

under State law, and CMS therefore waives the requirements of this subpart with respect to such an HHA if, during the preceding 5 years the HHA has—

(a) Not had any unpaid claims or unpaid civil money penalties or assessments; and

(b) Not had any of its claims referred by CMS to the Department of Justice or the General Accounting Office in accordance with part 401 of this chapter.

[63 FR 313, Jan. 5, 1998, as amended at 63 FR 29655, June 1, 1998]

#### § 489.63 Parties to the bond.

The surety bond must name the HHA as Principal, CMS as Obligee, and the surety company (and its heirs, executors, administrators, successors and assignees, jointly and severally) as Surety.

#### § 489.64 Authorized Surety and exclusion of surety companies.

(a) An HHA may obtain a surety bond required under § 489.61 only from an authorized Surety.

(b) An authorized Surety is a surety company that—

(1) Has been issued a Certificate of Authority by the U.S. Department of the Treasury in accordance with 31 U.S.C. 9304 to 9308 and 31 CFR parts 223, 224, and 225 as an acceptable surety on Federal bonds and the Certificate has neither expired nor been revoked; and

(2) Has not been determined by CMS to be an unauthorized Surety for the purpose of an HHA obtaining a surety bond under this section.

(c) CMS determines that a surety company is an unauthorized Surety under this section—

(1) If, upon request by CMS, the surety company fails to furnish timely confirmation of the issuance of, and the validity and accuracy of information appearing on, a surety bond an HHA presents to CMS that shows the surety company as Surety on the bond;

(2) If, upon presentation by CMS to the surety company of a request for payment on a surety bond and of sufficient evidence to establish the surety company's liability on the bond, the surety company fails to timely pay CMS in full the amount requested, up to the face amount of the bond; or

(3) For other good cause.

(d) Any determination CMS makes under paragraph (c) of this section is effective immediately when notice of the determination is published in the FEDERAL REGISTER and remains in effect until a notice of reinstatement is published in the FEDERAL REGISTER.

(e) Any determination CMS makes under paragraph (c) of this section does not affect the Surety's liability under any surety bond issued by a surety company to an HHA before notice of such determination is published in accordance with paragraph (d) of this section.

(f) A determination by CMS that a surety company is an unauthorized Surety under this section is not a debarment, suspension, or exclusion for the purposes of Executive Order No. 12549 (3 CFR, 1986 comp., p. 189).

#### § 489.65 Amount of the bond.

(a) *Basic rule.* The amount of the surety bond must be \$50,000 or 15 percent of the Medicare payments made by CMS to the HHA in the HHA's most recent fiscal year for which a cost report has been accepted by CMS, whichever is greater.

(b) *Computation of the 15 percent: Participating HHA.* The 15 percent is computed as follows:

(1) For the initial bond—on the basis of Medicare payments made by CMS to the HHA in the HHA's most recent fiscal year as shown in the HHA's most recent cost report that has been accepted by CMS. If the initial bond will cover less than a full fiscal year, the computation of the 15 percent will be based on the number of months of the fiscal year that the bond will cover.

(2) For subsequent bonds—on the basis of Medicare payments made by CMS in the most recent fiscal year for which a cost report has been accepted. However, if payments in the first six months of the current fiscal year differ from such an amount by more than 25 percent, then the amount of the bond is 15 percent of such payments projected on an annualized basis.

(c) *Computation of 15 percent: An HHA that seeks to become a participating HHA by obtaining assets or ownership interest.* For an HHA that seeks to become a participating HHA by purchasing the

assets or the ownership interest of a participating or formerly participating HHA, the 15 percent is computed on the basis of Medicare payments made by CMS to the participating or formerly participating HHA in the most recent fiscal year that a cost report has been accepted.

(d) *Change of ownership.* For an HHA that undergoes a change of ownership the 15 percent is computed on the basis of Medicare payments made by CMS to the HHA for the most recently accepted cost report.

(e) *An HHA that seeks to become a participating HHA without obtaining assets or ownership interest.* For an HHA that seeks to become a participating HHA without purchasing the assets or the ownership interest of a participating or formerly participating HHA, the 15 percent computation does not apply.

(f) *Exception to the basic rule.* If an HHA's overpayment in the most recently accepted cost report exceeds 15 percent of annual payments, CMS may require the HHA to secure a bond in an amount up to or equal to the amount of overpayment, provided the amount of the bond is not less than \$50,000.

(g) *Expiration of the 15 percent provision.* For an annual surety bond, or for a rider on a continuous surety bond, that is required to be submitted on or after June 1, 2005, notwithstanding any reference in this subpart to 15 percent as a basis for determining the amount of the bond, the amount of the bond or rider, as applicable, must be \$50,000 or such amount as CMS specifies in accordance with paragraph (f) of this section, whichever amount is greater.

[63 FR 313, Jan. 5, 1998, as amended at 63 FR 29655, June 1, 1998]

**§ 489.66 Additional requirements of the surety bond.**

The surety bond that an HHA obtains under this subpart must meet the following additional requirements:

(a) The bond must guarantee that within 30 days of receiving written notice from CMS of an unpaid claim or unpaid civil money penalty or assessment, which notice contains sufficient evidence to establish the Surety's liability under the bond, the Surety will pay CMS, up to the stated amount of the bond—

(1) The full amount of any unpaid claim, plus accrued interest, for which the HHA is responsible; and

(2) The full amount of any unpaid civil money penalty or assessment imposed by CMS on the HHA, plus accrued interest.

(b) The bond must provide the following:

(1) The Surety is liable for unpaid claims, unpaid civil money penalties, and unpaid assessments that are discovered when the surety bond is in effect, regardless of when the payment, overpayment, or other event giving rise to the claim, civil money penalty, or assessment occurred, provided CMS makes a written demand for payment from the Surety during, or within 90 days after, the term of the bond.

(2) If the HHA fails to furnish a bond meeting the requirements of this subpart F for the year following expiration of the term of an annual bond, or if the HHA fails to submit a rider when a rider is required to be submitted under this subpart, or if the HHA's provider agreement is terminated, the last bond or rider, as applicable, submitted by the HHA to CMS, which bond or applicable rider meets the requirements of this subpart, remains effective and the Surety remains liable for unpaid claims, civil money penalties, and assessments that—

(i) CMS determines or imposes on or asserts against the HHA based on overpayments or other events that took place during or prior to the term of the last bond or rider; and

(ii) Were determined or imposed during the 2 years following the date the HHA failed to submit a bond or required rider or the date the HHA's provider agreement is terminated, whichever is later.

(c) The bond must provide that the Surety's liability to CMS under the bond is not extinguished by any action of the HHA, the Surety, or CMS, including but not necessarily limited to any of the following actions:

(1) Action by the HHA or the Surety to terminate or limit the scope or term of the bond. The Surety's liability may be extinguished, however, when—

(i) The Surety furnishes CMS with notice of such action not later than 10 days after receiving notice from the