Medicare Program; Surety Bond Requirement for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) [CMS-6006-F]

As mandated by section 4312(b) of the Balanced Budget Act of 1997 (BBA), CMS is implementing section 1834(a)(16) of the Social Security Act (the Act), requiring the majority of DMEPOS suppliers to furnish CMS with a surety bond in the amount of $50,000. Existing suppliers must submit bonds to NSC by October 2, 2009, while new suppliers must have bonds in place no later than May 4, 2009.

Background

In the January 20, 1998 Federal Register (63 FR 2926) a proposal for implementation of 1834 of the Act as published, as mandated by section 4312(a) of the BBA. This proposal was to require a DME supplier to provide to CMS a surety bond valued at not less than $50,000. The proposed rule would require an individual surety bond for each NPI number for which a billing number was issued.

As published in a final rule titled "Medicare Program; Additional Supplier Standards (HCFA-6004-FC)" in the October 11, 2000 Federal Register, CMS elected against incorporation of the surety bond provision and announced that a new proposed rule would be issued at a later date. In the August 1, 2007 Federal Register (72 FR 42001) a proposed rule titled "Medicare Program; Surety Bond Requirement for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)" was published. This proposed rule was to implement regulations requiring suppliers of DMEPOS to furnish CMS with a surety bond valued at no less than $65,000, with the increased value justified by a CPI adjustment.

On January 2, 2009, CMS published CMS-6006-F, the final rule implementing the surety bond requirement for DMEPOS suppliers. The minimum bond rate has been reset to $50,000.

CMS' Intentions

CMS offers the following justification for the implementation of the surety bond requirement:

1. Limit the Medicare program risk to fraudulent DME suppliers;
2. Enhance the Medicare enrollment process to help ensure that only legitimate DME suppliers are enrolled or are allowed to remain in the Medicare program;
3. Ensure that the Medicare program recoups erroneous payments that result from fraudulent or abusive billing practices by allowing CMS or its designated contractor to seek payments from a surety up to the penal sum;
4. Help ensure that Medicare beneficiaries receive products and services that are considered reasonable and necessary from legitimate DME suppliers.

It should also be noted that CMS does acknowledge that approximately 28.5% of all NPI numbers will discontinue supplying to Medicare Part B beneficiaries as a result of the implementation of the surety bond requirement along with accreditation requirements.

Provisions of "Medicare Program; Surety Bond Requirement for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)" (CMS-6006-F)

- Certain suppliers of DMEPOS will be required to submit to NSC a surety bond valued at no less than $50,000. Existing suppliers must provide the bond no later than October 2, 2009; new suppliers (including those relocating or changing ownership) must provide the bond no later than May 4, 2009.

- Any supplier not carrying a surety bond for any length of time will be deemed noncompliant. Medicare billing privileges will be revoked for the period during which the supplier is noncompliant. The DMEPOS supplier will be held liable for any items or services provided during any gap in coverage (suppliers will not be permitted to charge beneficiaries for items or services provided during any gap in service).

- A tiered scale has been implemented, requiring DMEPOS who have been deemed to be of "significantly higher risk" to the Medicare program to provide NSC with a surety bond of value exceeding the minimum requirement of $50,000.

    - Suppliers with at least one adverse legal action against them in the ten years preceding are deemed to be of "high risk." With each occurrence the required value of the surety bond will increase at a rate of $50,000.
        - For example: Two 'occurrences' would equate to the necessity of a surety bond valued at $150,000 or {$50,000 + (2 X $50,000)}
    - NSC will notify suppliers needing to obtain an elevated bond by mail no later than May 2, 2009.
    - Final adverse actions, by definition, include the following:
        - I. A Medicare-imposed revocation of any Medicare billing privileges;
        - II. Suspension or revocation of a license to provide health care by any State licensing authority;
        - III. Revocation or suspension by an accreditation organization;

IV. A conviction of a Federal or State felony offense (as defined in §424.535(a)(3)(A)(i)) within the ten years preceding enrollment, revalidation, or re-enrollment; or
V. An exclusion or debarment from participating in a Federal or State health care program.

- Suppliers will be required to use a firm from the Federal surety approval list.

- The surety bond must be a continuous bond as opposed to annual bond.

- The surety is liable for unpaid claims, civil money penalties (CMPs) and assessments taking place during the bond or rider. The surety's liability is limited, however, to the penal sum of the bond.

- CMS reserves the right to immediately draw claims from the surety to collect debts or in the event that it finds sufficient evidence of wrongdoing; CMS need not wait for the entire appeals process to exhaust itself. It should also be noted that CMS has not granted the surety the same appeal rights that the supplier has.

- The surety may cancel the bond at any time by providing 30-days written notice to the supplier and NSC. This would effectively cancel a DME's billing privileges and release the surety from any future liability. The surety would, however, remain responsible for any liabilities prior to cancellation.

  - Revocation of a supplier's billing privileges is not effective until fifteen days after the date on the revocation notice letter (sent from NSC to DMEPOS supplier). This allows time for a corrective action plan (CAP) in the event that an error has been made.

Exemptions

- Surety bond exceptions have been implemented for the following:

  - Physicians and non-physician practitioners (NPPs) when supplying only to their own patients;
  - State-licensed O&P personnel providing only custom-made orthotics and prosthetics and supplies related to custom-made O&P devices;
    - This exception does not include DMEs employing State-licensed O&P personnel.
  - Physical therapists and occupational therapists who are providing orthotics, prosthetics and supplies only to their own patients;
  - DMEPOS suppliers operated by a Federal, State, local, or tribal government agency if the DME supplier has provided CMS with a comparable surety bond required under State law.
    - This exception applies only if the supplier does not have any unpaid claims, CMPs, or assessments.

Financial Impact

CMS' expectations are that impact of the surety bond requirement on suppliers to be $106.2 million for year 1 and $102.3 million in subsequent years. This estimation is based on the number of NPI numbers in place today, taking into account the following assumptions:

- A large number of suppliers (25,188) will elect to discontinue servicing Medicare beneficiaries;
- A large number of suppliers (15,241) qualify for one of the exceptions noted above;
- The average annual cost of a $50,000 surety bond will be $1,500;

Note: The $1,500 cost published by CMS does not necessarily reflect current market price for such surety bond. Multiple variables will impact the true cost to each provider.

- No more than one-half of one percent of all suppliers subject to the surety bond requirement has had a final adverse action imposed against theme within the last ten years;
- Year 1 paperwork costs will be approximately $4.1 million and annual implementation costs thereafter to be approximately $180,000 per year;

Industry Impact

- The elimination of more than 28,000 suppliers will undoubtedly have an impact on the availability of goods and services to Medicare beneficiaries.

- The requirement of $50,000 surety bond for all suppliers, regardless of size or billing history, produces a much greater burden on small independent suppliers than it does large-volume DMEs.

- Costs associated with the surety bond requirement, along with the impending accreditation requirement and implementation of Round 1.2 of competitive bidding, are likely to push a significantly larger number of suppliers away from the industry than CMS' analysis would indicate.

VGM Insurance will be offering surety bonds to fit your needs, and will have more information coming next week.