



NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

1828 L Street, NW, Suite 720
Washington, DC 20036-5104
Tel: 202.686.3700
Fax: 202.686.3656
www.nasbp.org

Via Express Mail

September 25, 2007

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-6006-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Re: **File Code CMS-6006-P: Medicaid Program; Surety Bond Requirement for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) (72 Fed. Reg. 42001, August 1, 2007)**

Dear Centers for Medicare & Medicaid Services (CMS):

On behalf of the National Association of Surety Bond Producers (NASBP), an international trade association established in 1942 and located in Washington, DC serving a membership of firms with personnel of over 5,000 surety agents and brokers, who specialize in providing surety bonds to companies and individuals for construction and other commercial purposes, I am writing to express our support for the spirit and direction of the proposed rule published in the Federal Register on August 1, 2007, concerning a surety bond requirement for suppliers of durable medical equipment. To that end, NASBP offers general and specific comments to assist CMS to understand surety underwriting terminology, practices, and concerns so that the final rule will represent a workable and attractive standard for the surety community.

General Comments on Proposed Rule

The proposed rule correctly notes the substantial benefit of prequalification that will inure to the Medicare program by requiring that suppliers undergo the underwriting analysis of surety companies to obtain surety bonds to meet enrollment requirements. Each surety is an independent business and will adopt different underwriting approaches; however, as a general principle, sureties will examine the applicant's experience, financial resources, and character in considering whether to grant surety credit. Such careful scrutiny will indeed help to differentiate suppliers. The proposed bond amount of \$65,000 is realistic and establishing a bond requirement for the majority of DMEPOS suppliers is consistent with standard suretyship.

To help CMS establish regulations and procedures that meet CMS objectives and that attract the maximum possible interest and participation by sureties, *NASBP will point out those aspects of the proposed rule that may serve as deterrents to achieving these goals.* From the surety perspective, key issues or concerns include the following:

- The proposed rule seems to obligate the surety to pay on claims simply by receiving notice and without receiving supporting documentation about the loss.
- The proposed rule does not appear to include a right by the surety to cancel the bond. The presence or absence of such a right is an important underwriting factor, particularly with respect to “continuous” bonds. It is important to note that the right to cancel by the surety does not mean the surety can be excused from liability for acts of its principal that occurred while the bond was in effect. It does mean, however, that by giving reasonable written notice to the obligee, a surety can be relieved from liability as to future acts. Such a clause is favored by sureties because, simply put, circumstances change. Without including such a cancellation right, sureties may be reticent to write these bonds.
- Bond coverage includes “civil money penalties” and other assessments which are variable and which shift the purpose of the bond from acting in the form of a guarantee for recouping substantiated losses to one serving, at least in part, as a form of penalty. Bonds should only cover amounts for proven losses and should not include amounts for civil penalties. Bonds incorporating amounts for civil money penalties within coverage usually are disfavored by sureties.

These concerns and others are discussed more fully below.

Specific Comments on Provisions of Proposed Rule

Below are selected provisions of the proposed rule on which NASBP wishes to provide specific comment.

1. Section 424.57 - Definition of “Unauthorized Surety.”

The proposed rule provides that a surety shall be deemed unauthorized “if it had previously failed to comply with a reasonable request from us for payment against a bond.” The example cited is “a request in writing, signed by an official of CMS or its representatives, or documentation about the amount payable by the supplier.”

Comment:

In the event of notification of a default from a bond obligee, the surety has a duty to the obligee to respond promptly and investigate fully the claim being presented and to make payment to the obligee for loss it may incur for which the principal is legally obligated. To secure such payment, however, the obligee must provide the surety with sufficient proof of default of the principal. A

simple letter with nothing more (such as substantiating documentation) is not sufficient proof of the loss and should not constitute grounds for considering a surety as an “unauthorized surety.”

2. Exceptions to the surety bond requirement for certain physicians and non-physician practitioners.

Comment:

NASBP believes that providing exceptions for the “occasional” or low volume supplier has merit. To that end, CMS could consider establishing a minimum threshold of payments as the delineation for an “opt out” exception for the furnishing of surety bonds by small volume suppliers. For example, a supplier with annual payments less than a stated dollar amount could opt out of the requirement to furnish a surety bond.

3. Exceptions to the surety bond requirement for certain licensed pharmacists.

Comment:

NASBP reiterates its position above that an exception should be considered for “occasional” providers, which could be accomplished through setting a threshold of payments at a stated dollar amount.

4. Exceptions to the surety bond requirement for large, publicly traded chain suppliers of DMEPOS.

Comment:

NASBP does not believe that CMS should exclude large, publicly traded chain suppliers, as this large volume group represents a significant risk exposure, particularly in the event of bankruptcy. However, CMS might consider establishing a maximum or cap on the aggregate dollar amount of the surety bonds required of such large volume suppliers so that they are not unduly burdened.

5. Exceptions to the surety bond requirement for any other appropriate criteria.

Comment:

NASBP reiterates its position on “occasional” suppliers.

6. Sec. 424.57 (c) (26) (iv) (C) Liability for Claims.

Comments:

This provision appears to be in conflict with sub-section (B). Part (B) provides that “The surety is liable for unpaid claims, CMPs, or assessments that are presented to the surety for payment when the surety bond is in effect, *regardless of when the payment, overpayment, or other event giving rise to the claim, CMPs, or assessment occurred...*”

Part (C) provides that “the surety remains liable for unpaid claims, CMPs, or assessments that *...took place during the term of the bond or rider...*”

Standard practice in the surety industry would suggest that part (B) be revised to place liability on the surety whose bond was in effect at the time of each respective default as provided by (C).

7. Sec. 424.57 (c) (26) (v) Cancellation of a bond.

The proposed rule allows the DMEPOS supplier to terminate or cancel a bond upon proper notice (30 days) to the NSC.

Comment:

The surety also should be allowed the privilege of terminating or canceling the bond. Further, since the CMS is to be named the obligee, notice of cancellation, whether given by the surety or the principal, should be delivered to CMS. A copy also could be required to be sent to NSC.

8. Sec. 424.57 (c) (26) (v) Lapse in bond coverage.

Comment:

The proposed rule requires the surety to “immediately notify the NSC if there is a lapse in coverage.” This requirement is unreasonable since the expiring surety would have no knowledge whether a replacement bond has been issued or if the billing privileges of the principal have been revoked. Providing the surety with the right to cancel the bond and requiring the surety notify CMS and NSC if the surety has received a notification of cancellation from the principal should be adequate.

9. Sec. 424.57 (c) (26) (v) (G) DMEPOS supplier’s failure to appeal.

The proposed rule provides that “the liability of the DMEPOS supplier and the surety is not extinguished by...(G) The DMEPOS supplier’s failure to exercise available appeal rights under Medicare *or to assign the rights to the surety.*”

Comment:

Upon receipt of notification of a default from CMS or NSC, the surety should be provided the same rights to the appeal process as the principal. To provide otherwise would result in an unjust enrichment for the CMS.

10. Sec. 424.57 (c) (26) (viii) (A) Submission of initial surety bond to NSC.

Comments:

It is unclear whether the original application and documentation for approval is submitted to DHHS or NSC. The bond, all riders, and notices of cancellation, should be filed with DHHS to avoid any confusion or loss of data should the Department change contractors.

11. Sec. 424.57 (c) (26) (viii) (B) Continuous bond or annual bond.

Comments:

Requiring a bond that is continuous until canceled is the most efficient method and requires minimal maintenance of files.

12. Sec. 424.57 (c) (26) (x) Change of surety-liability.

Comments:

This provision appears to be in conflict with sub-section (B). Part (B) provides that “The surety is liable for unpaid claims, CMPs, or assessments that are presented to the surety for payment when the surety bond is in effect, *regardless of when the payment, overpayment, or other event giving rise to the claim, CMPs, or assessment occurred...*”

Part (x) provides that “the new surety will be responsible for any overpayments, CMPs, or assessments incurred by the DMEPOS supplier *beginning with the effective date of the new surety bond*. The previous surety is responsible for any overpayments, CMPs, or assessments *that occurred up to the date of the change of surety.*”

Standard practice in the surety industry would suggest that part (B) be revised to place liability on the surety whose bond was in effect at the time of each respective default as provided by (C).

NASBP appreciates the opportunity to provide these comments to CMS. Although NASBP supports the overall direction and spirit of the proposed rule, NASBP respectfully requests consideration of its concerns and comments in the final rule. Further, NASBP would welcome a dialogue with CMS to assist CMS in developing specific proof of loss guidelines for bond claims and in clarifying bond requirements so they comport with prevailing practices and terminology.

Please do not hesitate to contact me at (202) 464-1173 or mmccallum@nasbp.org should you have questions or concerns about these comments.

Sincerely,



Mark H. McCallum
General Counsel & Director of Government Relations

cc: Richard A. Foss, NASBP
Lynne W. Cook, NASBP