

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

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

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

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

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

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

Suggestions Regarding Unrelated Legislation

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

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

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

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

Informing Providers of Sanctions Action

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

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