

# Proposed Rules

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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-AJ42

### Financial Sanctions of Health Care Providers Participating in 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). This proposed rule addresses the financial sanctions provisions of Section 2 of Public Law 105-266, the Federal Employees Health Care Protection Act of 1998, which authorize OPM to impose civil monetary penalties and financial assessments against health care providers who commit certain types of violations against the FEHBP. In concert with the previously-issued regulations on debarment and suspension authorities, this proposed rule will afford OPM a full range of administrative remedies to deter and rectify provider misconduct within FEHBP. The regulatory framework established by this issuance provides appropriate due process protections to assure that the amounts of financial sanctions are assessed through a consistent and equitable process, the Government's financial interests are fully protected, and financial sanctions are imposed only after an opportunity for an administrative hearing on all facts material to the basis for the sanctions.

**DATES:** Submit comments on or before April 11, 2003.

**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](mailto:debar@opm.gov).

**FOR FURTHER INFORMATION CONTACT:** David Cope, by telephone at 202-606-2851, by FAX at 202-606-2153, or by e-mail at [debar@opm.gov](mailto:debar@opm.gov).

#### SUPPLEMENTARY INFORMATION:

#### Background

Section 2 of the Federal Employees Health Care Protection Act of 1998 (Pub. L. 105-266), enacted a comprehensive set of administrative sanctions authorities for OPM to use in combating health care provider fraud within the FEHBP. These authorities fall into two broad categories—exclusion, comprising suspension and debarment from participation in FEHBP, and financial sanctions, comprising civil monetary penalties and financial assessments.

On December 12, 2001, OPM published proposed regulations at 66 FR 64160 to implement the exclusion-based authorities. The current issuance contains proposed regulations for the financial sanctions authorities. When issued as final rules, the two regulatory packages shall fully implement all of the administrative sanctions enacted by Pub. L. 105-266.

Administrative sanctions enable an agency to protect its financial and program interests against individuals or entities that have committed certain types of actionable violations specified by statute. In addition, health care provider sanctions also protect the health care interests of persons covered through the FEHBP. Both of these interests are specifically recognized by the proposed regulations as principal objectives of sanctions activities.

Exclusion-related sanctions recognize past misconduct and protect against future violations by removing the subject of the sanction from further participation in FEHBP. (In the context of the FEHBP sanctions statute, "participation" means receiving funds. Thus, an excluded provider may treat FEHBP covered persons, but may not be paid FEHBP funds for any items or services provided after the effective date of the exclusion.)

Financial sanctions have similar "look back" and "look forward" purposes. Pub. L. 105-266 established two categories of financial sanctions—assessments and civil monetary penalties. As stated in § 890.1060(b) of the proposed rule, assessments are intended to recognize all of the losses, costs, and damages OPM incurred as the

result of a provider's wrongful conduct, although the amount assessed is not limited by the dollar value of those items. Civil monetary penalties are lump-sum amounts that, while computed by reference to improper claims, are intended principally to deter future violations.

Section 890.1060(e) states that financial sanctions may be imposed in addition to all other criminal, civil, and administrative remedies that any state or Federal agency may apply to the same conduct by a provider.

#### Bases for Financial Sanctions

Pub. L. 105-266 sets forth three bases for imposing financial sanctions. All relate in some degree either to claims actually filed with FEHBP carriers or to conduct associated with claims, even if no claim was filed. In contrast to exclusion-based sanctions, where the underlying violations need not have affected FEHBP, financial sanctions may be imposed only for violations that directly involve FEHBP enrollees, carriers, or funds.

As outlined in § 890.1061 of the proposed rule, the bases for financial sanctions are (1) fraudulent or improper claims; (2) false or misleading statements in or about claims; and (3) failure to provide claims-related information that is required by law to be disclosed.

#### Imposing Financial Sanctions

While some exclusion-based sanctions are mandatory (*i.e.*, OPM must debar a provider who commits certain types of violations), imposition of any financial sanction is always permissive with the debarring official. Sections 890.1062(b) through (d) identify the factors that the debarring official must consider in deciding whether to impose financial sanctions in a given case. Most of these factors are identified specifically by Pub. L. 105-266. We have added § 890.1062(d) to reflect the particular importance OPM attaches to protecting FEHBP covered persons from untrustworthy providers.

#### Amounts of Financial Sanctions

Section 890.1063 reflects the statutory limits on amounts of financial sanctions. Assessments may not exceed twice the amount claimed for each item or service "involved" in the claims on which the assessment is based. Civil monetary penalties may not exceed

\$10,000 for each “involved” item or service. As the statute makes clear, penalties and assessments may be imposed concurrently for the same violations.

#### **Setting the Amount of Financial Sanctions Within Statutory Limits**

Federal courts have regularly upheld the use of financial sanctions authority in health care claims cases to produce a total of assessments and penalties that substantially exceeds the amount of Federal funds that had been paid improperly. Thus, the debarring official has authority to set sanctions amounts across very wide permissible limits, and decisions regarding the amounts may carry significant financial consequences for providers. Section 890.1064 is intended to provide the guidance necessary for the debarring official to exercise this authority in an equitable and consistent manner. Section 890.1064(b) sets the overall policy context for determining amounts of financial sanctions, including recovery of all damages, losses, and costs incurred by OPM as a result of sanctionable violations, and imposition of an additional penalty amount to deter future violations. Section 890.1064(c) emphasizes that “damages, losses, and costs” are to be given the broadest possible interpretation. Section 890.1064(d) summarizes the factors that the debarring official must consider in determining the amount of financial sanctions. These consist of (1) the factors identified in § 890.1062 as material to determining whether to impose financial sanctions; (2) the level of aggravation or mitigation reflected in the circumstances of the case; (3) the need to deter future misconduct; and (4) the provider’s financial situation. This latter factor is not referred to in Pub. L. 105–266, but the concept appears in several other agencies’ financial sanctions regulations, including the Department of Health and Human Services’ Medicare provider sanctions authorities. Section 890.1064(e) addresses aggravating and mitigating factors as a series of benchmarks, describing the types of violations that would warrant assessments and penalties at the higher and lower ends of the statutory range.

#### **Procedures**

The procedures for proposing and imposing financial sanctions generally mirror those used for permissive debarments. OPM initiates a financial sanction action by sending written notice of the proposed sanction. As is the case with exclusion-based sanctions, there is a 6-year limitation period for

proposed financial sanctions. Section 890.1066 explains the limitation period and specifies the contents and methods of delivery of the notice. Section 890.1067 sets out the options available to providers upon receiving a notice of proposed sanctions. In brief, the provider may either formally contest the sanctions or seek to settle or compromise them through negotiation with the debarring official. As indicated in § 890.1068, if the subject of the proposed sanction takes no action during the 30-day notice period, OPM may immediately finalize the sanction, without further right of appeal or recourse by the provider.

#### **Contesting Proposed Financial Sanctions**

Sections 890.1069 through 1071 address contests of proposed financial sanctions. They incorporate by reference most of the provisions of §§ 890.1022 through 1029, regarding contests of proposed permissive debarments.

As indicated by § 890.1069, the subject of the proposed sanction may contest it simply by submitting documents to the debarring official, or, at the provider’s option, may also make a personal appearance, with or without counsel, to present testimony and oral arguments.

Section 890.1070(a) states that (as is the case in contests of proposed debarments), facts previously adjudicated in due process proceedings (*e.g.*, criminal or civil proceedings, administrative hearings, or actions that constitute waiver of the right to a due process proceeding) are binding on the debarring official in deciding the contest.

Section 890.1070(b) sets “preponderance of the evidence” as the standard of proof for decisions on contests.

Section 890.1070(c) states that the amounts of penalties and assessments proposed in OPM’s notice to the provider effectively establish a ceiling on the size of financial sanctions that may ultimately be imposed. The debarring official cannot increase the proposed amount under any circumstances, and has the discretion to impose a lower amount if evidence in the administrative record so warrants.

Section 890.1071 applies to contests of financial sanctions the same decisionmaking methodologies established for contests of proposed debarments in §§ 890.1026 through 1029. The debarring official shall decide the contest without a further proceeding if there are no disputed material facts. If material facts are in dispute, the debarring official must refer them to a

hearing officer who has had no prior involvement in the case, to conduct a due process hearing. The hearing process under § 890.1071(c) tracks that used to resolve disputed material facts in contests of proposed debarments. The hearing officer reports the facts found to the debarring official, who must accept and apply these findings in reaching a final decision on the contest.

#### **Appeals of Final Decisions**

Section 890.1072 states the right of judicial appeal provided in the FEHBP sanctions statute. Any provider on whom a final decision of the debarring official imposes any financial sanction may appeal to the appropriate U.S. district court, unless the provider’s ability to appeal has been foreclosed by their failure to administratively contest a proposed sanction in a timely manner.

#### **Collecting Payment of Financial Sanctions**

Section 890.1073 outlines the methods OPM shall use to collect financial sanctions. These include a mutually agreed payment schedule and other administrative debt collection procedures, including offset against monies owed by other Federal agencies. If administrative efforts do not resolve the debt, 5 U.S.C. 8902a(i) authorizes the Department of Justice to file a civil lawsuit in the appropriate U.S. district court to enforce payment. As stated in 890.1073(e), the statute further specifies that monies collected in respect of financial sanctions are to be paid to the Employees Health Benefits Fund.

#### **Regulatory Flexibility Act**

I certify that this proposed regulation will not have a significant economic impact on a substantial number of small entities, because the financial sanctions are limited to the portion of health care providers’ activities involving transactions with the Federal Employees Health Benefits Program.

#### **Executive Order 12866, Regulatory Review**

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

#### **List of Subjects in 5 CFR Part 890**

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

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. In Subpart J, §§ 890.1060 through 1073 are added to read as follows:

**Subpart J—Administrative Sanctions Imposed Against Health Care Providers**

Sec.

**Civil Monetary Penalties and Financial Assessments**

- 890.1060 Purpose and scope of civil monetary penalties and assessments.
- 890.1061 Bases for penalties and assessments.
- 890.1062 Deciding whether to impose penalties and assessments.
- 890.1063 Maximum amounts of penalties and assessments.
- 890.1064 Determining the amounts of penalties and assessments to be imposed on a provider.
- 890.1065 Deciding whether to suspend or debar a provider in a case that also involves penalties and assessments.
- 890.1066 Notice of proposed penalties and assessments.
- 890.1067 Provider contests of proposed penalties and assessments.
- 890.1068 Effect of not contesting proposed penalties and assessments.
- 890.1069 Information the debarring official shall consider in deciding a provider's contest of proposed penalties and assessments.
- 890.1070 Burdens of proof and standards of evidence in contests of proposed penalties and assessments.
- 890.1071 Deciding contests of proposed penalties and assessments.
- 890.1072 Further appeal rights after final decision on penalties and assessments.
- 890.1073 Collecting penalties and assessments.

**Civil Monetary Penalties and Financial Assessments**

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

(a) *Civil monetary penalty.* A civil monetary penalty is an amount that OPM may impose on a health care

provider who commits one of the violations listed in § 890.1061. Penalties are intended to protect the integrity of FEHBP by deterring repeat violations by the same provider and by reducing the likelihood of future violations by other providers.

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

(c) *Use of terminology.* In §§ 890.1060 through 1072

*Penalty* means "civil monetary penalty;" and

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

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

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

**§ 890.1061 Bases for penalties and assessments.**

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

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

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

**§ 890.1062 Deciding whether to impose penalties and assessments.**

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

(b) *Factors to be considered.* In deciding whether to impose penalties and assessments against a provider that

has committed one of the violations identified in § 890.1061, OPM shall consider:

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

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

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

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

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

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

(7) Such other factors as justice may require.

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

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

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

**§ 890.1063 Maximum amounts of penalties and assessments.**

OPM may impose penalties and assessments in amounts not to exceed those set forth in 5 U.S.C. 8902a(d).

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

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

(b) *Objectives of penalties and assessments.* In setting the amounts of penalties and assessments to be imposed on a provider, the debarring official shall be guided by the overall objectives of:

(1) Assuring that the United States is fully compensated for all damages, losses, and costs associated with a provider's violations; and

(2) Deterring future violations by the provider on whom the penalties and

assessments were imposed, and other health care providers.

(c) *Determining damages, losses, and costs.* In determining the appropriate amount of compensation due to the United States, OPM shall include, at the minimum:

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

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

(3) All costs associated with administrative review of a case, including every phase of the administrative sanctions process described by this subpart.

(d) *Factors considered in determining amounts of penalties and assessments.* In determining the amounts of penalties and assessments to impose on a provider OPM shall consider:

(1) All of the factors set forth in § 890.1062(b) through (d);

(2) The provider's personal financial situation, or, in the case of violations committed by an entity, the entity's financial situation;

(3) The Government's interests in deterring future misconduct by providers; and

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

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

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

(2) Violations for which a provider had direct knowledge of the material facts (for example, submitting claims that the provider knew to contain false, inaccurate, or misleading information), or for which the provider did not cooperate with OPM's or an FEHBP carrier's investigations, constitute aggravating circumstances. OPM may

consider violations where the provider did not have direct knowledge of the material facts, or in which the provider cooperated with post-violation investigative efforts, to be less serious.

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

(4) A pattern of conduct reflecting numerous improper claims, high-dollar false claims, or improper claims involving several types of items or services constitutes aggravating circumstances. OPM may consider a small number of improper claims for relatively low dollar amounts to be less serious.

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

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

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

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

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

**§ 890.1066 Notice of proposed penalties and assessments.**

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

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

the notice within 6 years of the date of the actions on which the proposed penalties and assessments are based.

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

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

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

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

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

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

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

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

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

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

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

**§ 890.1067 Provider contests of proposed penalties and assessments.**

(a) *Contesting proposed sanctions.* A provider may formally contest the proposed penalties and assessments by sending a written notice to the debarring official within 30-days after receiving the notice described in § 890.1066. The debarring official shall apply the administrative procedures set forth in §§ 890.1069 through 1071 to decide the contest.

(b) *Contesting debarments and financial sanctions concurrently.* If OPM proposes debarment and penalties and assessments in the same notice, the provider may contest both the debarment and the financial sanctions in the same proceeding. If the provider pursues a combined contest, the

requirements set forth in §§ 890.1022 through 1024, as well as this section, apply.

(c) *Settling or compromising proposed sanctions.* As part of or in lieu of a contest, a provider may offer to settle the proposed penalties and assessments. The debarring official has authority to settle or compromise proposed sanctions at any time before issuing a final decision under § 890.1071.

**§ 890.1068 Effect of not contesting proposed penalties and assessments.**

(a) *Proposed sanctions may be implemented immediately.* If a provider does not inform the debarring official of his intention to contest proposed penalties and assessments within the 30-day period set forth by § 890.1067(a), OPM may implement the proposed sanctions immediately, without further procedures.

(b) *Debarring official sends notice after implementing sanctions.* The debarring official shall send the provider written notice, via certified return receipt mail or express delivery service, stating:

(1) The amount of penalties and assessments imposed;

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

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

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

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

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

(b) *Mandatory disclosures.* In addition to any other information submitted during the contest, the provider shall inform the debarring official in writing of:

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

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

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

**§ 890.1070 Burdens of proof and standards of evidence in contests of proposed penalties and assessments.**

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

(b) *Preponderance of the evidence.* To impose penalties and assessments, the debarring official must find that the preponderance of the evidence in the entire official record demonstrates that the provider committed a sanctionable violation described in § 890.1061.

(c) *Final decision regarding the amount of penalties and assessments.* If the preponderance of the evidence establishes that a provider committed a sanctionable violation for which penalties and assessments may be imposed, the debarring official may impose financial sanctions in amounts not exceeding those proposed in the notice issued to the provider under § 890.1066.

**§ 890.1071 Deciding contests of proposed penalties and assessments.**

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

(b) *Deciding the contest without further proceedings.* To decide the contest without further administrative proceedings, the debarring official must determine that the evidentiary record contains no *bona fide* dispute as to material facts. A "material fact" is a fact essential to determining whether a provider committed a sanctionable violation for which penalties and assessments may be imposed. If there are no *bona fide* disputed material facts, the debarring official shall apply the provisions of § 890.1070 to reach a final decision of the contest.

(c) *Bona fide dispute about material facts.* If the debarring official determines that the official record contains a *bona fide* dispute about any fact material to the basis for the proposed penalties and

assessments, a fact-finding hearing shall be held to resolve the disputed facts. The provisions of §§ 890.1027(b) and (c), 1028, and 1029(a) and (b) govern such hearings.

(d) *Debarring official's decision after fact-finding hearing.* After receiving the results of the fact-finding hearing, the debarring official shall apply the provisions of § 890.1070 to reach a final decision of the contest.

**§ 890.1072 Further appeal rights after final decision to impose penalties and assessments.**

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

**§ 890.1073 Collecting penalties and assessments.**

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

(b) *No agreement on payment schedule.* In the absence of an agreed-upon payment schedule, OPM shall collect penalties and assessments under its regular procedures for resolving debts owed to the Employees Health Benefits Fund.

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

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

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

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**DEPARTMENT OF AGRICULTURE**

**Animal and Plant Health Inspection Service**

**7 CFR Part 360**

[Docket No. 02-067-1]

**Noxious Weeds; Cultivars of Kikuyu Grass**

**AGENCY:** Animal and Plant Health Inspection Service, USDA.