



The Surety & Fidelity
Association of America
Serving the Industry Since 1908

H.R. 1970---Surety Bonding Helps Prevent Medicare Fraud and Waste

Surety Bonding for Suppliers of Medical Equipment under Medicare

The Centers for Medicare and Medicaid Services (CMS) issued its final surety bond regulation in January 2009. The Balanced Budget Act of 1997 requires that suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) to patients under Medicare must post a surety bond in an amount not less than \$50,000. The law provides that the Secretary may waive the bond in only one instance – when the supplier provides a comparable surety bond under state law. The regulation requires a surety bond in the amount of \$50,000 for each National Provider Identifier (“NPI”). Bonds for new NPIs must be furnished by May 4, 2009, and bonds for existing NPIs must be furnished by October 2, 2009. The bond is intended to assure that suppliers of items to Medicare beneficiaries are legitimate and financially sound.

At the same time it announced the bonding regulation, the CMS also announced that it had revoked the billing privileges of over 1,300 medical equipment suppliers in California and Florida. Between 2005 and 2007, these DMEPOS suppliers were paid \$265 million. The CMS also announced that it suspended payments to home health agencies in Miami. The 2007 Medicare error rate report found almost \$1 billion in improper payments for medical equipment and supplies.

How the Bond Works

The two primary functions of this bond are: 1) to prequalify the license applicants who will comply with the statutory and regulatory obligations under Medicare, and in so doing, prevent losses; and 2) to provide some reimbursement for losses, up to the penal sum of the bond, if the supplier defaults on its obligations. The surety will provide the CMS with the pre-qualification of suppliers that are financially sound and will perform as required. The bond supports the CMS function of eliminating suppliers that abuse the system. The bond also will give CMS the benefit of the bond amount being available to cover return of over payments and any civil penalties assessed.

The bond provides a strong incentive for medical equipment suppliers to comply with the Medicare rules because if there is a legitimate claim against their bond the supplier must indemnify or repay the surety for any claims paid by the surety under the bond. The supplier that does not perform as required has his or her own assets at stake for the results of non-compliance. That kind of financial incentive, combined with the surety’s prequalification, is a valuable new tool for CMS in fighting waste and fraud in the Medicare program. A January 1999 report from the General Accounting Office (GAO)

reaffirmed the value of the surety bond as a way of reducing fraud and waste in the Medicare program.

The cost of a bond will vary by surety company depending on each company's underwriting and rating factors. As a general rule, the cost of the DMEPOS bond will range from 1% to 2% of the bond amount on an annual basis. That would be \$500 to \$1,000 for the bond. All insurance companies must charge the rates that they have on file and that have been approved by the state insurance departments.

Exemptions to the Surety Bond Requirement Should Remain Limited

In the regulatory process, representatives of several of the suppliers and their associations asked to be exempted from the surety bond requirement. The arguments used in support of an exemption from the surety bond requirement included the following: (1) the persons or entities were otherwise regulated and/or publicly traded; (2) such entities were too small to present a risk of fraud; (3) the bond was an added cost of doing business; (4) the entities were not the type of supplier that has been involved in the cases of Medicare fraud; and (5) the suppliers were located in rural areas.

The CMS granted no broad exemptions to the bonding requirement as the legislative history of the Balanced Budget Act indicated that Congress wanted the bond to apply to all suppliers. (Note that the statute provided the Secretary only one basis on which to waive the bond.) The CMS exempted only the following: 1) government operated DMEPOS suppliers that have provided CMS a comparable surety bond under state law; 2) physicians and non-physician practitioners (NPPs); 3) state licensed orthotic and prosthetic personnel operating in private practice making custom-made orthotics and prosthetics; and 4) state licensed physical and occupational therapists. The first supplier under the exception must show that it has provided a comparable surety bond under state law. The other excepted entities are not supplying equipment in the open market or as their core business. To qualify for the last three exemptions, all persons in these groups must be in private practice and furnishing items only as a part of their professional service to their patients. If such professionals are employed by a supplier, the supplier would have to be bonded. The statutory language and legislative history also indicated that Congress intended an exemption for such licensed professionals.

H.R. 1970 would exempt state licensed pharmacies and mail order pharmacies from the bond requirements. The pharmacists were unsuccessful in achieving an exemption in the regulations and now seek in Congress what they could not obtain from the federal agencies in charge of giving effect to the law. This will open the door for every supplier to do the same. In addition, the nature of the pharmacies' business is a supply business that carries with it the exposure for billing fraud and abuse for which the statutory bond requirement was intended. Furthermore, the pharmacy business is far outside the scope of exceptions narrowly crafted by CMS.

What is Needed Now

The Balanced Budget Act of 1997 was enacted to fight fraud and waste in the Medicare and Medicaid programs. It has taken over a decade to fully implement the law, including

the required surety bond. Rather than exempting large groups of suppliers from this law, now is the time to let the surety bond operate to assure that only solvent and legitimate suppliers of medical equipment and supplies are available to Medicare patients.