction" to include an individual's participation in first offender, pre-trial diversion, or other programs under which a formal adjudication of an offense is withheld. The commenters considered this definition to be "overly broad," so as to include any infraction, including an inadvertent billing error. As we have previously noted in this preamble, we intended the regulatory definition of "conviction" to correspond precisely to the statutory definition of that term set forth in 5 U.S.C. 8902a(a)(1)(C). As now rewritten, the definition of "conviction" appearing in § 890.1003 of the final rule simply cites to 5 U.S.C. 8902a(a)(1)(C). The exact wording identified as objectionable by the commenter is contained in 8902a(a)(1)(C)(iv). Further, as we have stated elsewhere in this preamble, we do not believe that a reasonable reading of the statutory definition of "conviction," or indeed any other provision of the FEHBP sanctions statute, would support the conclusion that a truly inadvertent provider error could be the basis of a sanctions action.

(2) Proposed § 890.1011(b)(1)(iii), authorizing permissive debarment of an entity based on an ownership or control interest by a provider who has been

assessed a civil monetary penalty under the FEHBP sanctions statute. One commenter expressed the belief that this provision “creates serious opportunities for abuse.” However, this proposed regulatory section directly restated the provisions of 5 U.S.C. 8902a(c)(2). The rewritten § 890.1011(b) simply cites the statutory provisions authorizing debarment based on ownership or control interests—5 U.S.C. 8902a(c)(2) and (3)—thus removing a substantial amount of unnecessary text without altering the intent or effect of the provision.

(3) Proposed § 890.1011(b)(2), authorizing permissive debarment of an individual provider who holds an ownership or control interest in an entity that has been debarred, convicted of a sanctionable offense, or assessed a civil monetary penalty under the FEHBP provider sanctions statute, if the individual knew or should have known of the entity’s violations. One commenter characterized this provision as “even more offensive” than the proposed § 890.1011(b)(1). In fact, this regulatory provision directly restates the provisions of 5 U.S.C. 8902a(c)(3). As noted in the preceding paragraph, we have revised the proposed § 890.1011(b) to consist simply of a reference to the statutory provisions authorizing debarment based on ownership and control interests, without restating the rather lengthy statutory text.

(4) Proposed § 890.1011(c), authorizing permissive debarment for certain enumerated claims-related violations. One commenter suggested that this provision would permit debarment based on “a single billing error.” In the proposed rule, § 890.1011(c) restated the statutory wording of the seven bases for permissive debarment established by 5 U.S.C. 8902a(c)(4) and (5) and (d)(1) and (2). As reworded in the final rule, § 890.1011(c) consists simply of a citation to those sections of the statute. Once again, we would note that a careful reading of these regulations and FEHBP sanctions law does not support the conclusion that a good faith error could be the basis for a sanctions action.

(5) Proposed § 890.1011(d), authorizing permissive debarment for a provider’s failure to furnish claims-related information requested by OPM or an FEHBP carrier. While the commenter did not indicate the precise nature of its objection to this provision, in fact the cited passage in the proposed rule directly restated 5 U.S.C. 8902a(d)(3). As it appears in the final rule, § 890.1011(d) consists only of a citation to that statutory provision.

Miscellaneous Revisions Identified by OPM Comments

As the result of comments from OPM sources, we have slightly modified the following sections of the regulatory package.

(1) The proposed §§ 890.1005 and 1012 address implementation of the 6-year statutory limitations period for mandatory and permissive debarments, respectively. In each section, we have replaced every instance of the phrase “issue * * * a notice of proposed debarment” with “send * * * a notice of proposed debarment.” The term “send” is used uniformly in proposed § 890.1006 to denote transmission of official notice, and its corresponding use in §§ 890.1005 and 1012 clarifies that the limitations period is tolled when OPM places a notice of proposed debarment into the transmission channels authorized by § 890.1006.

(2) The proposed § 890.1028(d) describes the manner in which OPM will create an official record of fact-finding hearings associated with permissive debarments. In preparing the regulatory text for the proposed rule, we inadvertently omitted from this section a phrase requiring OPM to furnish the provider with a free copy of an audio recording of the hearing. We have restored that intended wording in the final rule. Further, we have changed the final sentence of § 890.1028(d) to indicate that OPM will arrange for transcription of the recording if the provider requests it, but that the provider must pay the cost of the transcription.

(3) The proposed § 890.1052(a) addressed the procedures for reinstating providers whose debarments were based on convictions that have been reversed on appeal. An OPM reviewer noted that the proposed wording of this section did not account for the full statutory definition of “conviction” in 5 U.S.C. 8902a(a)(1)(C), which indicates that a provider is considered to have been convicted “without regard to the pendency or outcome of any appeal.” Upon a literal reading, this passage would seem to support the interpretation that a provider remains convicted—and thus debarred—even if an appeals court reverses or vacates the conviction on which the debarment is based. However, such an interpretation would clearly produce anomalous results.

The actual intent of the statutory wording is to permit a mandatory debarment to remain in effect until the appeals process, including possible retrials, has concluded. This avoids the possibility of sequential retractions and

reinstatements of debarments which could result from differing appeals court rulings as a case progresses through the appeals process. Therefore, as noted elsewhere in this preamble, we have expanded the wording of § 890.1052(a) to reflect that OPM will reinstate a provider on the basis of a reversed conviction only if a final appeals ruling has been issued and there is no further possibility of a retrial or if an appeals court enters a judgment of acquittal based on the provider’s innocence.

(4) We added a definition of “days” in § 890.1003 to support the distinction between the “calendar day” timeframes applied to most deadlines established by the regulation and the “business day” timeframe associated with presumed receipt of notices of proposed sanctions under § 890.1006(e)(2).

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities, because it affects only health care providers’ transactions with the Federal Employees Health Benefits Program.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon.

Office of Personnel Management.

Kay Coles James,
Director.

Accordingly, OPM is amending part 890 of title 5, Code of Federal Regulations as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

1. The authority citation for part 890 is revised to read as follows:

Authority: 5 U.S.C. 8913; § 890.803 also issued under 50 U.S.C. 403(p), 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; § 890.102 also issued under sections 11202(f), 11232(e), 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061, unless otherwise noted.

2. Subpart J of part 890 is revised to read as follows:

Subpart J—Administrative Sanctions Imposed Against Health Care Providers

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- 890.1052 Reinstatements without application.
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[Reserved]

Subpart J—Administrative Sanctions Imposed Against Health Care Providers

Authority: 5 U.S.C. 8902a.

General Provisions and Definitions

§ 890.1001 Scope and purpose.

(a) *Scope.* This subpart implements 5 U.S.C. 8902a, as amended by Public Law 105–266 (October 19, 1998). It establishes a system of administrative sanctions that OPM may, or in some

cases, must apply to health care providers who have committed certain violations. The sanctions include debarment, suspension, civil monetary penalties, and financial assessments.

(b) *Purpose.* OPM uses the authorities in this subpart to protect the health and safety of the persons who obtain their health insurance coverage through the FEHBP and to assure the financial and programmatic integrity of FEHBP transactions.

§ 890.1002 Use of terminology.

Unless otherwise indicated, within this subpart the words “health care provider,” “provider,” and “he” mean a health care provider(s) of either gender or as a business entity, in either the singular or plural. The acronym “OPM” and the pronoun “it” connote the U.S. Office of Personnel Management.

§ 890.1003 Definitions.

In this subpart:

Carrier means an entity responsible for operating a health benefits plan described by 5 U.S.C. 8903 or 8903a.

Community means a geographically-defined area in which a provider furnishes health care services or supplies and for which he may request a limited waiver of debarment in accordance with this subpart. *Defined service area* has the same meaning as community.

Contest means a health care provider's request for the debarring or suspending official to reconsider a proposed sanction or the length or amount of a proposed sanction.

Control interest means that a health care provider:

(1) Has a direct and/or indirect ownership interest of 5 percent or more in an entity;

(2) Owns a whole or part interest in a mortgage, deed of trust, note, or other obligation secured by the entity or the entity's property or assets, equating to a direct interest of 5 percent or more of the total property or assets of the entity;

(3) Serves as an officer or director of the entity, if the entity is organized as a corporation;

(4) Is a partner in the entity, if the entity is organized as a partnership;

(5) Serves as a managing employee of the entity, including but not limited to employment as a general manager, business manager, administrator, or other position exercising, either directly or through other employees, operational or managerial control over the activities of the entity or any portion of the entity;

(6) Exercises substantive control over an entity or a critical influence over the activities of the entity or some portion of thereof, whether or not employed by the entity; or

(7) Acts as an agent of the entity.
Conviction or convicted has the meaning set forth in 5 U.S.C. 8902a(a)(1)(C).

Covered individual means an employee, annuitant, family member, or former spouse covered by a health benefits plan described by 5 U.S.C. 8903 or 8903a or an individual eligible to be covered by such a plan under 5 U.S.C. 8905(d).

Days means calendar days, unless specifically indicated otherwise.

Debarment means a decision by OPM's debarring official to prohibit payment of FEHBP funds to a health care provider, based on 5 U.S.C. 8902a (b), (c), or (d) and this subpart.

Debarring official means an OPM employee authorized to issue debarments and financial sanctions under this subpart.

FEHBP means the Federal Employees Health Benefits Program.

Health care services or supplies means health care or services and supplies such as diagnosis and treatment; drugs and biologicals; supplies, appliances and equipment; and hospitals, clinics, or other institutional entities that furnish supplies and services.

Incarceration means imprisonment, or any type of confinement with or without supervised release, including but not limited to home detention, community confinement, house arrest, or similar arrangements.

Limited waiver means an approval by the debarring official of a health care provider's request to receive payments of FEHBP funds for items or services rendered in a defined geographical area, notwithstanding debarment, because the provider is the sole community provider or sole source of essential specialized services in a community.

Mandatory debarment means a debarment based on 5 U.S.C. 8902a(b).

Office or OPM means the United States Office of Personnel Management or the component thereof responsible for conducting the administrative sanctions program described by this subpart.

Permissive debarment means a debarment based on 5 U.S.C. 8902a(c) or (d).

Provider or provider of health care services or supplies means a physician, hospital, clinic, or other individual or entity that, directly or indirectly, furnishes health care services or supplies.

Reinstatement means a decision by OPM to terminate a health care provider's debarment and to restore his eligibility to receive payment of FEHBP funds.

Sanction or administrative sanction means any administrative action authorized by 5 U.S.C. 8902a or this subpart, including debarment, suspension, civil monetary penalties, and financial assessments.

Should know or should have known has the meaning set forth in 5 U.S.C. 8902a(a)(1)(D).

Sole community provider means a provider who is the only source of primary medical care within a defined service area.

Sole source of essential specialized services in a community means a health care provider who is the only source of specialized health care items or services in a defined service area and that items or services furnished by a non-specialist cannot be substituted without jeopardizing the health or safety of covered individuals.

Suspending official means an OPM employee authorized to issue suspensions under 5 U.S.C. 8902a and this subpart.

Mandatory Debarments

§ 890.1004 Bases for mandatory debarments.

(a) *Debarment required.* OPM shall debar a provider who is described by any category of offense set forth in 5 U.S.C. 8902a(b).

(b) *Direct involvement with an OPM program unnecessary.* The conduct underlying the basis for a provider's mandatory debarment need not have involved an FEHBP covered individual or transaction, or any other OPM program.

§ 890.1005 Time limits for OPM to initiate mandatory debarments.

OPM shall send a provider a written notice of a proposed mandatory debarment within 6 years of the event that forms the basis for the debarment. If the basis for the proposed debarment is a conviction, the notice shall be sent within 6 years of the date of the conviction. If the basis is another agency's suspension, debarment, or exclusion, the OPM notice shall be sent within 6 years of the effective date of the other agency's action.

§ 890.1006 Notice of proposed mandatory debarment.

(a) *Written notice.* OPM shall inform a provider of his proposed debarment by written notice sent not less than 30 days prior to the proposed effective date.

(b) *Contents of the notice.* The notice shall contain information indicating the:

- (1) Effective date of the debarment;
- (2) Minimum length of the debarment;
- (3) Basis for the debarment;
- (4) Provisions of law and regulation authorizing the debarment;

(5) Effect of the debarment;

(6) Provider's right to contest the debarment to the debarring official;

(7) Provider's right to request OPM to reduce the length of debarment, if it exceeds the minimum period required by law or this subpart; and

(8) Procedures the provider shall be required to follow to apply for reinstatement at the end of his period of debarment, and to seek a waiver of the debarment on the basis that he is the sole health care provider or the sole source of essential specialized services in a community.

(c) *Methods of sending notice.* OPM shall send the notice of proposed debarment and the final decision notice (if a contest is filed) to the provider's last known address by first class mail, or, at OPM's option, by express delivery service.

(d) *Delivery to attorney, agent, or representatives.* (1) If OPM proposes to debar an individual health care provider, it may send the notice of proposed debarment directly to the provider or to any other person designated by the provider to act as a representative in debarment proceedings.

(2) In the case of a health care provider that is an entity, OPM shall deem notice sent to any owner, partner, director, officer, registered agent for service of process, attorney, or managing employee as constituting notice to the entity.

(e) *Presumed timeframes for receipt of notice.* OPM computes timeframes associated with the delivery notices described in paragraph (c) of this section so that:

(1) When OPM sends notice by a method that provides a confirmation of receipt, OPM deems that the provider received the notice at the time indicated in the confirmation; and

(2) When OPM sends notice by a method that does not provide a confirmation of receipt, OPM deems that the provider received the notice 5 business days after it was sent.

(f) *Procedures if notice cannot be delivered.* (1) If OPM learns that a notice was undeliverable as addressed or routed, OPM shall make reasonable efforts to obtain a current and accurate address, and to resend the notice to that address, or it shall use alternative methods of sending the notice, in accordance with paragraph (c) of this section.

(2) If a notice cannot be delivered after reasonable followup efforts as described in paragraph (f)(1) of this section, OPM shall presume that the provider received notice 5 days after the latest date on which a notice was sent.

(g) *Use of electronic means to transmit notice.* [Reserved]

§ 890.1007 Minimum length of mandatory debarments.

(a) *Debarment based on a conviction.* The statutory minimum period of debarment for a mandatory debarment based on a conviction is 3 years.

(b) *Debarment based on another agency's action.* A debarment based on another Federal agency's debarment, suspension, or exclusion remains in effect until the originating agency terminates its sanction.

§ 890.1008 Mandatory debarment for longer than the minimum length.

(a) *Aggravating factors.* OPM may debar a provider for longer than the 3-year minimum period for mandatory debarments if aggravating factors are associated with the basis for the debarment. The factors OPM considers to be aggravating are:

(1) Whether the FEHBP incurred a financial loss as the result of the acts underlying the conviction, or similar acts that were not adjudicated, and the level of such loss. In determining the amount of financial loss, OPM shall not consider any amounts of restitution that a provider may have paid;

(2) Whether the sentence imposed by the court included incarceration;

(3) Whether the underlying offense(s), or similar acts not adjudicated, occurred repeatedly over a period of time, and whether there is evidence that the offense(s) was planned in advance;

(4) Whether the provider has a prior record of criminal, civil, or administrative adjudication of related offenses or similar acts; or

(5) Whether the actions underlying the conviction, or similar acts that were not adjudicated, adversely affected the physical, mental, or financial well-being of one or more covered individuals or other persons.

(b) *Mitigating factors.* If the aggravating factors justify a debarment longer than the 3 year minimum period for mandatory debarments, OPM shall also consider whether mitigating factors may justify reducing the debarment period to not less than 3 years. The factors that OPM considers to be mitigating are:

(1) Whether the conviction(s) on which the debarment is based consist entirely or primarily of misdemeanor offenses;

(2) Whether court records, including associated sentencing reports, contain an official determination that the provider had a physical, mental, or emotional condition before or during the commission of the offenses

underlying the conviction that reduced his level of culpability; or

(3) Whether the provider's cooperation with Federal and/or State investigative officials resulted in criminal convictions, civil recoveries, or administrative actions against other individuals, or served as the basis for identifying program weaknesses. Restitution made by the provider for funds wrongfully, improperly, or illegally received from Federal or State programs may also be considered as a mitigating circumstance.

(c) *Maximum period of debarment.* There is no limit on the maximum period of a mandatory debarment based on a conviction.

§ 890.1009 Contesting proposed mandatory debarments.

(a) *Contesting the debarment.* Within 30 days after receiving OPM's notice of proposed mandatory debarment, a provider may submit information, documents, and written arguments in opposition to the proposed debarment. OPM's notice shall contain specific information about where and how to submit this material. If a timely contest is not filed, the proposed debarment shall become effective as stated in the notice, without further action by OPM.

(b) *Requesting a reduction of the debarment period.* If OPM proposes a mandatory debarment for a period longer than the 3-year minimum required by 5 U.S.C. 8902a(g)(3), the provider may request a reduction of the debarment period to not less than 3 years, without contesting the debarment itself.

(c) *Personal appearance before the debarring official.* In addition to providing written material, the provider may appear before the debarring official personally or through a representative to present oral arguments in support of his contest. OPM's notice shall contain specific information about arranging an in-person presentation.

§ 890.1010 Debarring official's decision of contest.

(a) *Prior adjudication is dispositive.* Evidence indicating that a provider was formally adjudicated for a violation of any type set forth in 5 U.S.C. 8902a(b) fully satisfies the standard of proof for a mandatory debarment.

(b) *Debarring official's decision.* The debarring official shall issue a written decision, based on the entire administrative record, within 30 days after the record closes to receipt of information. The debarring official may extend this decision period for good cause.

(c) *No further administrative proceedings.* The debarring official's

decisions regarding mandatory debarment and the period of debarment are final and are not subject to further administrative review.

Permissive Debarments

§ 890.1011 Bases for permissive debarments.

(a) *Licensure actions.* OPM may debar a health care provider to whom the provisions of 5 U.S.C. 8902a(c)(1) apply. OPM may take this action even if the provider retains current and valid professional licensure in another State(s).

(b) *Ownership or control interests.* OPM may debar a health care provider based on ownership or control of or by a debarred provider, as set forth in 5 U.S.C. 8902a(c)(2) and (3).

(c) *False, deceptive, or wrongful claims practices.* OPM may debar a provider who commits claims-related violations as set forth in 5 U.S.C. 8902a(c)(4) and (5) and 5 U.S.C. 8902a(d)(1) and (2).

(d) *Failure to furnish required information.* OPM may debar a provider who knowingly fails to provide information requested by an FEHBP carrier or OPM, as set forth in 5 U.S.C. 8902a(d)(3).

§ 890.1012 Time limits for OPM to initiate permissive debarments.

(a) *Licensure cases.* If the basis for the proposed debarment is a licensure action, OPM shall send the provider a notice of proposed debarment within 6 years of the effective date of the State licensing authority's revocation, suspension, restriction, or nonrenewal action, or the date on which the provider surrendered his license to the State authority.

(b) *Ownership or control.* If the basis for the proposed debarment is ownership or control of an entity by a sanctioned person, or ownership or control of a sanctioned entity by a person who knew or should have known of the basis for the entity's sanction, OPM shall send a notice of proposed debarment within 6 years of the effective date of the sanction on which the proposed debarment is based.

(c) *False, deceptive, or wrongful claims practices.* If the basis for the proposed debarment involves a claim filed with a FEHBP carrier, OPM shall send the provider a notice of proposed debarment within 6 years of the date he presented the claim for payment to the covered person's FEHBP carrier.

(d) *Failure to furnish requested information.* If the basis for the proposed debarment involves a provider's failure to furnish information requested by OPM or an FEHBP carrier,

OPM shall send the notice of proposed debarment within 6 years of the date on which the carrier or OPM requested the provider to furnish the information in question.

§ 890.1013 Deciding whether to propose a permissive debarment.

(a) *Review factors.* The factors OPM shall consider in deciding whether to propose a provider's debarment under a permissive debarment authority are:

(1) The nature of any claims involved in the basis for the proposed debarment and the circumstances under which they were presented to FEHBP carriers;

(2) The improper conduct involved in the basis for the proposed debarment, and the provider's degree of culpability and history of prior offenses;

(3) The extent to which the provider poses or may pose a risk to the health and safety of FEHBP-covered individuals or to the integrity of FEHBP transactions; and

(4) Other factors specifically relevant to the provider's debarment that shall be considered in the interests of fairness.

(b) *Absence of a factor.* The absence of a factor shall be considered neutral, and shall have no effect on OPM's decision.

(c) *Specialized review in certain cases.* In determining whether to propose debarment under 5 U.S.C. 8902a(c)(4) for providing items or services substantially in excess of the needs of a covered individual or for providing items or services that fail to meet professionally-recognized quality standards, OPM shall obtain the input of trained reviewers, based on written medical protocols developed by physicians. If OPM cannot reach a decision on this basis, it shall consult with a physician in an appropriate specialty area.

§ 890.1014 Notice of proposed permissive debarment.

Notice of a proposed permissive debarment shall contain the information set forth in § 890.1006.

§ 890.1015 Minimum and maximum length of permissive debarments.

(a) *No mandatory minimum or upper limit on length of permissive debarment.* There is neither a mandatory minimum debarment period nor a limitation on the maximum length of a debarment under any permissive debarment authority.

(b) *Debarring official's process in setting period of permissive debarment.* The debarring official shall set the period of each debarment issued under a permissive debarment authority after considering the factors set forth in § 890.1016 and the factors set forth in

the applicable section from among §§ 890.1017 through 890.1021.

§ 890.1016 Aggravating and mitigating factors used to determine the length of permissive debarments.

(a) *Aggravating factors.* The presence of aggravating circumstances may support an OPM determination to increase the length of a debarment beyond the nominal periods set forth in §§ 890.1017 through 890.1021. The factors that OPM considers as aggravating are:

(1) Whether the provider's actions underlying the basis for the debarment, or similar acts, had an adverse impact on the physical or mental health or well-being of one or more FEHBP-covered individuals or other persons.

(2) Whether the provider has a documented history of prior criminal wrongdoing; civil violations related to health care items or services; improper conduct; or administrative violations addressed by a Federal or State agency. OPM may consider matters involving violence, patient abuse, drug abuse, or controlled substances convictions or violations to be particularly serious.

(3) Whether the provider's actions underlying the basis for the debarment, or similar acts, resulted in financial loss to the FEHBP, FEHBP-covered individuals, or other persons. In determining whether, or to what extent, a financial loss occurred, OPM shall not consider any amounts of restitution that the provider may have paid.

(4) Whether the provider's false, wrongful, or improper claims to FEHBP carriers were numerous, submitted over a prolonged period of time, or part of an on-going pattern of wrongful acts.

(5) Whether the provider was specifically aware of or directly responsible for the acts constituting the basis for the debarment.

(6) Whether the provider attempted to obstruct, hinder, or impede official inquiries into the wrongful conduct underlying the debarment.

(b) *Mitigating factors.* The presence of mitigating circumstances may support an OPM determination to shorten the length of a debarment below the nominal periods set forth in §§ 890.1017 through 890.1021, respectively. The factors that OPM considers as mitigating are:

(1) Whether the provider's cooperation with Federal, State, or local authorities resulted in criminal convictions, civil recoveries, or administrative actions against other violators, or served as the basis for official determinations of program weaknesses or vulnerabilities. Restitution that the provider made for

funds wrongfully, improperly, or illegally received from Federal or State programs may also be considered as a mitigating factor.

(2) Whether official records of judicial proceedings or the proceedings of State licensing authorities contain a formal determination that the provider had a physical, mental, or emotional condition that reduced his level of culpability before or during the period in which he committed the violations in question.

(c) *Absence of factors.* The absence of aggravating or mitigating factors shall have no effect to either increase or lower the nominal period of debarment.

§ 890.1017 Determining length of debarment based on revocation or suspension of a provider's professional licensure.

(a) *Indefinite term of debarment.* Subject to the exceptions set forth in paragraph (b) of this section, debarment under 5 U.S.C. 8902a(c)(1) shall be for an indefinite period coinciding with the period during which the provider's license is revoked, suspended, restricted, surrendered, or otherwise not in effect in the State whose action formed the basis for OPM's debarment.

(b) *Aggravating circumstances.* If any of the aggravating circumstances set forth in § 890.1016 apply, OPM may debar the provider for an additional period beyond the duration of the licensure revocation or suspension.

§ 890.1018 Determining length of debarment for an entity owned or controlled by a sanctioned provider.

OPM shall determine the length of debarments of entities under 5 U.S.C. 8902a(c)(2) based on the type of violation committed by the person with an ownership or control interest. The types of violations actionable under this provision are:

(a) *Owner/controller's debarment.* The debarment of an entity based on debarment of an individual with an ownership or control interest shall be for a period concurrent with the individual's debarment. If any aggravating or mitigating circumstances set forth in § 890.1016 apply solely to the entity and were not considered in setting the period of the individual's debarment, OPM may debar the entity for a period longer or shorter than the individual's debarment.

(b) *Owner/controller's conviction.* The debarment of an entity based on the criminal conviction of a person with an ownership or control interest for an offense listed in 5 U.S.C. 8902a(b)(1)–(4) shall be for a period of not less than 3 years, subject to adjustment for any aggravating or mitigating circumstances

set forth in § 890.1016 applying solely to the entity.

(c) *Owner/controller's civil monetary penalty.* The debarment of an entity based on a civil monetary penalty imposed on a person with an ownership or control interest, shall be for a period of not less than 3 years, subject to adjustment for any aggravating or mitigating circumstances set forth in § 890.1016 applying solely to the entity.

§ 890.1019 Determining length of debarment based on ownership or control of a sanctioned entity.

OPM shall determine the length of debarments of individual providers under 5 U.S.C. 8902a(c)(3) based on the type of violation committed by the sanctioned entity owned or controlled by the person with an ownership or control interest. The types of violations actionable under this provision are:

(a) *Entity's debarment.* If a provider's debarment is based on his ownership or control of a debarred entity, the debarment shall be concurrent with the entity's debarment. If any of the aggravating or mitigating circumstances identified in § 890.1016 applies directly to the provider that owns or controls the debarred entity and was not considered in setting the period of the entity's debarment, OPM may debar the provider for a period longer or shorter, respectively, than the entity's debarment.

(b) *Entity's conviction.* If a provider's debarment is based on the criminal conviction of an entity he owns or controls for an offense listed in 5 U.S.C. 8902a(b)(1)–(4), OPM shall debar the provider for a period of no less than 3 years, subject to adjustment for any aggravating or mitigating circumstances identified in § 890.1016 that apply to the provider as an individual.

(c) *Entity's civil monetary penalty.* If a provider's debarment is based on a civil monetary penalty imposed on an entity he owns or controls, OPM shall debar him for 3 years, subject to adjustment on the basis of the aggravating and mitigating circumstances listed in § 890.1016 that apply to the provider as an individual.

§ 890.1020 Determining length of debarment based on false, wrongful, or deceptive claims.

Debarments under 5 U.S.C. 8902a(c)(4) and (5) and 5 U.S.C. 8902a(d)(1) and (2) shall be for a period of 3 years, subject to adjustment based on the aggravating and mitigating factors listed in § 890.1016.

§ 890.1021 Determining length of debarment based on failure to furnish information needed to resolve claims.

Debarments under 5 U.S.C. 8902a(d)(3) shall be for a period of 3 years, subject to adjustment based on the aggravating and mitigating factors listed in § 890.1016.

§ 890.1022 Contesting proposed permissive debarments.

(a) *Right to contest a proposed debarment.* A provider proposed for debarment under a permissive debarment authority may challenge the debarment by filing a written contest with the debarring official during the 30-day notice period indicated in the notice of proposed debarment. In the absence of a timely contest, the debarment shall become effective as stated in the notice, without further action by OPM.

(b) *Challenging the length of a proposed debarment.* A provider may contest the length of the proposed debarment, while not challenging the debarment itself, or may contest both the length of a debarment and the debarment itself in the same contest.

§ 890.1023 Information considered in deciding a contest.

(a) *Documents and oral and written arguments.* A provider may submit documents and written arguments in opposition to the proposed debarment and/or the length of the proposed debarment, and may appear personally or through a representative before the debarring official to provide other relevant information.

(b) *Specific factual basis for contesting the proposed debarment.* A provider's oral and written arguments shall identify the specific facts that contradict the basis for the proposed debarment as stated in the notice of proposed debarment. A general or unsupported denial of the basis for debarment does not raise a genuine dispute over facts material to the debarment, and the debarring official shall not give such a denial any probative weight.

(c) *Mandatory disclosures.* Regardless of the basis for the contest, providers are required to disclose certain types of background information, in addition to any other information submitted during the contest. Failure to provide such information completely and accurately may be a basis for OPM to initiate further legal or administrative action against the provider. The specific items of information that shall be furnished to OPM are:

(1) Any existing, proposed, or prior exclusion, debarment, penalty, or other

sanction imposed on the provider by a Federal, State, or local government agency, including any administrative agreement that purports to affect only a single agency;

(2) Any criminal or civil legal proceeding not referenced in the notice of proposed debarment that arose from facts relevant to the basis for debarment stated in the notice; and

(3) Any entity in which the provider has a control interest, as that term is defined in § 890.1003.

§ 890.1024 Standard and burden of proof for deciding contests.

OPM shall demonstrate, by a preponderance of the evidence in the administrative record as a whole, that a provider has committed a sanctionable violation.

§ 890.1025 Cases where additional fact-finding is not required.

In each contest, the debarring official shall determine whether a further fact-finding proceeding is required in addition to presentation of arguments, documents, and information. An additional fact-finding proceeding is not required when:

(a) *Prior adjudication.* The proposed debarment is based on facts determined in a prior due process adjudication. Examples of prior due process proceedings include, but are not limited to, the adjudication procedures associated with:

(1) Licensure revocation, suspension, restriction, or nonrenewal by a State licensing authority;

(2) Debarment, exclusion, suspension, civil monetary penalties, or similar legal or administrative adjudications by Federal, State, or local agencies;

(3) A criminal conviction or civil judgment; or

(4) An action by a provider that constitutes a waiver of his right to a due process adjudication, such as surrender of professional license during the pendency of a disciplinary hearing, entering a guilty plea or confession of judgment in a judicial proceeding, or signing a settlement agreement stipulating facts that constitute a sanctionable violation.

(b) *Material facts not in dispute.* The provider's contest does not identify a bona fide dispute concerning facts material to the basis for the proposed debarment.

§ 890.1026 Procedures if a fact-finding proceeding is not required.

(a) *Debarring official's procedures.* If a fact-finding proceeding is not required, the debarring official shall issue a final decision of a provider's contest within 30 days after the record

closes for submitting evidence, arguments, and information as part of the contest. The debarring official may extend this timeframe for good cause.

(b) *No further administrative review available.* There are no further OPM administrative proceedings after the presiding official's final decision. A provider adversely affected by the decision may appeal under 5 U.S.C. 8902a(h)(2) to the appropriate U.S. district court.

§ 890.1027 Cases where an additional fact-finding proceeding is required.

(a) *Criteria for holding fact-finding proceeding.* The debarring official shall request another OPM official ("presiding official") to hold an additional fact-finding proceeding if:

(1) Facts material to the proposed debarment have not been adjudicated in a prior due process proceeding; and

(2) These facts are genuinely in dispute, based on the entire administrative record available to the debarring official.

(b) *Qualification to serve as presiding official.* The presiding official is designated by the OPM Director or another OPM official authorized by the Director to make such designations. The presiding official shall be a senior official who is qualified to conduct informal adjudicative proceedings and who has had no previous contact with the proposed debarment or the contest.

(c) *Effect on contest.* The debarring official shall defer a final decision on the contest pending the results of the fact-finding proceeding.

§ 890.1028 Conducting a fact-finding proceeding.

(a) *Informal proceeding.* The presiding official may conduct the fact-finding proceedings as informally as practicable, consistent with principles of fundamental fairness. Formal rules of evidence or procedure do not apply to these proceedings.

(b) *Proceeding limited to disputed material facts.* The presiding official shall consider only the genuinely disputed facts identified by the debarring official as material to the basis for the debarment. Matters that have been previously adjudicated or that are not in bona fide dispute within the administrative record shall not be considered by presiding official.

(c) *Provider's right to present information, evidence, and arguments.* A provider may appear before the presiding official with counsel, submit oral and written arguments and documentary evidence, present witnesses on his own behalf, question any witnesses testifying in support of

the debarment, and challenge the accuracy of any other evidence that the agency offers as a basis for the debarment.

(d) *Record of proceedings.* The presiding official shall make an audio recording of the proceedings and shall provide a copy to the provider at no charge. If the provider wishes to have a transcribed record, OPM shall arrange for production of one which may be purchased at cost.

(e) *Presiding official's findings.* The presiding official shall resolve all of the disputed facts identified by the debarring official, on the basis of a preponderance of the evidence contained within the entire administrative record. The presiding official shall issue a written report of all findings of fact to the debarring official within 30 days after the record of the fact-finding proceeding closes.

§ 890.1029 Deciding a contest after a fact-finding proceeding.

(a) *Findings shall be accepted.* The debarring official shall accept the presiding official's findings of fact, unless they are arbitrary, capricious, or clearly erroneous. If the debarring official concludes that the factual findings are not acceptable, they may be remanded to the presiding official for additional proceedings in accordance with § 890.1028.

(b) *Timeframe for final decision.* The debarring official shall issue a final written decision on a contest within 30 days after receiving the presiding official's findings. The debarring official may extend this decision period for good cause.

(c) *Debarring official's final decision.* (1) The debarring official shall observe the evidentiary standards and burdens of proof stated in § 890.1024 in reaching a final decision.

(2) In any case where a final decision is made to debar a provider, the debarring official has the discretion to set the period of debarment, subject to the factors identified in §§ 890.1016 through 1021.

(3) The debarring official has the discretion to decide not to impose debarment in any case involving a permissive debarment authority.

(d) *No further administrative proceedings.* No further administrative proceedings shall be conducted after the debarring official's final decision in a contest involving an additional fact-finding hearing. A provider adversely affected by the debarring official's final decision in a contested case may appeal under 5 U.S.C. 8902a(h)(2) to the appropriate U. S. district court.

Suspension

§ 890.1030 Effect of a suspension.

(a) *Temporary action pending formal proceedings.* Suspension is a temporary action pending completion of an investigation or ensuing criminal, civil, or administrative proceedings.

(b) *Immediate effect.* Suspension is effective immediately upon the suspending official's decision, without prior notice to the provider.

(c) *Effect equivalent to debarment.*

The effect of a suspension is the same as the effect of a debarment. A suspended provider may not receive payment from FEHBP funds for items or services furnished to FEHBP-covered persons while suspended.

§ 890.1031 Grounds for suspension.

(a) *Basis for suspension.* OPM may suspend a provider if:

(1) OPM obtains reliable evidence indicating that one of the grounds for suspension listed in paragraph (b) of this section applies to the provider; and

(2) The suspending official determines under paragraph (c) of this section that immediate action to suspend the provider is necessary to protect the health and safety of persons covered by FEHBP.

(b) *Grounds for suspension.* Evidence constituting grounds for a suspension may include, but is not limited to:

(1) Indictment or conviction of a provider for a criminal offense that is a basis for mandatory debarment under this subpart;

(2) Indictment or conviction of a provider for a criminal offense that reflects a risk to the health, safety, or well-being of FEHBP-covered individuals;

(3) Other credible evidence indicating, in the judgment of the suspending official, that a provider has committed a violation that would warrant debarment under this subpart. This may include, but is not limited to:

(i) Civil judgments;

(ii) Notice that a Federal, State, or local government agency has debarred, suspended, or excluded a provider from participating in a program or revoked or declined to renew a professional license; or

(iii) Other official findings by Federal, State, or local bodies that determine factual or legal matters.

(c) *Determining need for immediate action.* Suspension is intended to protect the public interest, including the health and safety of covered individuals or the integrity of FEHBP funds. The suspending official has wide discretion to decide whether to suspend a provider. A specific finding of

immediacy or necessity is not required to issue a suspension. The suspending official may draw reasonable inferences from the nature of the alleged misconduct and from a provider's actual or potential transactions with the FEHBP.

§ 890.1032 Length of suspension.

(a) *Initial period.* The initial term of all suspensions shall be an indefinite period not to exceed 12 months.

(b) *Formal legal proceedings not initiated.* If formal legal or administrative proceedings have not begun against a provider within 12 months after the effective date of his suspension, the suspending official may:

- (1) Terminate the suspension; or
- (2) If requested by the Department of Justice, the cognizant United States Attorney's Office, or other responsible Federal, State, or local prosecuting official, extend the suspension for an additional period, not to exceed 6 months.

(c) *Formal proceedings initiated.* If formal criminal, civil, or administrative proceedings are initiated against a suspended provider, the suspension may continue indefinitely, pending the outcome of those proceedings.

(d) *Terminating the suspension.* The suspending official may terminate a suspension at any time, and shall terminate it after 18 months, unless formal proceedings have begun within that period.

§ 890.1033 Notice of suspension.

(a) *Written notice.* OPM shall send written notice of suspension according to the procedures and methods described in § 890.1006(c)–(f).

(b) *Contents of notice.* The suspension notice shall contain information indicating that:

- (1) The provider has been suspended, effective on the date of the notice;
- (2) The initial period of the suspension;
- (3) The basis for the suspension;
- (4) The provisions of law and regulation authorizing the suspension;
- (5) The effect of the suspension; and
- (6) The provider's rights to contest the suspension.

§ 890.1034 Counting a period of suspension as part of a subsequent debarment.

The debarring official may consider the provider's contiguous period of suspension when determining the length of a debarment.

§ 890.1035 Provider contests of suspensions.

(a) *Filing a contest of the suspension.* A provider may challenge a suspension

by filing a contest, in writing, with the suspending official not later than 30 days after receiving notice of suspension. The suspension shall remain in effect during the contest, unless rescinded by the suspending official.

(b) *Informal proceeding.* The suspending official shall use informal, flexible procedures to conduct the contest. Formal rules of evidence and procedure do not apply to this proceeding.

§ 890.1036 Information considered in deciding a contest.

(a) *Presenting information and arguments to the suspending official.* A provider may submit documents and written arguments in opposition to the suspension, and may appear personally, or through a representative, before the suspending official to provide any other relevant information.

(b) *Specific factual basis for contesting the suspension.* The provider shall identify specific facts that contradict the basis for the suspension as stated in the suspension notice. A general denial of the basis for suspension does not raise a genuine dispute over facts material to the suspension, and the suspending official shall not give such a denial any probative weight.

(c) *Mandatory disclosures.* Any provider contesting a suspension shall disclose the items of information set forth in § 890.1023(c). Failure to provide such information completely and accurately may be a basis for OPM to initiate further legal or administrative action against the provider.

§ 890.1037 Cases where additional fact-finding is not required.

The suspending official may decide a contest without an additional fact-finding process if:

- (a) *Previously adjudicated facts.* The suspension is based on an indictment or on facts determined by a prior adjudication in which the provider was afforded due process rights. Examples of due process proceedings include, but are not limited to, the adjudication procedures associated with licensure revocation, suspension, restriction, or nonrenewal by a State licensing authority; similar administrative adjudications by Federal, State, or local agencies; a criminal conviction or civil judgment; or an action by the provider that constitutes a waiver of his right to a due process adjudication, such as surrender of professional licensure during the pendency of a disciplinary hearing, entering a guilty plea or confession of judgment in a judicial

proceeding, or signing a settlement agreement stipulating facts that constitute a sanctionable violation. Neither the existence of the prior adjudication nor any of the underlying circumstances are considered to be subject to genuine factual dispute as part of the suspension proceeding.

(b) *Advisory by law enforcement officials.* OPM is advised by the Department of Justice, the appropriate U.S. Attorney's Office, a State attorney general's office, or a State or local prosecutor's office that proceedings before a presiding official would prejudice the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension.

(c) *No bona fide dispute of material facts.* The information, arguments, and documents submitted to the suspending official do not establish that there is a bona fide factual dispute regarding facts material to the suspension.

§ 890.1038 Deciding a contest without additional fact-finding.

(a) *Written decision.* The suspending official shall issue a written decision on the contest within 30 days after the record closes for submitting evidence, arguments, and information. The suspending official may extend this timeframe for good cause.

(b) *No further administrative review available.* The suspending official's decision is final and is not subject to further administrative review.

§ 890.1039 Cases where additional fact-finding is required.

(a) *Criteria for holding fact-finding proceeding.* The debarring official shall request another OPM official ("presiding official") to hold an additional fact-finding proceeding if:

- (1) Facts material to the suspension have not been adjudicated in a prior due process proceeding; and
- (2) These facts are genuinely in dispute, based on the entire administrative record available to the debarring official.

(b) *Qualification to serve as presiding official.* The presiding official is designated by the OPM Director or another OPM official authorized by the Director to make such designations. The presiding official shall be a senior official who is qualified to conduct informal adjudicative proceedings and who has had no previous contact with the suspension or the contest.

(c) *Effect on contest.* The suspending official shall defer a final decision on the contest pending the results of the fact-finding proceeding.

§ 890.1040 Conducting a fact-finding proceeding.

(a) *Informal proceeding.* The presiding official may conduct the fact-finding proceedings as informally as practicable, consistent with principles of fundamental fairness. Specific rules of evidence or procedure do not apply to these proceedings.

(b) *Proceeding limited to disputed material facts.* The presiding official shall consider only the genuinely disputed facts identified by the suspending official as relevant to the basis for the suspension. Matters that have been previously adjudicated or which are not in bona fide dispute within the record shall not be considered by the presiding official.

(c) *Right to present information, evidence, and arguments.* A provider may appear before the presiding official with counsel, submit oral and written arguments and documentary evidence, present witnesses, question any witnesses testifying in support of the suspension, and challenge the accuracy of any other evidence that the agency offers as a basis for the suspension.

(d) *Record of proceedings.* The presiding official shall make an audio recording of the proceedings and shall provide a copy to the provider at no charge. If the provider wishes to have a transcribed record, OPM shall arrange for production of one which may be purchased at cost.

(e) *Presiding official's findings.* The presiding official shall resolve all of the disputed facts identified by the suspending official, on the basis of a preponderance of the evidence in the entire administrative record. Within 30 days after the record of the proceeding closes, the presiding official shall issue a written report of all findings of fact to the suspending official.

§ 890.1041 Deciding a contest after a fact-finding proceeding.

(a) *Presiding official's findings shall be accepted.* The suspending official shall accept the presiding official's findings, unless they are arbitrary, capricious, or clearly erroneous.

(b) *Suspending official's decision.* Within 30 days after receiving the presiding official's report, the suspending official shall issue a final written decision that either sustains, modifies, or terminates the suspension. The suspending official may extend this period for good cause.

(c) *Effect on subsequent debarment or suspension proceedings.* A decision by the suspending official to modify or terminate a suspension shall not prevent OPM from subsequently debarring the same provider, or any other Federal

agency from either suspending or debarring the provider, based on the same facts.

Effect of Debarment**§ 890.1042 Effective dates of debarments.**

(a) *Minimum notice period.* A debarment shall take effect not sooner than 30 days after the date of OPM's notice of proposed debarment, unless the debarring official specifically determines that the health or safety of covered individuals or the integrity of the FEHBP warrants an earlier effective date. In such a situation, the notice shall specifically inform the provider that the debarring official decided to shorten or eliminate the 30-day notice period.

(b) *Uncontested debarments.* If a provider does not file a contest within the 30-day notice period, the proposed debarment shall take effect on the date stated in the notice of proposed debarment, without further procedures, actions, or notice by OPM.

(c) *Contested debarments and requests for reducing the period of debarment.* If a provider files a contest within the 30-day notice period, the proposed debarment shall not go into effect until the debarring official issues a final written decision, unless the health or safety of covered individuals or the integrity of the FEHBP requires the debarment to be effective while the contest is pending.

§ 890.1043 Effect of debarment on a provider.

(a) *FEHBP payments prohibited.* A debarred provider is not eligible to receive payment, directly or indirectly, from FEHBP funds for items or services furnished to a covered individual on or after the effective date of the debarment. Also, a provider shall not accept an assignment of a claim for items or services furnished to a covered individual during the period of debarment. These restrictions shall remain in effect until the provider is reinstated by OPM.

(b) *Governmentwide effect.* Debarment precludes a provider from participating in all other Federal agencies' procurement and nonprocurement programs and activities, as required by section 2455 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103—355). Other agencies may grant a waiver or exception under their own regulations, to permit a provider to participate in their programs, notwithstanding the OPM debarment.

(c) *Civil or criminal liability.* A provider may be subject to civil monetary penalties under this subpart or criminal liability under other Federal statutes for knowingly filing claims,

causing claims to be filed, or accepting payment from FEHBP carriers for items or services furnished to a covered individual during a period of debarment.

Notifying Outside Parties About Debarment and Suspension Actions**§ 890.1044 Entities notified of OPM-issued debarments and suspensions.**

When OPM debar or suspends a provider under this subpart, OPM shall notify:

- (a) All FEHBP carriers;
- (b) The General Services Administration, for publication in the comprehensive Governmentwide list of Federal agency exclusions;
- (c) Other Federal agencies that administer health care or health benefits programs; and
- (d) State and local agencies, authorities, boards, or other organizations with health care licensing or certification responsibilities.

§ 890.1045 Informing persons covered by FEHBP about debarment or suspension of their provider.

FEHBP carriers are required to notify covered individuals who have obtained items or services from a debarred or suspended provider within one year of the date of the debarment or suspension of:

- (a) The existence of the provider's debarment or suspension;
- (b) The minimum period remaining in the provider's period of debarment; and
- (c) The requirement that OPM terminate the debarment or suspension before FEHBP funds can be paid for items or services the provider furnishes to covered individuals.

Exceptions to the Effect of Debarments**§ 890.1046 Effect of debarment on payments for services furnished in emergency situations.**

A debarred health care provider may receive FEHBP funds paid for items or services furnished on an emergency basis if the FEHBP carrier serving the covered individual determines that:

- (a) The provider's treatment was essential to the health and safety of the covered individual; and
- (b) No other source of equivalent treatment was reasonably available.

§ 890.1047 Special rules for institutional providers.

(a) *Covered individual admitted before debarment.* If a covered person is admitted as an inpatient before the effective date of an institutional provider's debarment, that provider may continue to receive payment of FEHBP funds for inpatient institutional services

until the covered person is released or transferred, unless the debarment official terminates payments under paragraph (b) of this section.

(b) *Health and safety of covered individuals.* If the debarment official determines that the health and safety of covered persons would be at risk if they remain in a debarred institution, OPM may terminate FEHBP payments at any time.

(c) *Notice of payment limitations.* If OPM limits any payment under paragraph (b) of this section, it shall immediately send written notice of its action to the institutional provider.

(d) *Finality of debarment official's decision.* The debarment official's decision to limit or deny payments under paragraph (b) of this section is not subject to further administrative review or reconsideration.

§ 890.1048 Waiver of debarment for a provider that is the sole source of health care services in a community.

(a) *Application required.* A provider may apply for a limited waiver of debarment at any time after receiving OPM's notice of proposed debarment. Suspended providers are not eligible to request a waiver of suspension.

(b) *Criteria for granting waiver.* To receive a waiver, a provider shall clearly demonstrate that:

(1) The provider is the *sole community provider* or the *sole source of essential specialized services in a community*;

(2) A limited waiver of debarment would be in the best interests of covered individuals in the defined service area;

(3) There are reasonable assurances that the actions which formed the basis for the debarment shall not recur; and

(4) There is no basis under this subpart for continuing the debarment.

(c) *Waiver applies only in the defined service area.* A limited waiver applies only to items or services provided within the defined service area where a provider is the *sole community provider* or *sole source of essential specialized services*.

(d) *Governmentwide effect continues.* A limited waiver applies only to a provider's FEHBP transactions. Even if OPM waives a debarment for FEHBP purposes, the governmentwide effect under section 2455 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355) continues for all other Federal agencies' procurement and nonprocurement programs and activities.

(e) *Waiver rescinded if circumstances change.* OPM shall rescind the limited waiver when any of its underlying bases no longer apply. If OPM rescinds the

limited waiver, the provider's debarment shall resume full effect for all FEHBP transactions. Events warranting rescission include, but are not limited to:

(1) The provider ceases to furnish items or services in the defined service area;

(2) Another provider begins to furnish equivalent items or services in the defined service area, so that the provider who received a waiver is no longer the sole provider or sole source; or

(3) The actions that formed the basis for the provider's debarment, or similar acts, recur.

(f) *Effect on period of debarment.* The minimum period of debarment is established when the debarment is initially imposed. A subsequent decision to grant, deny, or rescind a limited waiver shall not change that period.

(g) *Application is necessary for reinstatement.* A provider who has received a limited waiver shall apply for reinstatement at the end of the debarment period, even if a limited waiver is in effect when the debarment expires.

(h) *Finality of debarment official's decision.* The debarment official's decision to grant or deny a limited waiver is final and not subject to further administrative review or reconsideration.

Special Exceptions to Protect Covered Persons

§ 890.1049 Claims for non-emergency items or services furnished by a debarred provider.

(a) *Covered individual unaware of debarment.* FEHBP funds may be paid for items and services furnished by a debarred provider if, at the time the items or services were furnished, the covered individual did not know, and could not reasonably be expected to know, that the provider was debarred. This provision is intended solely to protect the interests of FEHBP covered persons who obtain services from a debarred or suspended provider in good faith and without knowledge that the provider has been sanctioned. It does not authorize debarred or suspended providers to submit claims for payment to FEHBP carriers.

(b) *Notice sent by carrier.* When paying a claim under the authority of paragraph (a) of this section, an FEHBP carrier shall send a written notice to the covered individual, stating that:

(1) The provider is debarred and prohibited from receiving payment of FEHBP funds for items or services furnished after the debarment date;

(2) Claims shall not be paid for items or services furnished by the debarred provider after the covered individual receives notice of the debarment;

(3) The current claim is being paid as a legally-authorized exception to the effect of the debarment in order to protect covered individuals who obtain items or services without knowledge of the provider's debarment;

(4) FEHBP carriers are required to deny payment of any claim for items or services rendered by a debarred provider 15 days or longer after the date of the notice described in paragraph (b) of this section, unless the covered individual had no knowledge of the provider's debarment when the items or services were rendered;

(5) The minimum period remaining in the provider's debarment; and

(6) FEHBP funds cannot be paid to the provider until OPM terminates the debarment.

§ 890.1050 Exception to a provider's debarment for an individual enrollee.

(a) *Request by a covered individual.* Any individual enrolled in FEHBP may submit a request through their FEHBP carrier for continued payment of items or services furnished by a debarred provider to any person covered under the enrollment. Requests shall not be accepted for continued payments to suspended providers.

(b) *OPM action on the request.* OPM shall consider the recommendation of the FEHBP carrier before acting on the request. To be approved, the request shall demonstrate that:

(1) Interrupting an existing, ongoing course of treatment by the provider would have a detrimental effect on the covered individual's health or safety; or

(2) The covered individual does not have access to an alternative source of the same or equivalent health care items or services within a reasonably accessible service area.

(c) *Scope of the exception.* An approved exception applies only to the covered individual(s) who requested it, or on whose behalf it was requested. The governmentwide effect of the provider's debarment under section 2455 of the Federal Acquisition Streamlining Act (Pub. L. 103-355) is not altered by an exception.

(d) *Provider requests not allowed.* OPM shall not consider an exception request submitted by a provider on behalf of a covered individual.

(e) *Debarment official's decision is final.* The debarment official's decision on an exception request is not subject to further administrative review or reconsideration.

Reinstatement**§ 890.1051 Applying for reinstatement when period of debarment expires.**(a) *Application required.*

Reinstatement is not automatic when the minimum period of a provider's debarment expires. The provider shall apply in writing to OPM, supplying specific information about the reinstatement criteria outlined in paragraph (c) of this section.

(b) *Reinstatement date.* A debarred provider may submit a reinstatement application not earlier than 60 days before the nominal expiration date of the debarment. However, in no case shall OPM reinstate a provider before the minimum period of debarment expires.

(c) *Reinstatement criteria.* To be approved, the provider's reinstatement application shall clearly demonstrate that:

(1) There are reasonable assurances that the actions resulting in the

provider's debarment have not recurred and will not recur;

(2) There is no basis under this subpart for continuing the provider's debarment; and

(3) There is no pending criminal, civil, or administrative action that would subject the provider to debarment by OPM.

(d) *Written notice of OPM action.* OPM shall inform the provider in writing of its decision regarding the reinstatement application.

(e) *Limitation on reapplication.* If OPM denies a provider's reinstatement application, the provider is not eligible to reapply for 1 year after the date of the denial.

§ 890.1052 Reinstatements without application.

OPM shall reinstate a provider without a reinstatement application if:

(a) *Conviction reversed.* The conviction on which the provider's debarment was based is reversed or

vacated by a final decision of the highest appeals court with jurisdiction over the case; and the prosecutorial authority with jurisdiction over the case has declined to retry it, or the deadline for retrial has expired without action by the prosecutor.

(b) *Sanction terminated.* A sanction imposed by another Federal agency, on which the debarment was based, is terminated by that agency.

(c) *Court order.* A Federal court orders OPM to stay, rescind, or terminate a provider's debarment.

(d) *Written notice.* When reinstating a provider without an application, OPM shall send the provider written notice of the basis and effective date of his reinstatement.

§ 890.1053 Table of procedures and effective dates for reinstatements.

The procedures and effective dates for reinstatements under this subpart are:

Basis for debarment	Application required?	Effective date
Period of debarment expires	Yes	After debarment expires.
Conviction reversed on final appeal/no retrial possible.	No	Retroactive (start of debarment).
Other agency sanction ends	No	Ending date of sanction.
Court orders reinstatement	No	Retroactive (start of debarment).

§ 890.1054 Agencies and entities to be notified of reinstatements.

OPM shall inform the FEHBP carriers, Government agencies and other organizations that were originally notified of a provider's debarment when a provider is reinstated under § 890.1051 or § 890.1052.

§ 890.1055 Contesting a denial of reinstatement.

(a) *Obtaining reconsideration of the initial decision.* A provider may contest OPM's decision to deny a reinstatement application by submitting documents

and written arguments to the debarring official within 30 days of receiving the notice described in § 890.1051(d). In addition, the provider may request to appear in person to present oral arguments to the debarring official. The provider may be accompanied by counsel when making a personal appearance.

(b) *Debarring official's final decision on reinstatement.* The debarring official shall issue a final written decision, based on the entire administrative record, within 30 days after the record closes to receipt of information. The

debarring official may extend the decision period for good cause.

(c) *Finality of debarring official's decision.* The debarring official's final decision regarding a provider's reinstatement is not subject to further administrative review or reconsideration.

Civil Monetary Penalties and Financial Assessments [Reserved]

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