

provider's ability to contest the proposed length of his or her debarment is not limited in any way by the aggravating and mitigating factors listed in §§ 890.1008 and 1016.

In regard to the treatment of restitution by these regulations, the professional organization posed a hypothetical example involving restitution of amounts received by a provider because of a "billing error." This example reflects an inaccurate premise. In fact, receipt of an incorrect payment of FEHBP funds due to a *bona fide* billing error is not a sanctionable violation, and these regulations would not apply in such a situation. However, if a provider receives payments of FEHBP funds because of false, fraudulent, deceptive, or otherwise wrongful claims that form the basis for a debarment, §§ 890.1008 and 1016 authorize the debarring official to consider the resultant financial loss to the Government as an aggravating factor. Because the actual amount of the improper payments reflects the seriousness of the provider's violation, the regulations do not provide for crediting any post-violation restitution in calculating the amount of the financial loss. However, it is appropriate to recognize restitution made as part of a provider's post-violation cooperation with law enforcement authorities under the mitigating factors in §§ 890.1008(b)(3) and 1016(b)(1). To the extent that the proposed regulation may not have clearly conveyed this meaning, we have reworded both §§ 890.1008 and 1016 to reflect unambiguously that restitution is an aspect of cooperation with law enforcement authorities that may be considered mitigating for purposes of computing a proposed period of debarment.

Length of Permissive Debarments

One of the professional organizations commented that the wording of the proposed 890.1015 was inconsistent with the underlying statutory provisions, to the extent that it could restrict the discretion of the debarring official in setting the length of debarments under permissive debarment authorities. In every case based on a permissive debarment authority, Public Law 105-266 allows the debarring official full discretion to debar or not debar, and, if he elects to debar, to set the period of the debarment without limitations as to length.

While we did not intend the proposed § 890.1015 to establish a mandatory minimum debarment period for permissive debarments, nor to limit the debarring official's discretion in any other way, we agree with the

commenter's observation that the proposed wording invited such an interpretation. Accordingly, we have revised § 890.1015 to clarify that the debarring official possesses full discretionary decisionmaking authority to establish the length of permissive debarments in every case.

Matters To Be Treated as Prior Adjudications

The proposed § 890.1025 sets forth the criteria which the debarring official will use to determine if OPM must conduct a fact-finding hearing to resolve a provider's administrative appeal of a debarment. Public Law 105-266 requires that every material fact on which a debarment is based be adjudicated in an appropriate administrative proceeding. However, OPM will not readjudicate facts determined in prior due process proceedings, such as criminal or civil actions or professional licensure actions, or facts to which the provider stipulated. Both professional associations objected to the wording of the proposed § 890.1025(a)(4), which would treat settlement agreements entered into by a provider to resolve civil or administrative actions as tantamount to adjudications, even if they contain no factual stipulations or admissions. Although the commenters did not so indicate, identical language also appeared in the proposed § 890.1037(a), regarding prior adjudications in the context of administrative appeals of suspensions. We agree with the commenters that these passages are inconsistent with the current state of the law. Therefore, we have modified the final text of both §§ 890.1025(a)(4) and 890.1037(a) to indicate that settlement agreements may be deemed to be waivers of adjudication only if they contain stipulations of facts establishing that a sanctionable violation occurred.

Informing FEHBP Enrollees about Provider Debarments

The proposed § 890.1045 required FEHBP carriers to notify their enrollees who have previously obtained items or services from a debarred provider of the provider's debarment, and specified certain items of information that must be included in the notification. An FEHBP carrier and the health insurance industry association both suggested that this section be modified to require debarred providers to notify the FEHBP enrollees with whom they deal of their debarment. This would relieve the carriers of the effort and cost associated with the notification responsibility.

OPM does not have statutory authority to directly regulate provider conduct in this manner. In fact, the proposed § 890.1045 was drawn directly from 5 U.S.C. 8902a(j), which requires OPM to issue regulations placing responsibility on the FEHBP carriers for informing enrollees of provider debarments. Therefore, we are not adopting this recommendation.

As an alternate suggestion, the health insurance industry association recommended that, if carriers must inform enrollees of provider debarments, the proposed § 890.1045 be modified to permit carriers to target their notifications in some manner. The literal wording of § 890.1045 would have required carriers to notify all enrollees who had ever received items or services from a debarred provider, but the commenter suggested that such a practice would involve excessive time and expense. Instead, the industry association suggested targeting notices to enrollees who have (1) incurred claims with providers that OPM deemed to present a risk to FEHBP members or (2) recently received services from debarred providers.

We believe this comment is well-founded. Our experience under the common rule has revealed that early enrollee notification is absolutely vital to carrying out the purpose of debarments. This is even more clearly the case under these regulations, because 5 U.S.C. 8902a(j) requires enrollee claims for items or services furnished by a debarred provider to be paid by FEHBP carriers if the enrollee was unaware of the provider's debarment. Since FEHBP enrollees generally need no prior approval or clearance to obtain covered services from a health care provider, they create an obligation on the part of their FEHBP carrier to pay claims simply by receiving such services. Well-targeted notice to potential patients regarding the debarment of a provider appears to be the most efficient means of reducing the incidence of enrollee contact with debarred providers.

Of the targeting criteria suggested by the industry association, we do not believe that we would consistently have sufficient information to reliably designate certain providers as "high risk." Further, such a practice could be perceived by providers as carrying a potentially stigmatizing effect beyond the reasonable needs of the sanctions process. In contrast, notifying enrollees who have recently obtained items and services from debarred providers appears to offer a reasonable approach to diminishing FEHBP payments to those providers, without the risk of