

assessed a civil monetary penalty under the FEHBP sanctions statute. One commenter expressed the belief that this provision “creates serious opportunities for abuse.” However, this proposed regulatory section directly restated the provisions of 5 U.S.C. 8902a(c)(2). The rewritten § 890.1011(b) simply cites the statutory provisions authorizing debarment based on ownership or control interests—5 U.S.C. 8902a(c)(2) and (3)—thus removing a substantial amount of unnecessary text without altering the intent or effect of the provision.

(3) Proposed § 890.1011(b)(2), authorizing permissive debarment of an individual provider who holds an ownership or control interest in an entity that has been debarred, convicted of a sanctionable offense, or assessed a civil monetary penalty under the FEHBP provider sanctions statute, if the individual knew or should have known of the entity’s violations. One commenter characterized this provision as “even more offensive” than the proposed § 890.1011(b)(1). In fact, this regulatory provision directly restates the provisions of 5 U.S.C. 8902a(c)(3). As noted in the preceding paragraph, we have revised the proposed § 890.1011(b) to consist simply of a reference to the statutory provisions authorizing debarment based on ownership and control interests, without restating the rather lengthy statutory text.

(4) Proposed § 890.1011(c), authorizing permissive debarment for certain enumerated claims-related violations. One commenter suggested that this provision would permit debarment based on “a single billing error.” In the proposed rule, § 890.1011(c) restated the statutory wording of the seven bases for permissive debarment established by 5 U.S.C. 8902a(c)(4) and (5) and (d)(1) and (2). As reworded in the final rule, § 890.1011(c) consists simply of a citation to those sections of the statute. Once again, we would note that a careful reading of these regulations and FEHBP sanctions law does not support the conclusion that a good faith error could be the basis for a sanctions action.

(5) Proposed § 890.1011(d), authorizing permissive debarment for a provider’s failure to furnish claims-related information requested by OPM or an FEHBP carrier. While the commenter did not indicate the precise nature of its objection to this provision, in fact the cited passage in the proposed rule directly restated 5 U.S.C. 8902a(d)(3). As it appears in the final rule, § 890.1011(d) consists only of a citation to that statutory provision.

Miscellaneous Revisions Identified by OPM Comments

As the result of comments from OPM sources, we have slightly modified the following sections of the regulatory package.

(1) The proposed §§ 890.1005 and 1012 address implementation of the 6-year statutory limitations period for mandatory and permissive debarments, respectively. In each section, we have replaced every instance of the phrase “issue * * * a notice of proposed debarment” with “send * * * a notice of proposed debarment.” The term “send” is used uniformly in proposed § 890.1006 to denote transmission of official notice, and its corresponding use in §§ 890.1005 and 1012 clarifies that the limitations period is tolled when OPM places a notice of proposed debarment into the transmission channels authorized by § 890.1006.

(2) The proposed § 890.1028(d) describes the manner in which OPM will create an official record of fact-finding hearings associated with permissive debarments. In preparing the regulatory text for the proposed rule, we inadvertently omitted from this section a phrase requiring OPM to furnish the provider with a free copy of an audio recording of the hearing. We have restored that intended wording in the final rule. Further, we have changed the final sentence of § 890.1028(d) to indicate that OPM will arrange for transcription of the recording if the provider requests it, but that the provider must pay the cost of the transcription.

(3) The proposed § 890.1052(a) addressed the procedures for reinstating providers whose debarments were based on convictions that have been reversed on appeal. An OPM reviewer noted that the proposed wording of this section did not account for the full statutory definition of “conviction” in 5 U.S.C. 8902a(a)(1)(C), which indicates that a provider is considered to have been convicted “without regard to the pendency or outcome of any appeal.” Upon a literal reading, this passage would seem to support the interpretation that a provider remains convicted—and thus debarred—even if an appeals court reverses or vacates the conviction on which the debarment is based. However, such an interpretation would clearly produce anomalous results.

The actual intent of the statutory wording is to permit a mandatory debarment to remain in effect until the appeals process, including possible retrials, has concluded. This avoids the possibility of sequential retractions and

reinstatements of debarments which could result from differing appeals court rulings as a case progresses through the appeals process. Therefore, as noted elsewhere in this preamble, we have expanded the wording of § 890.1052(a) to reflect that OPM will reinstate a provider on the basis of a reversed conviction only if a final appeals ruling has been issued and there is no further possibility of a retrial or if an appeals court enters a judgment of acquittal based on the provider’s innocence.

(4) We added a definition of “days” in § 890.1003 to support the distinction between the “calendar day” timeframes applied to most deadlines established by the regulation and the “business day” timeframe associated with presumed receipt of notices of proposed sanctions under § 890.1006(e)(2).

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities, because it affects only health care providers’ 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.

Office of Personnel Management.

Kay Coles James,
Director.

Accordingly, OPM is amending 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 is revised 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, unless otherwise noted.

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