

Proposed Rules

Federal Register

Vol. 66, No. 239

Wednesday, December 12, 2001

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing to amend its regulations on administrative sanctions of health care providers participating in the Federal Employees Health Benefits Program (FEHBP). The proposed regulations implement the suspension and debarment provisions of section 2 of the Federal Employees Health Care Protection Act of 1998 (Pub. L. 105-266). This statute modified both the substantive and procedural requirements for FEHBP administrative sanctions. These regulations supercede interim regulations issued in 1989 to implement the earlier sanctions legislation that was amended by Pub. L. 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 it covers.

DATES: Submit comments on or before February 11, 2002.

ADDRESSES: Send or deliver written comments to David Cope, U.S. Office of Personnel Management, 1900 E Street NW., Room 6400, Washington, DC 20415, or submit comments electronically to debar@opm.gov.

FOR FURTHER INFORMATION CONTACT: David Cope, 202-606-2851, FAX 202-606-2153.

SUPPLEMENTARY INFORMATION:

Background

A 1991 GAO report (GGD-91-95, "Fraud and Abuse: Stronger Controls

Needed in Federal Employees Health Benefits Program") concluded that OPM needed to be more aggressive in dealing with health care provider integrity problems. Among other steps, GAO recommended that the agency take action to implement effective administrative sanctions authorities.

OPM recognized that an appropriate administrative sanctions program for FEHBP would necessitate legislative action to replace earlier sanctions legislation that had proved to be costly and ultimately unworkable. As an interim measure, in May 1993, OPM adopted the Governmentwide Nonprocurement Suspension and Debarment Common Rule (common rule), a standardized regulatory program that permitted the agency to effectuate sanctions issued by other agencies. Under this authority, OPM has debarred from the FEHBP over 18,700 health care providers who had previously been excluded from the Medicare, Medicaid, and other programs under the Social Security Act by the Office of Inspector General (OIG) of the Department of Health and Human Services. The OPM common rule regulations appear at 5 CFR part 970.

While operating under the common rule, OPM developed legislative proposals for health care provider sanctions that were comprehensive (i.e., offering a full range of sanctions authorities) and procedurally efficient, while affording appropriate due process protections to the subjects of sanctions action. Bills containing these authorities were introduced in both the 104th and 105th Congresses, and a version that closely paralleled the OPM proposals was enacted as part of Pub. L. 105-266 on October 19, 1998.

This proposed rule is the first of two planned regulatory issuances that together will implement all of the Pub. L. 105-266 sanctions authorities. We are addressing debarments and suspensions in the first issuance because we expect them to constitute the majority of our sanctions workload. OPM is currently developing a separate regulatory issuance to address the financial sanctions authorities enacted by Pub. L. 105-266, including financial assessments and civil monetary penalties.

Purposes of Administrative Sanctions

Administrative sanctions are civil remedies that agencies impose under

their own authority to protect their programs from transactions with untrustworthy individuals or entities and to recover program funds paid improperly or fraudulently. Because administrative sanctions are not considered to be "punitive," they can, and frequently are, imposed in addition to other remedies, such as criminal or civil judicial action.

Virtually every federal agency has some form of sanctions authority. The most common types of administrative sanctions are:

- Debarment—removing an individual or entity from participation in a program for a designated period of time, after a due process proceeding;
- Suspension—removing an individual or entity from program participation on an immediate basis, without prior due process, because he currently poses a threat to the public interest; and
- Financial sanctions—imposing double or treble damages, fines, and monetary assessments or penalties, based on a due process proceeding.

Administrative Sanctions of Health Care Providers

Various studies by the GAO, the Office of the Inspector General (OIG) of the Department of Health and Human Services, and health insurance industry groups have placed the overall rate of provider fraud in the American health care system within a range of 6 to 12 percent of the total dollar value of claims. The OIG of the Office of Personnel Management has recognized for many years that fraud by health care providers poses a significant problem for both the financial integrity of the Federal Employees Health Benefits Program (FEHBP) and the health care interests of the persons who obtain coverage through it.

One of the difficulties in pursuing provider-related fraud within FEHBP has been the inadequacy of the legal remedies available to address the problem, prior to the passage of Pub. L. 105-266. Although the false claims, false statements, and mail fraud statutes are nominally applicable to many instances of health care fraud, in practice they are seldom invoked because of the high burden of proof in criminal cases and the fact that the dollar amounts in question typically do not reach prosecutorial thresholds. In fact, most instances of provider fraud

are not amenable to being handled appropriately within the federal judicial system. However, the Pub. L. 105–266 administrative sanctions authorities, as implemented by the proposed regulation, are specifically designed to address fraudulent or improper conduct by health care providers quickly, efficiently, and cost-effectively.

Transition to Statutory Debarment System

Adoption of this proposed regulation will have the following effect on existing OPM regulations:

- Upon issuance, this rule will replace the 1989 interim final version of 5 CFR part 890, subpart J, which reflected the legislation superseded by Pub. L. 105–266.
- As of the date this regulation goes into effect, OPM will discontinue issuing new debarments under the common rule (5 CFR part 970) in favor of actions under 5 CFR part 890, subpart J. Common rule debarments already in effect will remain so until the exclusions on which they are based are terminated by the originating agency.

Administrative Sanctions Will Not Affect FEHBP Operations

The proposed regulation fully reflects the policy concepts underlying OPM's operation of the FEHBP. The principal objectives of administrative sanctions activities will be to protect the health and safety of covered persons and the integrity of the FEHBP by excluding providers whose conduct indicates that they may pose a threat to either of those interests. Other than terminating the rights of certain providers to receive payment of FEHBP funds, the regulations will not affect the manner or conditions through which health care services are delivered to FEHBP-covered persons, or any other aspect of the provider–patient relationship. There will be no effect on the ability of FEHBP subscribers to select health insurance coverage appropriate to their circumstances. Finally, sanctions imposed under these regulations will apply only to health care providers, and will not affect the contractual relationship between OPM and the FEHBP carriers. As a related matter, OPM is committed to coordinating with other agencies to combat health care fraud and abuse. The proposed rule attempts wherever possible to maintain consistency and cooperation between FEHBP sanctions and the Medicare administrative sanctions program operated by the OIG, Department of Health and Human Services.

Mandatory and Permissive Debarment

Pub. L. 105–266 established two broad categories of debarments, distinguished by their underlying bases and the debarring official's range of discretion in imposing the sanction. Mandatory debarment authorities require OPM to debar providers who, in prior due process proceedings, were found to have committed certain types of violations. This concept has been part of the Medicare administrative sanctions statute for many years. As detailed in § 890.1004 of the proposed rule, grounds for mandatory debarment include conviction of crimes involving (1) fraud or other financial misconduct, (2) abuse of patients, (3) abuse of controlled substances, or (4) obstruction of an investigation of those crimes. Mandatory debarment also applies to providers who have been debarred, suspended, or excluded by another Federal agency.

Permissive debarment authorities cover violations for which the debarring official may exercise discretion to impose or not impose debarment, according to the facts of each case. Pub. L. 105–266 established 12 separate grounds for permissive debarment. Section 1011 of the proposed rule arranges these grounds into four broad categories. The categories are (1) actions involving revocation, suspension, nonrenewal, or surrender of health care licensure; (2) ownership or control of an entity by a debarred provider, or ownership/control by a provider of a debarred entity; (3) false, deceptive, or wrongful claims practices; and (4) refusal to provide information requested by OPM or a FEHBP carrier to determine the validity or amount of a claim.

Length of Debarments

Pub. L. 105–266 and the proposed rule establish a minimum 3-year period of debarment for mandatory debarments based on convictions. The proposed rule also adopts the Medicare practice of using specific aggravating and mitigating factors to determine whether a period of debarment longer than the minimum period should be imposed (see § 890.1008). Mandatory debarments based on another agency's sanction will always be for an indefinite period running concurrently with the sanction on which they are based. Therefore, they are not subject to a specified minimum period or to extension because of aggravating factors.

Unlike mandatory debarments, Pub. L. 105–266 does not specify statutory minimum periods for permissive debarments. However, to foster economical and consistent

decisionmaking, §§ 890.1016–890.1021 of the proposed rule recommend periods for permissive debarments that may be increased or decreased, based on factors specified in the statute. In the interests of sound administration, § 890.1015 establishes an overall minimum period of not less than one year for any permissive debarment.

Procedures and Appeals

Pub. L. 105–266, and these proposed regulations, require OPM to implement the findings of prior criminal, civil, or administrative due process proceedings with regard to all categories of mandatory debarments. For permissive debarments, the debarring official may, but is not required to, accept the relevant findings of a prior adjudication at the Federal, State, or local level as satisfying the requisite factual basis for debarment (e.g., a licensure revocation or suspension by a Federal regulatory board).

The subject of a proposed mandatory debarment will receive a 30-day advance notice of the impending debarment and may challenge (“contest”) OPM's action by submitting information and arguments on their behalf (see § 890.1006). If OPM proposes a period of debarment exceeding the 3-year statutory minimum, the provider has the further right to make a personal appearance before the debarring official. The proposed mandatory debarment can be withdrawn only if the basis for it no longer exists, such as a conviction being reversed on appeal, or if the proposed subject is incorrectly identified. No further administrative appeal or reconsideration is available. Mandatory debarments become effective when implemented by OPM and remain in force during all judicial appeals. Sections 890.1009 and 890.1010 of the proposed rule address these procedures.

Permissive debarments (other than those based on prior adjudications) inherently require more extensive adjudication of individual cases than mandatory debarments. However, Pub. L. 105–266 provided an effective method of administering them by establishing specific factors that OPM must consider when deciding whether to impose a permissive debarment. These are enumerated in § 890.1013 of the proposed rule. A provider proposed for debarment on permissive grounds that have been previously adjudicated will receive advance written notice and an opportunity to contest the proposed debarment on essentially the same basis as an individual proposed for debarment on mandatory grounds. These procedures are reflected in

§§ 890.1022–890.1026 of the proposed rule.

When the grounds for a permissive debarment have not previously been determined through a due process adjudication, Pub. L. 105–266 requires that OPM provide an opportunity for a due process hearing to establish the underlying facts. If the debarring official determines that the administrative record contains a *bona fide* dispute about facts material to the debarment, he must request a fact-finding hearing before imposing debarment. If the debarring official decides that there is no genuine and material factual dispute on the record, he may issue a decision without a hearing. Except for debarments based on refusal to provide requested information or false/wrongful claims, the debarment will remain in effect while the hearing and associated procedures are held. The presiding official's findings (whether the hearing is held before or after debarment) are binding on the debarring official. No further administrative appeals are available after the debarring official's final decision. Sections 890.1027–890.1029 of the proposed rule detail the procedural rights of a provider subject to permissive debarment on previously unadjudicated grounds.

Suspension

Suspension is a temporary measure, equivalent in its effect to debarment, i.e., FEHBP funds may not be paid for items or services furnished while a provider is suspended. However, in contrast to a debarment, suspension can be imposed without prior due process, pending the completion of legal or administrative proceedings. Although Pub. L. 105–266 does not address suspension per se, it does confer discretion to make debarments effective immediately, if necessary to protect the health and safety of covered individuals. To exercise this authority systematically, we are proposing in §§ 890.1030–890.1041 to treat suspension as a separate form of sanction. This is also consistent with governmentwide practice under the Uniform Suspension and Debarment Common Rule. Section 890.1031 outlines the bases for taking a suspension action. To suspend a provider, OPM must have reasonable cause to believe that he has committed a violation warranting debarment and adequate evidence that the health and safety of covered individuals, or the integrity of FEHBP funds, would be at risk if a suspension were not issued immediately.

As provided in § 890.1032, the initial period of a suspension may not exceed

12 months. The Department of Justice or a Federal or local prosecutor may request that the suspension be extended for an additional six months. When formal legal or administrative proceedings are initiated during the period of suspension, it may continue indefinitely, pending their completion. If a suspended provider is subsequently debarred, § 890.1034 authorizes the debarring official to account for the period of suspension in determining the period of debarment.

Sections 890.1035–890.1041 provide a reconsideration procedure for suspensions, including the opportunity to make a personal appearance before the suspending official and the right to request a fact-finding proceeding before a presiding official when there is a *bona fide* dispute regarding facts material to the suspension.

Waivers and Exceptions

The proposed rule contains a number of waivers and exceptions that protect the financial and health care interests of persons who obtain their health insurance coverage through the FEHBP. These include provisions that (1) claims will be paid for covered persons who obtain services from a debarred provider without knowledge of his debarment [§ 890.1045]; (2) services furnished by a debarred provider in an emergency situation will be paid under each carrier's emergency coverage provisions [§ 890.1046]; (3) inpatients who were admitted to a debarred institution before its debarment will have continued coverage for inpatient institutional services until they are discharged or transferred, unless OPM determines that their health and safety require an earlier termination of payments [§ 890.1047]; (4) providers who are the sole provider of health care services or the sole source of essential specialized services in a community may apply for a limited waiver of debarment to continue their participation in FEHBP [§ 890.1048]; and (5) covered persons may apply for individual exceptions to permit continued payment of FEHBP funds for services they receive from a debarred provider if equivalent services are not reasonably available to them from a nondebarred provider or if interrupting an ongoing course of treatment by the debarred provider would create a risk to their health [§ 890.1050].

Reinstatement

The proposed rule recognizes two types of reinstatement. First, § 890.1051 implements the provisions of Pub. L. 105–266 authorizing OPM to establish regulations under which debarred providers may be reinstated after

expiration of the term of their debarment. The statute makes all such reinstatements permissive on OPM's part and requires the provider to prove that they meet the criteria of § 890.1051(c). The proposed rule requires the debarred provider to apply for reinstatement. The effective date of a provider's reinstatement is to be established by OPM, but it may not occur before the period of debarment expires.

The second type of reinstatement, addressed in § 890.1052, applies when administrative or legal action occurring after the debarment has the effect of retroactively invalidating the basis for the debarment. This will occur, for example, where a conviction or licensure action that was the grounds for our debarment is overturned on appeal. In this case, the provider may qualify for reinstatement before their period of debarment expires. Also included in this category are cases where a provider excluded by another agency is reinstated by that agency, thus removing the basis for debarment. In all of these situations, OPM will reinstate the provider without an application being filed. The effective date of these “automatic” reinstatements will reflect the date of the event forming the basis for the reinstatement. Therefore, if an appeals court's reversal of a criminal conviction or licensure revocation has the effect of invalidating the action from its inception, we will normally make the reinstatement retroactive to the beginning date of the debarment. However, in the case of a termination of a sanction imposed by another Federal agency, the effective date of the automatic reinstatement will be the date of the other agency's reinstatement. The table in § 890.1053 provides an additional reference aid on these issues.

Regulatory Flexibility Act

I certify that this proposed regulation will not have a significant economic impact on a substantial number of small entities.

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 proposes to amend 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 continues 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.

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

Subpart J—Administrative Sanctions Imposed Against Health Care Providers

Sec.

General Provisions and Definitions

- 890.1001 What are the scope and purpose of these regulations?
- 890.1002 How is this subpart written and organized?
- 890.1003 What terms in this subpart have specialized meanings?

Mandatory Debarments

- 890.1004 What are the grounds for mandatory debarments?
- 890.1005 What is OPM's time limit for initiating a mandatory debarment?
- 890.1006 How will OPM notify me of my proposed debarment?
- 890.1007 What is the minimum period of debarment for mandatory debarments?
- 890.1008 When can the period of a mandatory debarment based on a conviction exceed the statutory minimum period?
- 890.1009 How may I contest OPM's proposal to debar me under a mandatory debarment authority?
- 890.1010 How will the debarring official decide my contest?

Permissive Debarments

- 890.1011 What are the grounds for permissive debarments?
- 890.1012 What are OPM's time limits for initiating a permissive debarment?
- 890.1013 How will OPM decide whether to propose a permissive debarment?
- 890.1014 How will OPM notify me of my proposed debarment under a permissive debarment authority?
- 890.1015 What are the minimum and maximum periods for permissive debarments?
- 890.1016 What aggravating and mitigating factors will OPM consider in making a final determination of the period of my debarment?
- 890.1017 How will OPM determine the period of my debarment based on

revocation or suspension of my professional licensure?

- 890.1018 How will OPM determine the period of debarment for an entity owned or controlled by a sanctioned person?
- 890.1019 How will OPM determine the period of my debarment based on my ownership or control of a sanctioned entity?
- 890.1020 How will OPM determine the period of my debarment based on false, wrongful, or deceptive claims?
- 890.1021 How will OPM determine the period of my debarment based on my failure to provide information needed to resolve claims?
- 890.1022 How may I contest OPM's proposal to debar me under a permissive debarment authority?
- 890.1023 What information will the debarring official consider as part of my contest?
- 890.1024 What standards and burdens of proof apply to my contest?
- 890.1025 When can the debarring official decide my contest without an additional fact-finding proceeding?
- 890.1026 How will the debarring official resolve my contest if a fact-finding proceeding is not required?
- 890.1027 When must the debarring official request a fact-finding proceeding before deciding my contest?
- 890.1028 How will the presiding official conduct the fact-finding proceeding?
- 890.1029 How will the debarring official decide my contest after the fact-finding proceeding?

Suspension

- 890.1030 What is a suspension?
- 890.1031 Under what circumstances may OPM suspend me?
- 890.1032 How long will my suspension last?
- 890.1033 How will OPM notify me of a suspension?
- 890.1034 If I am debarred after being suspended, will the suspension period count as part of the debarment period?
- 890.1035 How may I contest OPM's decision to suspend me?
- 890.1036 What information will the suspending official consider as part of my contest?
- 890.1037 When can the suspending official decide my contest without arranging an additional fact-finding proceeding?
- 890.1038 How will the suspending official resolve my contest if he determines that a fact-finding proceeding is not required?
- 890.1039 Under what circumstances must the suspending official arrange a fact-finding proceeding before deciding my contest?
- 890.1040 How will the presiding official conduct the fact-finding proceeding?
- 890.1041 How will the suspending official decide my contest after the fact-finding proceeding is completed?

Effect of Debarment

- 890.1042 When will my debarment go into effect?
- 890.1043 How does my debarment affect me?

Notifying Outside Parties About Debarment and Suspension Actions

- 890.1044 What entities will OPM notify of my debarment or suspension?
- 890.1045 How will OPM inform persons covered by FEHBP about my debarment or suspension?

Exceptions to the Effect of Debarments

- 890.1046 How does my debarment affect payments to me for services I furnish in emergency situations?
- 890.1047 What special rules apply to me as an institutional provider?
- 890.1048 How may I obtain a waiver of my debarment if I am the sole source of health care services in a community?

Special Exceptions To Protect Covered Persons

- 890.1049 How will FEHBP carriers handle claims for items or services furnished after a provider's debarment?
- 890.1050 How may an FEHBP covered individual request an exception to a provider's debarment?

Reinstatement

- 890.1051 How may I be reinstated when my period of debarment expires?
- 890.1052 Under what circumstances will OPM reinstate me without my filing an application?
- 890.1053 Table of procedures and effective dates for reinstatements.
- 890.1054 What agencies and entities will OPM notify about my reinstatement?
- 890.1055 How may I contest OPM's decision to deny my reinstatement application?

Civil Monetary Penalties and Financial Assessments [Reserved]

Subpart J—Administrative Sanctions Imposed Against Health Care Providers

General Provisions and Definitions

§ 890.1001 What are the scope and purpose of these regulations?

(a) *Scope.* This subpart implements section 8902a of title 5, United States Code, 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 will use the authorities in this subpart to protect the health and safety of the persons who obtain their health insurance coverage through the FEHBP and the financial and programmatic integrity of FEHBP transactions.

§ 890.1002 How is this subpart written and organized?

(a) *Plain language format.* We wrote this subpart in a question-and-answer

format to make it easier for the public and health care providers to use. In this format, the questions comprising most section headings are integral parts of the respective sections and subsections, because the reader cannot interpret the answers without the context of the questions. Therefore, each question and answer are a unified whole with regulatory effect. The tables contained in this subpart also have regulatory effect.

(b) *Words connoting OPM and health care providers.* Unless otherwise indicated, the words “you,” “me,” and “I” connote a health care provider(s) and the word “we” connotes the Office of Personnel Management.

§ 890.1003 What terms in this subpart have specialized meanings?

The following terms have the meanings shown throughout this subpart:

(a) *Carrier* means an entity responsible for operating a health benefits plan described by section 8903 or section 8903a of title 5, United States Code.

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

(c) *Contest* means your request for the debarring or suspending official to reconsider your proposed sanction, its length, or its amount.

(d) *Control interest* means that:

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

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

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

(4) You are a partner in the entity, if it is organized as a partnership;

(5) You are a managing employee of the entity, including but not limited to a general manager, business manager, administrator, or other employee who exercises, either directly or through other employees, operational or managerial control over the activities of the entity or a portion of it;

(6) You have substantive control over an entity or a critical influence over the activities of the entity or some portion of it, whether or not you are employed by the entity; or

(7) You act as an agent of the entity.

(e) *Conviction* or *convicted* means the following, without regard to the pendency or outcome of an appeal (other than a judgment of acquittal based on innocence) or request for relief:

(1) A Federal, State, or local court has entered a judgment of conviction against you for a felony or misdemeanor offense;

(2) A Federal, State, or local court has found you guilty of a felony or misdemeanor offense;

(3) A Federal, State, or local court has accepted your plea of guilty, nolo contendere, or the equivalent to a felony or misdemeanor offense; or

(4) You have entered a first offender, diversion, or other program in which a judgment of conviction for a felony or misdemeanor offense has been withheld.

(f) *Covered individual* means an employee, annuitant, family member, or former spouse covered by a health benefits plan described by section 8903 or section 8903a of title 5, United States Code, or an individual eligible under section 8905(d) of title 5, United States Code.

(g) *Debarment* means a decision by the debarring official to prohibit payment of FEHBP funds to you, based on section 8902a (b), (c), or (d) of title 5, United States Code and this subpart.

(h) *Debarring official* means an OPM employee authorized to issue debarments under this subpart.

(i) *FEHBP* means the Federal Employees Health Benefits Program.

(j) *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 or other institutional entities that furnish supplies and services.

(k) *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.

(l) *Limited waiver* means an approval by the debarring official of your request to receive payments of FEHBP funds for items or services rendered in a defined geographical area, notwithstanding your debarment, because you are the sole community provider or sole source of essential specialized services in a community.

(m) *Mandatory debarment* means a debarment based on section 8902a(b) of title 5, United States Code. OPM must debar providers who have committed violations listed in that section.

(n) *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.

(o) *Permissive debarment* means a debarment based on sections 8902a(c) or (d) of title 5, United States Code. The debarring official has discretionary authority to debar providers who have committed violations listed in those sections.

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

(q) *Reinstatement* means a decision by OPM to terminate your debarment and restore your eligibility to receive payment of FEHBP funds.

(r) *Sanction or administrative sanction* means any administrative action authorized by section 8902a of Title 5, United States Code, or this subpart, including debarment, suspension, civil monetary penalties, and financial assessments.

(s) *Should know or should have known* means that you act(ed) in deliberate ignorance or reckless disregard of the truth or falsity of information. For the purpose of imposing a sanction when the grounds incorporate a “should know” standard, no proof of specific intent to defraud is required to determine that you have committed an actionable violation.

(t) *Sole community provider* means that you are the only source of primary medical care within a defined service area.

(u) *Sole source of essential specialized services in a community* means that you are the only source of specialized health care items or services in a defined service area and items or services furnished by a non-specialist cannot be substituted without jeopardizing the health or safety of covered individuals.

(v) *Suspending official* means an OPM employee authorized to issue suspensions under this subpart.

Mandatory Debarments

§ 890.1004 What are the grounds for mandatory debarments?

OPM must debar you if any of the factors listed in paragraph (a) or (b) of this section applies to you.

(a) *Conviction for criminal offenses.* You have been convicted under Federal or State law of a criminal offense relating to:

(1) Fraud, corruption, breach of fiduciary responsibility, or other

financial misconduct in connection with the delivery of a health care service or supply;

(2) Neglect or abuse of patients in connection with the delivery of a health care service or supply;

(3) Interference with or obstruction of an investigation or prosecution of a criminal offense described in paragraph (a)(1) or (a)(2) of this section; or

(4) Unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

(b) *Administrative sanction currently in effect.* You are currently debarred, suspended, or otherwise excluded from any Federal procurement or nonprocurement activity, within the meaning of section 2455 of the Federal Acquisition Streamlining Act of 1994.

(c) *Direct involvement with an OPM program unnecessary.* Your conviction of an offense listed in paragraph (a) of this section or your receiving a sanction described in paragraph (b) of this section need not have involved an FEHBP covered individual or transaction, or any other OPM program, in order to serve as a basis for mandatory debarment.

§ 890.1005 What is OPM's time limit for initiating a mandatory debarment?

OPM must issue you 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 must be issued within 6 years of the date of the conviction. If the basis is another agency's suspension, debarment, or exclusion, the OPM notice must be issued within 6 years of the effective date of the other agency's action.

§ 890.1006 How will OPM notify me of my proposed debarment?

(a) *Written notice.* We will inform you of your proposed debarment by written notice sent not less than 30 days prior to the proposed effective date.

(b) *Contents of the notice.* The notice will contain the following items of information:

- (1) Effective date of your debarment;
- (2) Minimum length of your debarment;
- (3) Basis for your debarment;
- (4) The provisions of law and regulation authorizing OPM to debar you;
- (5) Effect of the debarment;
- (6) Your right to contest the debarment to the debarring official;
- (7) Your right to request that we reduce the period of your debarment, if it exceeds the minimum required by law or this subpart; and

(8) The procedures you must follow to apply for reinstatement at the end of your period of debarment, or to seek a waiver of the debarment on the basis that you are the sole health care provider in a community or the sole source of essential specialized services.

(c) *Methods of sending notice.* We will send the notice of proposed debarment to you by one of the following means:

- (1) First class mail or, at our option, express delivery service, to your last known street or post office address;
- (2) Facsimile transmission (fax), if you have furnished us a current fax number; or
- (3) E-mail, if you have furnished us a current e-mail address.

(d) *Delivery to attorney, agent, or representatives.*

(1) If we are proposing to debar you as an individual, we may send the notice of proposed debarment to you or to any other person you have designated to act on your behalf during debarment proceedings.

(2) If we are proposing to debar an entity, we may send the notice of proposed debarment to any owner, partner, director, officer, registered agent for service of process, attorney, or managing employee.

(e) *Presumed timeframes for receipt of notice.* When we compute deadlines associated with your receipt of notices we send to you, we will apply the timeframes specified in paragraphs (e)(1) through (e)(3) of this section.

(1) We will consider any notice we send by first class mail or express delivery service to your last known street or post office address as having been received by you not later than 5 days after we send it.

(2) We will consider any notice we send by facsimile (fax) transmission to a number that you provided to us as having been received by you when we transmit it.

(3) We will consider any notice we send by e-mail to an e-mail address that you furnished to us as having been received by you when we transmit it to your email service provider.

(f) *Procedures if notice cannot be delivered.*

(1) If we learn that a notice we sent to you was undeliverable as addressed or routed, we will make reasonable efforts to obtain a current and accurate address or to use alternative methods of transmitting the notice to you.

(2) If we are unable to deliver a notice to you after reasonable followup efforts, we will presume that you received it 5 days after the date of our final attempt to send it to you.

§ 890.1007 What is the minimum period of debarment for 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 mandatory debarment based on another Federal agency's debarment, suspension, or exclusion remains in effect until the originating agency terminates its sanction.

§ 890.1008 When can the period of a mandatory debarment based on a conviction exceed the statutory minimum period?

(a) *Aggravating factors.* OPM may debar you for longer than the 3-year minimum period if aggravating factors are associated with the basis for your debarment. The factors we consider to be aggravating are as follows:

(1) The FEHBP incurred a financial loss as the result of the acts underlying your conviction, or similar acts that were not adjudicated. In determining whether a financial loss occurred, we will not consider any amounts of restitution you may have paid;

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

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

(4) You have a prior record of criminal, civil, or administrative adjudication of related offenses or similar acts; or

(5) The actions underlying your 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 debarring you for longer than 3 years, we will also consider whether mitigating factors may justify reducing your debarment period to not less than 3 years. The only factors that we will consider to be mitigating are as follows:

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

(2) Court records, including associated sentencing reports, contain an official determination that you had a physical, mental, or emotional condition before or during the commission of the offenses underlying the conviction that reduced your level of culpability; or

(3) Your 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.

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

§ 890.1009 How may I contest OPM's proposal to debar me under a mandatory debarment authority?

(a) *Contesting the debarment.* Within 30 days after receiving written notice that we intend to debar you under a mandatory debarment authority, you may submit information, documents, and written arguments in opposition to the proposed debarment. Our notice will give you specific information about where and how to submit this material. If you do not file a timely contest, your debarment will become effective as stated in the notice, without further action by OPM.

(b) Requesting a reduction of the debarment period. If we propose to debar you for a period longer than the 3-year minimum required by § 890.1007(a), you may request us to reduce the debarment period to not less than 3 years. You may make this request even if you are not contesting the debarment itself. In addition to providing written material, you may appear before the debarring official personally or through a representative to present oral arguments in support of your contest. Our notice will give you specific information about arranging an in-person presentation.

§ 890.1010 How will the debarring official decide my contest?

(a) *Prior adjudication is dispositive.* Evidence indicating that you were the subject of a prior adjudication of a type described in § 890.1004 fully satisfies the standard of proof for a mandatory debarment.

(b) *Debarring official's decision.* The debarring official will issue a written decision, based on all the information in the administrative record, within 30 days after the administrative record is complete. This decision period may be extended for good cause.

(c) *No further administrative proceedings.* The debarring official's decisions regarding mandatory debarment and the period of your debarment are final and are not subject to further administrative review.

Permissive Debarments

§ 890.1011 What are the grounds for permissive debarments?

(a) *Licensure actions.* We may debar you if either paragraph (a)(1) or (a)(2) of this section applies to you. We may take this action even if you retain current and valid professional licensure in another State(s).

(1) A State licensing authority revokes, suspends, restricts, or declines to renew your license to provide health care items or services for reasons related to your professional competence, professional performance, or financial integrity; or

(2) You surrender your license to provide health care items or services while a formal disciplinary proceeding concerning your professional competence, professional performance, or your financial integrity is pending before a State licensing authority.

(b) *Ownership or control interests.*

(1) We may debar a health care provider that is an entity because a person who holds an ownership or control interest of 5 percent or more in the entity has been:

(i) Convicted of a criminal offense listed in § 890.1003(a) as a basis for debarment;

(ii) Debarred under this subpart from participating in the FEHBP; or

(iii) Assessed with a civil monetary penalty under section 8902a of title 5, United States Code and this subpart.

(2) We may debar you as an individual if both paragraphs (b)(2)(i) and (b)(2)(ii) of this section apply to you.

(i) You have an ownership or control interest in an entity that has been:

(A) Convicted of a criminal offense listed in § 890.1004(a) as a basis for debarment;

(B) Debarred under this subpart from participating in the FEHBP; or

(C) Assessed with a civil monetary penalty under section 8902a of title 5, United States Code and this subpart; and

(ii) You know or should know of the actions underlying the entity's conviction, debarment, or civil monetary penalty.

(c) *False, deceptive, or wrongful claims practices.* We may debar you if, in connection with a claim or claims submitted to a FEHBP carrier, you commit any of the following violations:

(1) You charge for health care items or services in an amount substantially in excess of your customary charges for those items or services;

(2) You charge for health care items or services that are substantially in excess of the needs of the covered individual to whom they are furnished;

(3) You charge for health care items or services whose quality fails to meet professionally recognized standards for items or services of that type;

(4) You charge for health care items or services that you knew or should have known were not furnished to the covered individual as claimed;

(5) You knowingly make, or cause to be made, a false statement or misrepresentation of a material fact reflected in a claim;

(6) You charge for items or services that you knew or should have known were furnished while you were debarred from participation in the FEHBP under this subpart; or

(7) You charge for items and services that you knew or should have known are in violation of the applicable charge limitations of section 8904(b) of title 5, United States Code.

(d) *Failure to furnish required information.* We may debar you if you knowingly fail to provide any information requested by a FEHBP carrier or OPM to determine:

(1) Whether a payment or reimbursement is properly payable; or

(2) The proper amount of payment or reimbursement that may be due.

§ 890.1012 What are OPM's time limits for initiating a permissive debarment?

(a) *Licensure cases.* If the basis for your proposed debarment is a licensure action, we must issue you a notice of proposed debarment within 6 years of the effective date on which a State licensing authority revoked, suspended, restricted, or declined to renew your license, or the date on which you surrendered your 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, we must issue 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 your proposed debarment involves a claim filed with a FEHBP carrier, we must issue you a notice of proposed debarment within 6 years of the date you presented the claim for payment to the covered person's FEHBP carrier.

(d) *Failure to furnish requested information.* If the basis for your proposed debarment involves your failure to furnish information requested by an FEHBP carrier or OPM, we must issue you a notice of proposed

debarment within 6 years of the date on which the carrier or OPM requested you to furnish the information in question.

§ 890.1013 How will OPM decide whether to propose a permissive debarment?

(a) *Review factors.* We will consider the factors listed in paragraphs (a)(1) through (a)(4) of this section in deciding whether to propose your debarment under a permissive debarment authority. The absence of a factor will be considered neutral; that is, it will have no effect on our decision.

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

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

(3) The extent to which you pose 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 your debarment that must be considered in the interests of fairness.

(b) *Specialized review in certain cases.* In determining whether to propose debarment under § 890.1011(c)(2), providing items or services substantially in excess of the needs of a covered individual, or § 890.1011(c)(3), providing items or services that fail to meet professionally-recognized quality standards, we will obtain the input of trained reviewers, based on written medical protocols developed by physicians. If we cannot reach a decision on this basis, we will consult with a physician in an appropriate specialty area.

§ 890.1014 How will OPM notify me of my proposed debarment under a permissive debarment authority?

We will apply the provisions of § 890.1006 to notify you of your proposed permissive debarment.

§ 890.1015 What are the minimum and maximum periods for permissive debarments?

We will not issue a permissive debarment for a period of less than one year, unless we specifically determine that a shorter period is in the interests of the FEHBP and its covered individuals. There is no limit on the maximum period of a permissive debarment.

§ 890.1016 What aggravating and mitigating factors will OPM consider in making a final determination of the period of my debarment?

(a) *Aggravating factors.* We will consider the presence of any of the

factors listed in paragraphs (a)(1) through (a)(5) of this section, to represent aggravating circumstances that may support increasing the length of a debarment beyond the periods specified in §§ 890.1016 through 890.1021, respectively. The absence of a factor will have no effect either to increase or lower the nominal period of debarment.

(1) Your 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) You have 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. We will consider matters involving violence, patient abuse, drug abuse, or controlled substances convictions or violations to be particularly serious.

(3) Your 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, we will not consider any amounts of restitution you may have paid.

(4) You filed false, wrongful, or improper claims to FEHBP carriers that were numerous, submitted over a prolonged period of time, part of an on-going pattern of wrongful acts, or of which you were specifically aware or directly responsible.

(5) You attempted to obstruct, hinder, or impede official inquiries into the wrongful conduct underlying your debarment.

(b) *Mitigating factors.* The presence of either of the factors identified in paragraphs (b)(1) or (b)(2) of this section may support shortening your period of debarment to not less than one year. Their absence will have no effect to either raise or lower the period of debarment.

(1) Your 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; and

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

§ 890.1017 How will OPM determine the period of my debarment based on revocation or suspension of my professional licensure?

(a) *Indefinite term of debarment.* Subject to the exceptions in paragraph (b) of this section, your debarment under § 890.1011(a) will be for an indefinite period coinciding with the period during which your license is revoked, suspended, restricted, surrendered, or otherwise not in effect in the State whose action against your license formed the basis for our debarment.

(b) *Aggravating circumstances.* If any of the aggravating circumstances in § 890.1016 apply to you, we may debar you for a stated period beyond the duration of your licensure revocation or suspension.

§ 890.1018 How will OPM determine the period of debarment for an entity owned or controlled by a sanctioned person?

We will determine the length of debarments issued under § 890.1011(b)(1) as described in paragraphs (a) through (c) of this section.

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

(b) *Debarment based on 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 § 890.1004(a)(1) through (a)(4), will be 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 entity itself.

(c) *Debarment based on 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, will be 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 entity itself.

§ 890.1019 How will OPM determine the period of my debarment based on my ownership or control of a sanctioned entity?

We will determine the period of a debarment issued under § 890.1011(b)(2) as described in paragraphs (a) through (c) of this section.

(a) *Concurrent with entity's debarment.* If your debarment is based on your ownership or control of a debarred entity, we may debar you for a period concurrent with the entity's debarment. If any of the aggravating or mitigating circumstances identified in § 890.1016 applies to you personally and was not considered in setting the period of the entity's debarment, we may debar you for a period longer or shorter than the entity's debarment.

(b) *Debarment based on conviction of entity.* If your debarment is based on the criminal conviction of an entity you own or control for an offense listed in § 890.1004(a)(1) through (a)(4), we will debar you 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 you as an individual.

(c) *Debarment based on civil monetary penalty against entity.* If your debarment is based on a civil monetary penalty imposed on an entity you own or control, we will debar you for 3 years, subject to adjustment on the basis of the aggravating and mitigating circumstances listed in § 890.1016 that apply to you as an individual.

§ 890.1020 How will OPM determine the period of my debarment based on false, wrongful, or deceptive claims?

Debarments under § 890.1011(c) will be for a period of 3 years, subject to adjustment based on the aggravating and mitigating factors listed in § 890.1016.

§ 890.1021 How will OPM determine the period of my debarment based on my failure to provide information needed to resolve claims?

Debarments under § 890.1011(d) will be for a period of 3 years, subject to adjustment based on the aggravating and mitigating factors listed in § 890.1016.

§ 890.1022 How may I contest OPM's proposal to debar me under a permissive debarment authority?

(a) *Right to contest your proposed debarment.* You may challenge a proposed debarment by filing a written contest with the debarring official during the 30-day notice period. If you do not file a timely contest, the debarment will become effective as stated in the notice, without further action by OPM.

(b) *Challenging the length of your proposed debarment.* You may contest the length of the proposed debarment, even if you are not challenging the debarment itself, or you may challenge both the length of a debarment and the debarment itself in the same contest. However, issues involving the length of a debarment are not subject to a fact-finding hearing under § 890.1028.

§ 890.1023 What information will the debarring official consider as part of my contest?

(a) *Documents and oral and written arguments.* You may submit documents and written arguments in opposition to the proposed debarment and/or its length, and you may appear personally or through a representative before the debarring official to provide any other information you believe to be relevant.

(b) *Specific factual basis for contesting the proposed debarment.* You must identify the specific facts that contradict the basis for your proposed debarment as stated in your notice of proposed debarment. A general or unsupported denial that the basis for debarment applies to you does not raise a genuine dispute over facts material to the debarment, and the debarring official will not give it any probative weight.

(c) *Mandatory disclosures.* In addition to any other information that you submit during the contest, you must inform the debarring official of any of the matters in paragraphs (c)(1) through (c)(3) of this section, that applies to you. If you fail to provide applicable information, OPM may initiate further legal or administrative action against you.

(1) Any existing, proposed, or prior exclusion, debarment, penalty, or other sanction imposed on you 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 you have a control interest, as that term is defined in § 890.1003(d).

§ 890.1024 What standards and burdens of proof apply to my contest?

(a) *Preponderance of evidence.* OPM must prove by a preponderance of the evidence that you have committed a sanctionable violation.

(b) *Demonstrating basis for not imposing debarment.* If OPM establishes an evidentiary basis for your debarment,

you have the burden of demonstrating that you are presently responsible to participate in FEHBP and that debarment is not necessary to protect the interests of the program and its covered individuals.

§ 890.1025 When can the debarring official decide my contest without an additional fact-finding proceeding?

A fact-finding proceeding in addition to your presentation of arguments, documents, and information to the debarring official is not required in the following circumstances:

(a) *Previously adjudicated facts.* Your 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 on your part that constitutes a waiver of your right to a due process adjudication, such as surrender of your professional license during the pendency of a disciplinary hearing, entering a guilty plea or confession of judgment in a judicial proceeding, or entering a settlement agreement to resolve or forestall a civil, criminal, or administrative action.

(b) *No dispute of material facts.* Your contest does not identify a *bona fide* dispute concerning facts material to the basis for your proposed debarment.

§ 890.1026 How will the debarring official resolve my contest if a fact-finding proceeding is not required?

(a) *Debarring official's procedures.* If the debarring official determines that a fact-finding proceeding is not required, you will receive the final decision on your contest within 30 days after the record closes for submitting evidence, arguments, and information as part of your contest. The debarring official may extend this timeframe for good cause.

(b) *No further administrative review available.* There are no further administrative proceedings after the presiding official's final decision. If you are adversely affected by the decision, you may appeal to the appropriate United States District Court under section 8902a(h)(2) of title 5, United States Code.

§ 890.1027 When must the debarring official request a fact-finding proceeding before deciding my contest?

(a) *Criteria for holding fact-finding proceeding.* The debarring official must request another OPM official ("presiding official") to hold a fact-finding proceeding if both paragraphs (a)(1) and (a)(2) of this section apply.

(1) Facts material to your 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 will be a senior official who is able to conduct informal adjudicative processes. He will have had no previous contact with your proposed debarment or the contest.

(c) *Effect on contest.* The debarring official must defer his decision on your contest pending the results of the fact-finding proceeding.

§ 890.1028 How will the presiding official conduct the fact-finding proceeding?

(a) *Informal proceeding.* The presiding official will 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 can consider only the genuinely disputed facts identified by the debarring official as relevant to the basis for your debarment. Matters previously adjudicated or about which there is no *bona fide* dispute on the record are outside the presiding official's jurisdiction.

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

(d) *Record of proceedings.* The presiding official will make an audio recording of the proceedings before him. If you wish to have a transcribed record, you may purchase it.

(e) *Presiding official's findings.* The presiding official will determine all of the disputed facts identified by the

debaring 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 must issue a written report of all findings of fact to the debarring official.

§ 890.1029 How will the debarring official decide my contest after the fact-finding proceeding?

(a) *Findings must be accepted.* The debarring official must accept the presiding official's findings of fact, unless they are arbitrary, capricious, or clearly erroneous. In such a case, the debarring official must remand the material facts to the presiding official for additional proceedings in accordance with § 890.1028.

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

(c) *Debaring official's final decision.*

(1) The debarring official must observe the evidentiary standards and burdens of proof stated in § 890.1024 in reaching a final decision to debar.

(2) In any case where the final decision is to debar, the debarring official has the discretion to set the period of debarment, subject to the factors identified in §§ 890.1015 through 890.1021.

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

(e) *No further administrative proceedings.* If you are adversely affected by the debarring official's final decision, you may appeal to the appropriate United States District Court under section 8902a(h)(2) of title 5, United States Code.

Suspension

§ 890.1030 What is 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 you.

(c) *Effect equivalent to debarment.* The effect of a suspension is the same as the effect of a debarment. You may not receive payment from FEHBP funds for items or services you furnish to covered individuals during the period of your suspension.

§ 890.1031 Under what circumstances may OPM suspend me?

(a) *Basis for suspension.* We may suspend you if both paragraphs (a)(1) and (a)(2) of this section apply.

(1) We obtain reliable evidence indicating that one of the grounds for suspension listed in paragraph (b) of this section applies to you; and

(2) The suspending official determines under paragraph (c) of this section that immediate action to suspend you is necessary to protect the public interest.

(b) *Grounds for suspension.* Evidence of any of the following situations may constitute grounds for a suspension:

(1) You are indicted for or convicted of a criminal offense that is a basis for mandatory debarment under this subpart;

(2) You are indicted for or convicted of a criminal offense that reflects a risk to the health, safety, or well-being of covered individuals who may obtain health care services or supplies from you; or

(3) OPM obtains credible evidence indicating, in the judgment of the suspending official, that you have committed a violation that would warrant your debarment under this subpart. This evidence 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 you from participating in its programs 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 you. He does not need to make a specific finding of immediacy or necessity before suspending you, and he may draw reasonable inferences from the nature of the alleged misconduct and from your actual or potential transactions with the FEHBP.

§ 890.1032 How long will my suspension last?

(a) *Initial period.* The suspending official will establish the initial term of all suspensions as an indefinite period not to exceed 12 months.

(b) *Formal legal proceedings not initiated.* If formal legal or administrative proceedings have not begun against you within 12 months

after the effective date of your 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 you while you are suspended, the suspension may continue indefinitely, pending the outcome of those proceedings.

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

§ 890.1033 How will OPM notify me of a suspension?

(a) *Written notice.* OPM will send you a written notice of suspension under the procedures and methods described in § 890.1006(c)–(e).

(b) *Contents of notice.* The suspension notice will contain the following information:

- (1) That you are suspended, effective on the date of the notice;
- (2) The initial period of your suspension;
- (3) The basis for your suspension;
- (4) The provisions of law and regulation authorizing your suspension;
- (5) The effect of your suspension; and
- (6) Your rights to contest the suspension.

§ 890.1034 If I am debarred after being suspended, will the suspension period count as part of the debarment period?

The debarring official may consider your contiguous period of suspension when determining the length of your debarment.

§ 890.1035 How may I contest OPM's decision to suspend me?

(a) *Filing a contest of the suspension.* You may challenge a suspension by filing a contest, in writing, with the suspending official not later than 30 days after you receive notice of your suspension. The suspension will remain in effect during the contest, unless it is rescinded by the suspending official.

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

§ 890.1036 What information will the suspending official consider as part of my contest?

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

(b) *Specific factual basis for contesting the suspension.* You must identify specific facts that contradict the basis for your suspension as stated in the suspension notice. A general denial that the basis for the suspension applies to you will not raise a genuine dispute over facts material to the suspension, and the suspending official will not give it any probative weight.

(c) *Mandatory disclosures.* You must inform the suspending official of any information described in paragraphs (c)(1) through (c)(3) of this section that applies to you:

- (1) Any existing, proposed, or prior exclusion, debarment, penalty, or other sanction imposed 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 proceeding not referenced in the suspension notice that arose from facts relevant to the basis for the suspension stated in the notice; and
- (3) Any entity in which you have a control interest, as that term is defined in § 890.1003(d).

§ 890.1037 When can the suspending official decide my contest without arranging an additional fact-finding proceeding?

In the situations described in paragraphs (a) through (c) of this section apply, the suspending official may decide your contest without an additional fact-finding process.

(a) *Previously adjudicated facts.* Your suspension is based on an indictment or on facts determined by a prior adjudication in which you were 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 on your part that constitutes a waiver of your right to a due process adjudication, such as surrender of your professional license during the pendency of a disciplinary hearing, entering a guilty plea or

confession of judgment in a judicial proceeding, or entering a settlement agreement to resolve or forestall a civil, criminal, or administrative action. 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 cognizant U.S. Attorney, 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 factual dispute.* The information, arguments, and documents you submit to the suspending official do not establish that there is a *bona fide* factual dispute regarding facts material to your suspension.

§ 890.1038 How will the suspending official resolve my contest if he determines that a fact-finding proceeding is not required?

(a) *Written decision.* The suspending official will issue a written decision on your contest within 30 days after the record closes for submitting evidence, arguments, and information as part of your contest. He 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 Under what circumstances must the suspending official arrange a fact-finding proceeding before deciding my contest?

(a) *Disputed material facts.* If the suspending official determines that your contest establishes the existence of a *bona fide* factual dispute regarding facts material to the suspension, he must arrange for them to be resolved through a fact-finding process conducted by another OPM official ("presiding official"), unless the restriction of § 890.1037(b) applies.

(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. He will be a senior official qualified to conduct informal administrative adjudications. The presiding official must have had no previous contact with your suspension or the contest.

(c) *Decision on contest deferred.* The suspending official must defer any

decision on your contest pending the results of the fact-finding process.

§ 890.1040 How will the presiding official conduct the fact-finding proceeding?

(a) *Informal proceeding.* The presiding official will 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 can consider only the genuinely disputed facts identified by the suspending official as relevant to the basis for your suspension. Matters previously adjudicated or about which there is no *bona fide* dispute on the record are outside the presiding official's jurisdiction.

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

(d) *Record of proceedings.* The presiding official will make an audio recording of the proceedings before him. If you wish to have a transcribed record, you may purchase it.

(e) *Presiding official's findings.* Within 30 days after the record of the fact-finding proceeding closes, the presiding official will forward to the suspending official a written report of findings that resolves all of the disputed material facts. You will receive a copy of this report simultaneously.

§ 890.1041 How will the suspending official decide my contest after the fact-finding proceeding is completed?

(a) *Presiding official's findings must be accepted.* The suspending official must 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 must 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 your suspension will not prevent OPM from subsequently debarring you, or any other Federal

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

Effect of Debarment

§ 890.1042 When will my debarment go into effect?

(a) *Minimum notice period.* Your debarment will take effect no 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 that situation, the notice will specifically inform you that the debarring official decided to shorten or eliminate the 30-day notice period.

(b) *Uncontested debarments.* If you do not contest the proposed debarment, it will 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 you contest the proposed debarment, it will 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 your debarment to be effective while your contest is pending.

§ 890.1043 How does my debarment affect me?

(a) *FEHBP payments prohibited.* You may not receive payment, directly or indirectly, from FEHBP funds for items or services that you provide to a covered individual on or after the effective date of your debarment. Also, you may not accept an assignment of a claim for items or services furnished to a covered individual during the period of your debarment. These restrictions remain in effect until you are reinstated by OPM.

(b) *Governmentwide effect.* Your debarment precludes you 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. Other agencies may grant you a waiver or exception under their own regulations, to permit you to participate in their programs.

(c) *Civil or criminal liability.* You may be subject to civil monetary penalties or criminal liability if you knowingly file claims, cause claims to be filed, or accept payment from FEHBP carriers for items or services that you provide to a covered individual on or after the effective date of your debarment.

Notifying Outside Parties About Debarment and Suspension Actions

§ 890.1044 What entities will OPM notify of my debarment or suspension?

We will notify the entities listed in paragraphs (a)–(d) of this section about your debarment or suspension.

- (a) FEHBP carriers;
- (b) 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 How will OPM inform persons covered by FEHBP about my debarment or suspension?

After receiving OPM's notice of your debarment or suspension, FEHBP carriers must inform covered individuals who have previously obtained items or services from you of the following:

- (a) That you are debarred or suspended;
- (b) The minimum period remaining in your period of debarment; and
- (c) That OPM must terminate your debarment or suspension before FEHBP funds can be paid for items or services you furnish to covered individuals.

Exceptions to the Effect of Debarments

§ 890.1046 How does my debarment affect payments to me for services I furnish in emergency situations?

You may receive FEHBP funds paid for items or services you furnish on an emergency basis if the FEHBP carrier serving the covered individual determines that:

- (a) Your 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 What special rules apply to me as an institutional provider?

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

(b) *Health and safety of covered individuals.* If the debarring official determines that the health and safety of covered persons would be at risk if they

remain in a debarred institution, OPM may terminate your FEHBP payments for them at any time.

(c) *Notice of payment limitations.* If we limit any payment under paragraph (b) of this section, we will inform you of our decision in writing.

(d) *Finality of debarring official's decision.* The debarring 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 How may I obtain a waiver of my debarment if I am the sole source of health care services in a community?

(a) *Application required.* You may apply for a limited waiver of your debarment at any time after you receive OPM's notice of proposed debarment. Suspended providers are not eligible to request a waiver of their suspension.

(b) *Criteria for granting waiver.* To receive a waiver, you must clearly demonstrate that you meet all of the following criteria:

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

(2) A limited waiver of the 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 your debarment will not recur; and

(4) There is no basis under this subpart for continuing your 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 you are the *sole community provider* or *sole source of essential specialized services*.

(d) *Governmentwide effect continues.* A limited waiver applies only to your FEHBP transactions. Even if we waive your debarment for FEHBP purposes, the governmentwide effect under section 2455 of the Federal Acquisition Streamlining Act of 1994 continues for all other Federal agencies' procurement and nonprocurement programs and activities.

(e) *Waiver rescinded if circumstances change.* We will rescind the limited waiver when any of the conditions on which it is based no longer apply. Examples include, but are not limited to the following:

(1) You cease to provide 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 you are no longer the sole provider or sole source; or

(3) The actions that formed the basis for your debarment, or similar acts,

recur. If we rescind the limited waiver, your debarment will resume full effect for all FEHBP transactions.

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

(g) *Application is necessary for reinstatement.* You must apply for reinstatement at the end of your period of debarment, even if your limited waiver is in effect when your 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 How will FEHBP carriers handle claims for items or services furnished after a provider's debarment?

(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 sanctioned 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, the carrier must send a written notice to the covered individual that includes the following information:

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

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

(3) That 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 their provider's debarment;

(4) That FEHBP carriers must 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 this subsection, 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) OPM must terminate the provider's debarment or suspension before FEHBP funds can be paid for items or services furnished to covered individuals.

§ 890.1050 How may an FEHBP covered individual request an exception to a provider's debarment?

(a) *Request by a covered individual.* Any individual in whose name an FEHBP subscription is issued may submit a request through the FEHBP carrier for continued payment of items or services furnished by a debarred provider to any person covered under that enrollment. Requests will not be accepted for continued payments to suspended providers.

(b) *OPM action on the request.* OPM will consider the recommendation of the FEHBP carrier before acting on the request. To be approved, the request must demonstrate that at least one of the situations in paragraphs (b)(1) or (b)(2) of this section applies.

(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 is not altered by an exception.

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

(e) *Finality of debarring official's decision.* The debarring official's decision on an exception request is not subject to further administrative review or reconsideration.

Reinstatement

§ 890.1051 How may I be reinstated when my period of debarment expires?

(a) *Application required.*

Reinstatement is not automatic when the minimum period of your debarment expires. You must apply in writing to

OPM, supplying specific information about the reinstatement criteria outlined in paragraph (c) of this section.

(b) *Reinstatement date.* We will accept your reinstatement application no earlier than 60 days before the nominal expiration date of your debarment. However, in no case will we reinstate you before your minimum period of debarment expires.

(c) *Reinstatement criteria.* Your reinstatement application must clearly demonstrate that you meet all of the following criteria:

(1) There are reasonable assurances that the actions resulting in your debarment have not and will not recur;

(2) There is no basis under this subpart for continuing your debarment; and

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

(d) *Written notice of OPM action.* We will inform you in writing of our decision on your reinstatement application.

(e) *Limitation on reapplication.* If we deny your reinstatement application, you may not reapply until 1 year after the date of our decision.

§ 890.1052 Under what circumstances will OPM reinstate me without my filing an application?

If any of the situations identified in paragraphs (a) through (c) of this section occurs, you should inform the debarring official immediately. OPM will reinstate you without the need for a

reinstatement application in these circumstances. OPM will send you a written notice concerning the effective date of your reinstatement.

(a) *Conviction reversed.* The conviction on which your debarment was based is reversed or vacated on appeal.

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

(c) *Court order.* A Federal court orders OPM to stay, rescind, or terminate your debarment.

§ 890.1053 Table of procedures and effective dates for reinstatements.

The following table indicates the procedures and effective dates for reinstatements under this subpart:

Basis for debarment	Application required?	Effective date
Period of debarment expires	Yes	After debarment expires.
Conviction reversed on appeal	No	Retroactive (start of debarment).
Other agency sanction ends	No	Ending date of sanction.
Court order ending debarment	No	Retroactive (start of debarment).

§ 890.1054 What agencies and entities will OPM notify about my reinstatement?

We will inform the FEHBP carriers, government agencies and other organizations that were originally notified of your debarment.

§ 890.1055 How may I contest OPM's decision to deny my reinstatement application?

(a) *Obtaining reconsideration of the initial decision.* You, or a representative acting on your behalf, may submit documents and written arguments to the debarring official, opposing the decision to deny your reinstatement application. In addition, you and/or your representative may request to appear in person to present oral arguments to the debarring official. You must submit these materials within 30 days after the date of the decision notice in paragraph (a) of this section.

(b) *Debarring official's final decision on reinstatement.* The debarring official will issue a final written decision, based on the entire administrative record, within 30 days of the record closing 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 is not subject to further administrative review or reconsideration.

Civil Monetary Penalties and Financial Assessments [Reserved]

[FR Doc. 01-30529 Filed 12-11-01; 8:45 am]

BILLING CODE 6325-52-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR PART 1310

[DEA-203C]

RIN 1117-AA52

Establishment of a Threshold for Gamma-Butyrolactone; Correction

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of proposed rulemaking; correction.

SUMMARY: This document corrects the proposed rule "Establishment of a Threshold for Gamma-Butyrolactone" (DEA-203P) which DEA published in the *Federal Register* on October 24, 2001 (66 FR 53746). The proposed rule concerned the establishment of a threshold for the List I chemical gamma-butyrolactone (GBL).

FOR FURTHER INFORMATION CONTACT:

Frank L. Sapienza, Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone (202) 307-7183

SUPPLEMENTARY INFORMATION:

Background

On Wednesday, October 24, 2001, DEA published a Notice of Proposed Rulemaking titled "Establishment of a Threshold for Gamma-Butyrolactone" in the *Federal Register* (66 FR 53746). The proposed regulations that are subject to this correction suggest adding new paragraphs at Title 21, Code of Federal Regulations (CFR), 1310.04(g)(1) and 21 CFR 1310.08. These paragraphs suggest that no threshold be established for GBL and that certain transactions in GBL be excluded from the definition of a regulated transaction, respectively. However, a previous Final Rule, published on Wednesday October 17, 2001, already added paragraphs at 21 CFR 1310.04(g)(1)(ii)-(iv) and 21 CFR 1310.08(j). Therefore, to alleviate any confusion which might arise by publication of this proposed rule, DEA is redesignating the text of the paragraphs in the proposed rule to align with the currently amended Code of Federal Regulations. No substantive changes to the proposed text are occurring in this correction. In addition, one typographical error is being corrected.

Accordingly, the publication on October 24, 2001 of the proposed rule (DEA-203P), which was the subject of FR Doc. 01-26741, is corrected as follows: