

\$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.