

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

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

#### Effective Date of Debarment Orders

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

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

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

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

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

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

#### Aggravating and Mitigating Factors

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

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

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