

JANUARY 5, 2009

OD'S DO NOT NEED TO OBTAIN SURETY BONDS

CMS released the DMEPOS surety bond rule last week and listened to the AOA's arguments against requiring physicians to obtain a surety bond as proposed in 2007. PTs and OTs can rejoice as well (see more information below, including CMS statistics):

"In reviewing the statutory language and legislative history of section 4312(a) of the BBA, we believe that the Congress intended to create an exception for physicians and NPPs. Accordingly, we have revised this final rule to establish an exception to the surety bond requirement for physicians as defined in section 1861(r) of the Act and NPPs as defined in section 1842(b)(18) of the Act, provided that the items are furnished only to the physician or NPP's own patients as part of his or her professional service as defined at section 1861(q) of the Act and as described in section 1861(s)(2)(K) of the Act."

**CMS STRENGTHENS EFFORTS TO FIGHT MEDICARE
WASTE, FRAUD AND ABUSE**

*Medicare Issues Final Rule Requiring Surety Bonds for DMEPOS Suppliers and
Takes Next Step in Fighting Home Health Fraud*

The Centers for Medicare & Medicaid Services (CMS) today announced it is requiring certain durable medical equipment suppliers to post a surety bond. In addition, CMS is announcing that it has revoked the billing privileges of more than 1,100 medical equipment suppliers in south Florida and southern California and suspending payments to home health agencies in the Miami-Dade, Fla. area.

"We know the majority of medical equipment suppliers and health care providers want to improve the health of Medicare beneficiaries, but we also know there are those who look for any opportunity to take advantage of beneficiaries and Medicare," said CMS Acting Administrator Kerry Weems. "The steps we are taking today provide us with additional oversight of the suppliers who furnish medical equipment to Medicare beneficiaries and those who provide home health services in South Florida."

CMS today issued a final surety bond regulation, required by the Balanced Budget Act of 1997, that makes certain suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) post a \$50,000 surety bond. Existing suppliers must comply with this requirement by Oct. 2, 2009 while newly enrolling suppliers must meet this requirement by May 4, 2009. This requirement was due in part to the large number of improper and potentially fraudulent payments to medical equipment suppliers for furnishing medical equipment and devices to people with Medicare. The 2007 Medicare error rate report found approximately \$1 billion in improper payments for medical equipment and supplies.

The surety bond requirement is designed to limit the Medicare program risk from fraudulent equipment suppliers and help to ensure that only those suppliers who remain in the program furnish items to Medicare beneficiaries that are considered reasonable and necessary from legitimate DME suppliers.

Suppliers who have had certain adverse legal actions imposed against them in the past may also be required to post a higher bond amount. All newly enrolling suppliers that meet the requirements of the rule will be required to have a surety bond before they can enroll in the Medicare program. More information about the new regulation can be found at www.cms.hhs.gov/MedicareProviderSupEnroll.

While this regulation requires most suppliers to obtain a surety bond, some companies or organizations that supply these items are exempt from the surety bond requirement, including certain physicians and non-physician practitioners, physical and occupational therapists, state-licensed orthotic and prosthetic personnel, and government-owned suppliers.

To prevent fraud, CMS has revoked billing privileges of 1,139 DMEPOS suppliers as part of the DMEPOS High-Risk Suppliers Demonstration. This project began in October 2007 and focuses on DMEPOS suppliers in South Florida and the Los Angeles metropolitan area. These suppliers, who were paid a combined total of \$265 million between calendar years 2005 and 2007, lost their billing privileges for not re-enrolling in the Medicare program and not meeting Medicare's supplier standards.

CMS is continuing to fight waste, fraud and abuse by home health suppliers in the Dade County, Fla., area by suspending payments and taking other payment and review actions. On Oct. 6, CMS initiated efforts to address potential waste, fraud and abuse by suspending payments to 10 home health agencies and is continuing to review claims and payments to other agencies as resources allow.

In addition to suspending payment, CMS is:

- • Implementing extensive pre- and post-payment review of claims submitted by ordering/referring physicians;
- • Validating claims submitted by physicians who order a high number of certain items or services by sending follow-up letters to these physicians;
- • Verifying the relationship between physicians who order a large number of home health services and the beneficiaries for whom they ordered those services; and
- • Identifying and visiting high risk beneficiaries to ensure they are appropriately receiving the services for which Medicare is being billed.

The final rule also explains:

As already discussed in section III. of this final rule, we are also creating an exception to the bond requirement for physicians and NPPs, as defined in section 1842(b)(18)(C) of the Act provided that the items are furnished only to the physician or NPP's own patients as part of his or her professional service. We believe that requiring physicians and NPPs to obtain a surety bond for items furnished for patients other than the practitioner's own patients is appropriate and consistent with the provisions previously established in accreditation and the legislative history of section 4312(a) of the BBA. Nonphysician practitioners listed in section 1842(b)(18)(C) of the Act include the following: PAs, NPs, clinical nurse specialists, certified nurse anesthetists, certified clinical social workers, clinical psychologists, and registered dietitian or nutrition professionals.

We maintain that physicians and NPPs furnishing DMEPOS to someone other than the physician or NPP's own patients as part of his or her physician service are providing services as a medical supply company. Accordingly, we believe that physicians, including clinics and group practices, must obtain a surety bond if they are providing any DMEPOS items to someone other than the physician or NPP's own patient. This will ensure that physicians and NPPs meet the same quality and program safeguard standards as other DMEPOS suppliers who are not exempt from the bonding requirements found in §424.57(d).

While it is true that the statutory exception identified in section 1834(a)(16) of the Act for physicians and NPPs does not specifically delineate between physicians and NPPs who provide DMEPOS supplies to their own patients and those who furnish such supplies in a different setting, we believe that there is a clear distinction between these two scenarios in terms of what the Congress intended in enacting section 1834(a)(16) of the Act. A physician or NPP who, for instance, furnishes DMEPOS supplies as part of her ownership of a DMEPOS supply company is not acting in her capacity as a practitioner who is providing ongoing care to a patient whom she is treating. Rather, the practitioner is operating his or her own side business. We do not believe that the Congress intended to allow a DMEPOS supply company to circumvent the surety bond requirement by hiring or contracting with a physician or NPP who can furnish DMEPOS supplies to the company's customers. To permit such a practice would be entirely inconsistent with the intent and spirit of section 1834(a)(16) of the Act.

To ensure that this final rule conforms to the Congress's wishes, we have therefore limited the physician and NPP exception to those practitioners who furnish DMEPOS supplies only to their own patients. We are also creating an exception to the bond requirement for State-licensed orthotic and prosthetic personnel operating in private practice and who furnish only orthotics, prosthetics, and supplies. Orthotic and prosthetic personnel are not operating in private practice when another individual or entity is a part owner of the enrolled practice location. It is important to note that we believe that there is a clear distinction between a DMEPOS supplier enrolled as a State-licensed orthotic and prosthetic personnel operating in private practice and operating independently of a medical supply company or other DMEPOS supplier and orthotic and prosthetic personnel employed by medical supply company or co-owned with another individual or entity. Since medical supply companies can enroll as a DMEPOS supplier with or without employing State-licensed orthotic and prosthetic personnel, we do not believe that medical supply companies employing State-licensed orthotic and prosthetic personnel qualify for an exception because the owners of the medical supply company are responsible for the management and billing of products and services, not the State-licensed orthotic or prosthetic personnel. Similarly, we believe orthotic or prosthetic personnel are not operating independently when other individual or entity is a part owner of an enrolled DMEPOS supplier's practice location. Finally, as with physicians and NPPs, State-licensed orthotic and prosthetic personnel operating as a sole owner and operating in private practice risk their State license if they are found guilty of fraudulent or abusive behavior; whereas, a medical supply company can reorganize under new ownership and reapply to participate in the Medicare program. Finally, since all DMEPOS suppliers are required to be accredited to participate in the Medicare program by September 30, 2009, we do not believe that it is appropriate to establish an exception based solely on whether State-licensed orthotic or prosthetic personnel are accredited.

As already discussed in section III of this final rule, we are also creating an exception to the bond requirement for State-licensed physical and occupational therapist operating in private practice provided that the therapist furnishes only orthotics, prosthetics and supplies and only to the therapist's own patients as part of the physical or occupational therapy service. State-licensed physical and occupational therapist are not operating in private practice when another individual or entity is a part owner of the enrolled practice location. Moreover, a State-licensed physical and occupational therapist furnishing DMEPOS to someone other than the therapist's own patients as part of the physical or occupational therapy service is not exempt from the surety bond requirement.

It is important to note that we believe that there is a clear distinction between a DMEPOS supplier enrolled as a State-licensed physical and occupational therapist operating in private practice and operating independently of a medical supply company or other DMEPOS supplier and a State-licensed physical and occupational therapist employed by a medical supply company or co-owned with another individual or entity. Since medical supply companies can enroll as a DMEPOS supplier with or without employing State-licensed physical and occupational therapists, we do not believe that medical supply companies employing State-licensed physical and occupational therapists qualify for an exception because the owners of the medical supply company are responsible for the management and billing of products and services, not the State-licensed physical and occupational therapists. Similarly, we believe State-licensed physical and occupational therapists are not operating independently when another individual or entity is a part owner of an enrolled DMEPOS supplier's practice location. Finally, as with physicians and NPPs, State-licensed physical and occupational therapists operating as a sole owner and operating in private practice risk their State license if they are found guilty of fraudulent or abusive behavior; whereas, a medical supply company can reorganize under new ownership and reapply to participate in the Medicare program. Since all DMEPOS suppliers are required to be accredited to participate in the Medicare program by September 30, 2009, we do not believe that it is appropriate to establish an exception based solely on whether State-licensed physical and occupational therapists are accredited.

Table 3: Categories of DMEPOS Suppliers as of September 2008 (Denoted by NPI)

**DMEPOS Supplier Type Number of
Suppliers**

Pharmacies 54,000

Physicians (including Podiatrists and Optometrists) 30,700

Medical Supply Companies with Orthotic Personnel, Prosthetic Personnel, Registered Pharmacist, or
Respiratory Therapist 16,600

Medical Supply Companies without Orthotic Personnel, Prosthetic Personnel, Registered Pharmacist, or
Respiratory Therapist 16,100

Opticians 13,500

Oxygen and Equipment Suppliers 12,400

Orthotic and Prosthetic Personnel 10,800

Grocery or Department Stores 7,000

Nursing Facilities 4,000

Independently Practicing/Billing Physical Therapists and Occupational Therapists 2,000

Other 1,500