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§ 890.907 Effective dates.

(a) The limitation specified in this subpart applies to inpatient hospital admissions commencing on or after January 1, 1992.

(b) The limitation specified in this subpart applies to physician services supplied on or after January 1, 1995.

[60 FR 26668, May 18, 1995]

§ 890.908 Notification of HHS.

An FEHB plan, under the oversight of OPM, will notify the Secretary of HHS, or the Secretary's designee, if the plan finds that:

(a) A hospital knowingly and willfully collects, on a repeated basis, more than the amount determined to be equivalent to the Medicare part A payment under the DRG-based PPS.

(b) A Medicare participating physician or supplier knowingly and willfully collects, on a repeated basis, more than the amount determined to be equivalent to the Medicare part B payment under the Medicare Participating Physician Fee Schedule.

(c) A Medicare nonparticipating physician or supplier knowingly and willfully charges, on a repeated basis, more than the amount determined to be equivalent to the Medicare limiting charge amount.

[60 FR 26668, May 18, 1995]

§ 890.909 End-of-year settlements.

Neither OPM, nor the FEHB plans, will perform end-of-year settlements with, or make retroactive adjustments as a result of retroactive changes in the Medicare payment calculation information to, hospital providers who have received FEHB benefit payments under this subpart.

[57 FR 10610, Mar. 27, 1992. Redesignated at 60 FR 26668, May 18, 1995]

§ 890.910 Provider information.

The hospital provider information used to calculate the amount equivalent to the Medicare part A payment will be updated on an annual basis.

[57 FR 10610, Mar. 27, 1992. Redesignated at 60 FR 26668, May 18, 1995]

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Subpart J—Administrative Sanctions Imposed Against Health Care Providers

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

SOURCE: 68 FR 5475, Feb. 3, 2003, unless otherwise noted.

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.

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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 rein-

statement 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.

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(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

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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

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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)

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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

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§ 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:

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(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.

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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.

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§ 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 time-frame for good cause.

(b) *No further administrative review available.* The suspending official's de-

cision 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

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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.

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NOTIFYING OUTSIDE PARTIES ABOUT DEBARMENT AND SUSPENSION ACTIONS

§ 890.1044 Entities notified of OPM- issued debarments and suspensions.

When OPM debars 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 sus- pension 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 or sus- pension on payments for services furnished in emergency situations.

A debarred or suspended 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.

[69 FR 9920, Mar. 3, 2004]

§ 890.1047 Special rules for institu- tional providers.

(a) *Covered individual admitted before debarment or suspension.* If a covered person is admitted as an inpatient before the effective date of an institutional provider's debarment or suspension, that provider may continue to receive payment of FEHBP funds for inpatient institutional services until the covered person is released or transferred, unless the debarring or suspending official terminates payments under paragraph (b) of this section.

(b) *Health and safety of covered individuals.* If the debarring or suspending official determines that the health and safety of covered persons would be at risk if they remain in a debarred or suspended 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 must immediately send written notice of its action to the institutional provider.

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

[69 FR 9920, Mar. 3, 2004]

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

(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

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(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 debarring official's decision.* The debarring 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 or suspended provider.

(a) *Covered individual unaware of debarment or suspension.* FEHBP funds may be paid for items or services furnished by a debarred or suspended provider if, at the time the items or services were furnished, the covered individual did not know, and could not reasonably be expected to have known, that the provider was debarred or suspended. 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 must send a written notice to the covered individual, stating:

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

(2) That claims may not be paid for items or services furnished by the debarred or suspended provider after the covered individual is informed of the debarment or suspension;

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

(4) That FEHBP carriers are required to deny payment of any claim for items or services rendered by a debarred or suspended 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 or suspension when the items or services were rendered;

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

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

[69 FR 9920, Mar. 3, 2004]

§ 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) *Debarring official's decision is final.* The debarring 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

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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

SOURCE: 69 FR 9921, Mar. 3, 2004, unless otherwise noted.

§ 890.1060 Purpose and scope of civil monetary penalties and assessments.

(a) *Civil monetary penalty.* A civil monetary penalty is an amount that OPM may impose on a health care provider who commits one of the violations listed in § 890.1061. Penalties are intended to protect the integrity of FEHBP by deterring repeat violations by the same provider and by reducing the likelihood of future violations by other providers.

(b) *Assessment.* An assessment is an amount that OPM may impose on a provider, calculated by reference to the claims involved in the underlying violations. Assessments are intended to recognize monetary losses, costs, and damages sustained by OPM as the result of a provider’s violations.

(c) *Definitions.* In §§ 890.1060 through 890.1072:

Penalty means civil monetary penalty; and

Penalties and assessments may connote the singular or plural forms of either of those terms, and may represent either the conjunctive or disjunctive sense.

(d) *Relationship to debarment and suspension.* In addition to imposing penalties and assessments, OPM may concurrently debar or suspend a provider from participating in the FEHBP on the basis of the same violations.

(e) *Relationship to other penalties provided by law.* The penalties, assessments, debarment, and suspension imposed by OPM are in addition to any other penalties that may be prescribed by law or regulation administered by an agency of the Federal Government or any State.

§ 890.1061 Bases for penalties and assessments.

(a) *Improper claims.* OPM may impose penalties and assessments on a provider if a claim presented by that provider for payment from FEHBP funds meets the criteria set forth in 5 U.S.C. 8902a(d)(1).

(b) *False or misleading statements.* OPM may impose penalties and assessments on a provider who makes a false statement or misrepresentation as set forth in 5 U.S.C. 8902a(d)(2).

(c) *Failing to provide claims-related information.* OPM may impose penalties and assessments on a provider who knowingly fails to provide claims-related information as otherwise required by law.

§ 890.1062 Deciding whether to impose penalties and assessments.

(a) *Authority of debarring official.* The debarring official has discretionary authority to impose penalties and assessments in accordance with 5 U.S.C. 8902a and this subpart.

(b) *Factors to be considered.* In deciding whether to impose penalties and assessments against a provider that has committed one of the violations identified in § 890.1061, OPM must consider:

(1) The number and frequency of the provider's violations;

(2) The period of time over which the violations were committed;

(3) The provider's culpability for the specific conduct underlying the violations;

(4) The nature of any claims involved in the violations and the circumstances under which the claims were presented to FEHBP carriers;

(5) The provider's history of prior offenses or improper conduct, including any actions that could have constituted a basis for a suspension, debarment, penalty, or assessment by any Federal or State agency, whether or not any sanction was actually imposed;

(6) The monetary amount of any damages, losses, and costs, as described in § 890.1064(c), attributable to the provider's violations; and

(7) Such other factors as justice may require.

(c) *Additional factors when penalty or assessment is based on provisions of § 890.1061(b) or (c).* In the case of violations involving false or misleading statements or the failure to provide claims-related information, OPM must also consider:

(1) The nature and circumstances of the provider's failure to properly report information; and

(2) The materiality and significance of the false statements or misrepresentations the provider made or caused to be made, or the information that the provider knowingly did not report.

§ 890.1063 Maximum amounts of penalties and assessments.

OPM may impose penalties and assessments in amounts not to exceed those set forth in U.S.C. 8902a(d).

§ 890.1064 Determining the amounts of penalties and assessments to be imposed on a provider.

(a) *Authority of debarring official.* The debarring official has discretionary authority to set the amounts of penalties and assessments in accordance with law and this subpart.

(b) *Factors considered in determining amounts of penalties and assessments.* In determining the amounts of penalties and assessments to impose on a provider, the debarring official must consider:

(1) The Government's interests in being fully compensated for all damages, losses, and costs associated with the provider's violations, including:

(i) Amounts wrongfully paid from FEHBP funds as the result of the provider's violations and interest on those amounts, at rates determined by the Department of the Treasury;

(ii) All costs incurred by OPM in investigating a provider's sanctionable misconduct; and

(iii) All costs incurred in OPM's administrative review of the case, including every phase of the administrative sanctions processes described by this subpart;

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(2) The Government's interests in deterring future misconduct by health care providers;

(3) The provider's personal financial situation, or, in the case of an entity, the entity's financial situation;

(4) All of the factors set forth in § 890.1062(b) and (c); and

(5) The presence of aggravating or less serious circumstances, as described in paragraphs (c)(1) through (c)(7) of this section.

(c) *Aggravated and less serious circumstances.* The presence of aggravating circumstances may cause OPM to impose penalties and assessments at a higher level within the authorized range, while less serious violations may warrant sanctions of relatively lower amounts. Paragraphs (c)(1) through (c)(7) of this section provide examples of aggravated and less serious violations. These examples are illustrative only, and are not intended to represent an exhaustive list of all possible types of violations.

(1) The existence of many separate violations, or of violations committed over an extended period of time, constitutes an aggravating circumstance. OPM may consider conduct involving a small number of violations, committed either infrequently or within a brief period of time, to be less serious.

(2) Violations for which a provider had direct knowledge of the material facts (for example, submitting claims that the provider knew to contain false, inaccurate, or misleading information), or for which the provider did not cooperate with OPM's or an FEHBP carrier's investigations, constitute aggravating circumstances. OPM may consider violations where the provider did not have direct knowledge of the material facts, or in which the provider cooperated with post-violation investigative efforts, to be less serious.

(3) Violations resulting in substantial damages, losses, and costs to OPM, the FEHBP, or FEHBP-covered persons constitute aggravating circumstances. Violations producing a small or negligible overall financial impact may be considered to be less serious.

(4) A pattern of conduct reflecting numerous improper claims, high-dollar false claims, or improper claims in-

volving several types of items or services constitutes aggravating circumstances. OPM may consider a small number of improper claims for relatively low dollar amounts to be less serious.

(5) Every violation involving any harm, or the risk of harm, to the health and safety of an FEHBP enrollee, must be considered an aggravating circumstance.

(6) Any prior violation described in § 890.1062(b)(5) constitutes an aggravating circumstance. OPM may consider repeated or multiple prior violations to represent an especially serious form of aggravating circumstances.

(7) OPM may consider other circumstances or actions to be aggravating or less serious within the context of an individual case, as the interests of justice require.

§ 890.1065 Deciding whether to suspend or debar a provider in a case that also involves penalties and assessments.

In a case where both penalties and assessments and debarment are proposed concurrently, OPM must decide the proposed debarment under the same criteria and procedures as if it had been proposed separately from penalties and assessments.

§ 890.1066 Notice of proposed penalties and assessments.

(a) *Written notice.* OPM must inform a provider of proposed penalties and assessments by written notice, sent via certified mail with return receipt requested, to the provider's last known street or post office address. OPM may, at its discretion, use an express service that furnishes a verification of delivery instead of postal mail.

(b) *Statutory limitations period.* OPM must send the notice to the provider within 6 years of the date on which the claim underlying the proposed penalties and assessments was presented to an FEHBP carrier. If the proposed penalties and assessments do not involve a claim presented for payment, OPM must send the notice within 6 years of the date of the actions on which the proposed penalties and assessments are based.

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(c) *Contents of the notice.* OPM's notice must contain, at a minimum:

(1) The statement that OPM proposes to impose penalties and/or assessments against the provider;

(2) Identification of the actions, conduct, and claims that comprise the basis for the proposed penalties and assessments;

(3) The amount of the proposed penalties and assessments, and an explanation of how OPM determined those amounts;

(4) The statutory and regulatory bases for the proposed penalties and assessments; and

(5) Instructions for responding to the notice, including specific explanations regarding:

(i) The provider's right to contest the imposition and/or amounts of penalties and assessments before they are formally imposed; and

(ii) OPM's right, if the provider does not contest the proposed penalties and assessments within 30 days of the date he receives the notice, to implement them immediately without further administrative appeal or recourse.

(d) *Proposing debarment in the same notice.* OPM may propose a provider's debarment in the same notice that also proposes penalties and assessments. In this case, the notice must also provide the elements of information required to appear in a notice of proposed debarment under § 890.1006(b).

(e) *Procedures if the notice cannot be delivered.* OPM must apply the provisions of § 890.1006(f) if the notice of proposed penalties and assessments cannot be delivered as originally addressed.

(f) *Sending notice by electronic means.*
[Reserved]

§ 890.1067 Provider contests of proposed penalties and assessments.

(a) *Contesting proposed sanctions.* A provider may formally contest the proposed penalties and assessments by sending a written notice to the debarring official within 30 days after receiving the notice described in § 890.1066. The debarring official must apply the administrative procedures set forth in §§ 890.1069 and 890.1070 to decide the contest.

(b) *Contesting debarments and financial sanctions concurrently.* If OPM proposes

debarment and penalties and assessments in the same notice, the provider may contest both the debarment and the financial sanctions in the same proceeding. If the provider pursues a combined contest, the requirements set forth in §§ 890.1022 through 890.1024, as well as this section, apply.

(c) *Settling or compromising proposed sanctions.* The debarring official may settle or compromise proposed sanctions at any time before issuing a final decision under § 890.1070.

§ 890.1068 Effect of not contesting proposed penalties and assessments.

(a) *Proposed sanctions may be implemented immediately.* In the absence of a timely response by a provider as required in the notice described in § 890.1066, the debarring official may issue a final decision implementing the proposed financial sanctions immediately, without further procedures.

(b) *Debarring official sends notice after implementing sanctions.* Immediately upon issuing a final decision under paragraph (a), the debarring official must send the provider written notice, via certified return receipt mail or express delivery service, stating:

(1) The amount of penalties and assessments imposed;

(2) The date on which they were imposed; and

(3) The means by which the provider may pay the penalties and assessments.

(c) *No appeal rights.* A provider may not pursue a further administrative or judicial appeal of the debarring official's final decision implementing any sanctions if a timely contest was not filed in response to OPM's notice under § 890.1066.

§ 890.1069 Information the debarring official must consider in deciding a provider's contest of proposed penalties and assessments.

(a) *Documentary material and written arguments.* As part of a provider's contest, the provider must furnish a written statement of reasons why the proposed penalties and assessments should not be imposed and/or why the amounts proposed are excessive.

(b) *Mandatory disclosures.* In addition to any other information submitted

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during the contest, the provider must inform the debarring official in writing of:

(1) Any existing, proposed, or prior exclusion, debarment, penalty, assessment, or other sanction that was imposed by a Federal, State, or local government agency, including any administrative agreement that purports to affect only a single agency; and

(2) Any current or prior criminal or civil legal proceeding that was based on the same facts as the penalties and assessments proposed by OPM.

(c) *In-person appearance.* A provider may request a personal appearance (in person, by telephone conference, or through a representative) to provide testimony and oral arguments to the debarring official.

§ 890.1070 Deciding contests of proposed penalties and assessments.

(a) *Debarring official reviews entire administrative record.* After the provider submits the information and evidence authorized or required by § 890.1069, the debarring official shall review the entire official record to determine if the contest can be decided without additional administrative proceedings, or if an evidentiary hearing is required to resolve disputed material facts.

(b) *Previously determined facts.* Any facts relating to the basis for the proposed penalties and assessments that were determined in prior due process proceedings are binding on the debarring official in deciding the contest. “Prior due process proceedings” are those set forth in § 890.1025(a)(1) through (4).

(c) *Deciding the contest without further proceedings.* To decide the contest without further administrative proceedings, the debarring official must determine that:

(1) The preponderance of the evidence in the administrative record as a whole demonstrates that the provider committed a sanctionable violation described in § 890.1061; and

(2) The evidentiary record contains no *bona fide* dispute of any fact material to the proposed financial sanction. A “material fact” is a fact essential to determining whether a provider committed a sanctionable violation for

which penalties and assessments may be imposed.

(d) *Final decision without further proceedings.* If the debarring official determines that paragraphs (c)(1) and (c)(2) of this section both apply, a final decision may be issued, imposing financial sanctions in amounts not exceeding those proposed in the notice to the provider described in § 890.1066.

(e) *Insufficient evidence.* If the debarring official determines that a preponderance of the evidence does not demonstrate that the provider committed a sanctionable violation described in § 890.1061, the notice of proposed sanctions described in § 890.1066 must be withdrawn.

(f) *Disputed material facts.* If the debarring official determines that the administrative record contains a *bona fide* dispute about any fact material to the proposed sanction, he must refer the case for a fact-finding hearing to resolve the disputed fact or facts. The provisions of § 890.1027(b) and (c), 890.1028, and 890.1029(a) and (b) will govern such a hearing.

(g) *Final decision after fact-finding hearing.* After receiving the report of the fact-finding hearing, the debarring official must apply the provisions of paragraphs (c), (d), and (e) of this section to reach a final decision on the provider’s contest.

§ 890.1071 Further appeal rights after final decision to impose penalties and assessments.

If the debarring official’s final decision imposes any penalties and assessments, the affected provider may appeal it to the appropriate United States district court under the provisions of 5 U.S.C. 8902a(h)(2).

§ 890.1072 Collecting penalties and assessments.

(a) *Agreed-upon payment schedule.* At the time OPM imposes penalties and assessments, or the amounts are settled or compromised, the provider must be afforded the opportunity to arrange an agreed-upon payment schedule.

(b) *No agreed-upon payment schedule.* In the absence of an agreed-upon payment schedule, OPM must collect penalties and assessments under its regular procedures for resolving debts

owed to the Employees Health Benefits Fund.

(c) *Offsets.* As part of its debt collection efforts, OPM may request other Federal agencies to offset the penalties and assessments against amounts that the agencies may owe to the provider, including Federal income tax refunds.

(d) *Civil lawsuit.* If necessary to obtain payment of penalties and assessments, the United States may file a civil lawsuit as set forth in 5 U.S.C. 8902(i).

(e) *Crediting payments.* OPM must deposit payments of penalties and assessments into the Employees Health Benefits Fund.

Subpart K—Temporary Continuation of Coverage

SOURCE: 54 FR 52339, Dec. 21, 1989, unless otherwise noted.

§ 890.1101 Purpose.

This subpart identifies the individuals who may temporarily continue coverage after the coverage would otherwise terminate under this part and sets forth the circumstances of their enrollment.

§ 890.1102 Definitions.

In this subpart—

Gross misconduct means a flagrant and extreme transgression of law or established rule of action for which an employee is separated and concerning which a judicial or administrative finding of gross misconduct has been made.

Qualifying event means any of the following events that qualify an individual for temporary continuation of coverage under subpart K of this part:

(1) A separation from Government service.

(2) A divorce or annulment.

(3) A change in circumstances that causes an individual to become ineligible to be considered an unmarried dependent child under this part.

§ 890.1103 Eligibility.

(a) Except as provided by paragraph (b) of this section, individuals described by this section are eligible to elect temporary continuation of cov-

erage under this subpart. Eligible individuals are as follows:

(1) Former employees whose coverage ends because of a separation from Federal service under any circumstances except an involuntary separation for gross misconduct.

(2) Individuals whose coverage as children under the family enrollment of an employee, former employee, or annuitant ends because they cease meeting the requirements for being considered unmarried dependent children. For the purpose of this section, children who are enrolled under this part as survivors of deceased employees or annuitants are considered to be children under a family enrollment of an employee or annuitant at the time of the qualifying event.

(3) Former spouses of employees, of former employees having continued family coverage under this subpart, or of annuitants, if the former spouse would be eligible for continued coverage under subpart H of this part except for failure to meet the requirement of § 890.803(a) (1) or (3) of this part or the documentation requirements of § 890.806(a) of this part, including former spouses who lose eligibility under subpart H within 36 months after termination of the marriage because they ceased meeting the requirement of § 890.803(a) (1) or (3) of this part.

(b) An individual who is otherwise eligible for benefits under this part (excluding the temporary extension of coverage and conversion privilege set forth in subpart D of this part) is not entitled to continued coverage under this subpart.

§ 890.1104 Notification by agency.

(a) In the case of a former employee who is eligible to elect temporary continuation of coverage under § 890.1103(a)(1), the employing office must notify the former employee concerning his or her rights under this subpart no later than 30 days after the end of the temporary extension of coverage provided under § 890.401.

(b)(1) In the case of a child who is eligible to elect temporary continuation of coverage under § 890.1103(a)(2), the enrollee may, within 60 days after the qualifying event, provide written notice to the employing office of the