

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 441 and 489

[HCFA-1152-2-F]

RIN 0938-AJ08

Medicare and Medicaid Programs; Surety Bond Requirements for Home Health Agencies

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Final rule.

SUMMARY: This final rule revised Medicare and Medicaid regulations concerning surety bond requirements published in the **Federal Register** (63 FR 29648) on June 1, 1998. Those regulations specified submission compliance dates for all home health agencies (HHAs) to furnish a surety bond to HCFA and/or to the State Medicaid agency. This rule removes those submission compliance dates.

EFFECTIVE DATE: This final rule is effective on July 31, 1998.

FOR FURTHER INFORMATION CONTACT: Ralph Goldberg, (410) 786-4870 (Medicare Provisions. Mary Linda Morgan, (410) 786-2011 (Medicaid Provisions).

SUPPLEMENTARY INFORMATION:

I. Background

The Balanced Budget Act of 1997 (BBA '97) requires each home health agency (HHA) to secure a surety bond in an amount of at least \$50,000 in order to participate in either the Medicare or the Medicaid program. This requirement applies to all participating Medicare and Medicaid HHAs, regardless of the date their participation began. We published a final rule in the **Federal Register** on January 5, 1998 (63 FR 292-355) to implement the surety bond requirements.

Generally, that rule requires each HHA participating in Medicare to obtain from an authorized Surety and then to furnish to the fiscal intermediary a surety bond in an amount that is the greater of \$50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program, as such annual amount appears in the HHA's most recently accepted cost report.

The rule also prohibits payment to a State for home health services furnished to Medicaid recipients unless the HHA has furnished the Medicaid State agency with a surety bond similar to one that meets Medicare requirements. The amount of the Medicaid surety bond

would be the greater of \$50,000 or 15 percent of the annual amount paid to the HHA by the Medicaid State agency for home health services.

As a result of technical issues concerning potential Surety liability raised by representatives of both the Surety and HHA industries after the publication of the January 5, 1998 final rule, we published a notice in the **Federal Register** on March 4, 1998 (63 FR 10732). That notice advised the public that we intended to make technical revisions to the January 5, 1998 final rule. In another final rule also published in the March 4, 1998 **Federal Register** (63 FR 10730), we removed the February 27, 1998 bond submission compliance date, and announced that we intended to establish a new submission compliance date that would be a date 60 days after the publication of a subsequent final rule.

On June 1, 1998, an additional final rule was published in the **Federal Register** (63 FR 29648), that addressed all of the technical changes announced in the March 4, 1998 notice and revised certain sections of the January 5, 1998 final rule. That rule also established that the initial submission of a surety bond for Medicare is July 31, 1998 and for Medicaid by a date specified by each Medicaid State agency but no later than September 29, 1998.

Because of significant concerns expressed by the United States Congress and HHAs, and notification that the General Accounting Office (GAO) is investigating issues surrounding the surety bond requirement we will suspend the compliance date until we evaluate the GAO report.

Although the surety bond requirements remain in effect, the practical effect of this document is to absolve participating HHAs from having to show compliance with the requirements until 60 days following publication of a new final rule but no earlier than February 15, 1999.

II. Provisions of this Final Rule

This rule removes the submission compliance dates that specify when participating HHAs must submit a surety bond in both the Medicare and Medicaid programs.

III. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite prior public comment on proposed rules. The notice of proposed rulemaking can be waived, however, if an agency finds good cause that notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a

statement of the finding and its reasons in the rule issued. We find good cause to waive the notice-and-comment procedure because it is impracticable to employ notice and comment procedures and issue a final rule on or before the earliest date currently required for HHAs to comply with surety bond submission (July 31, 1998). For this reason, we find good cause to waive notice-and-comment and to issue this final rule.

IV. Waiver of 30-Day Delay in Effective Date

We ordinarily make the effective date of a final rule at least 30 days after the publication of the rule in the **Federal Register**. However, this 30-day delay can be waived if an agency finds good cause for making the effective date of the rule earlier than 30 days after the publication of the rule. For the same reason discussed in section III. above we find it would be impracticable to delay the effective date of this rule. Therefore, we find good cause to waive the 30-day delay in the effective date for this rule and have made the effective date the date of publication in the **Federal Register**.

V. OMB Review

In accordance with the provisions of E.O. 12866, this document was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 441

Family planning, Grant programs—health, Infants and children, Medicaid, Penalties, Reporting and recordkeeping requirements.

42 CFR Part 489

Health facilities, Medicare, Reporting and recordkeeping requirements.

42 CFR Chapter IV is amended as set forth below:

PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES

A. Part 441 is amended as follows:

1. The authority citation for part 441 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In § 441.16 the heading of paragraph (i) and paragraph (i)(1) are revised to read as follows: § 441.16 Home health agency requirements for surety bonds; Prohibition on FFP.

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(i) *Term and type of bond.* (1) *Initial term:* Each participating HHA that is not

exempted by paragraph (d) of this section must submit to the State Medicaid agency a surety bond for a term beginning January 1, 1998. If an annual bond is submitted for the initial term it must be effective for an annual period specified by the State Medicaid agency.

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PART 489—PROVIDER AGREEMENTS AND SUPPLIER APPROVALS

B. Part 489 is amended as follows:

1. The authority citation for part 489 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

2. in § 489.67 the heading and paragraph (a) are revised to read as follows:

§ 489.67 Term and type of bond.

(a) Each participating HHA that does not meet the criteria for waiver under § 489.62 must submit to HCFA in a form as HCFA may specify, a surety bond for a term beginning January 1, 1998. If an annual bond is submitted for the initial term, it must be effective through the end of the HHA's current fiscal year.

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(Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh)). (Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Programs, and Program No. 93.778, Medical Assistance Program).

Dated July 27, 1998.

Nancy-Ann Min DePearle,
Administrator, Health Care Financing Administration.

Dated July 28, 1998.

Donna E. Shalala,
Secretary.

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