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Client Alert

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Home Health Surety Bonds Have OIG and Industry Support: When and How Will CMS Act?

Almost fifteen years ago, the Centers for Medicare & Medicaid Services (CMS) adopted a final rule requiring home health agencies (HHAs) to post surety bonds in the amount of $50,000, or 15% of the annual amount received from Medicare, whichever was greater. That regulation quickly faced opposition by Congress and by the National Association for Home Care, and CMS responded by indefinitely postponing the implementation date for compliance. More recently, the Patient Protection and Affordable Care Act (ACA) allowed the amount of the surety bond to be set based on a HHA's Medicare revenues. Although the law has remained unimplemented, recent OIG pressure and industry support are likely to lead to implementation.

OIG pressure came in the form of an OIG Report titled "Surety Bonds Remain an Unused Tool to Protect Medicare from Home Health Overpayments." September 2012, OEI – 03 – 12 – 00070. The OIG collected data from CMS on overpayments to HHAs in the years 2007 through 2011. For each year, CMS provided the total amount of overpayments and interest outstanding as of February 29, 2012. The OIG Report found that 2004 HHAs still owed CMS approximately $408 million, and that it could have recovered at least $39 million if the HHAs had each been required to post a surety bond of $50,000.

As a result of its findings, the OIG recommended that CMS implement the surety bond requirement, and consider increasing the amount above $50,000 for HHAs with high Medicare payment amounts. CMS concurred that implementing the surety bond requirement may help reduce program vulnerabilities in the home health sector, confirming that it is currently "evaluating its options" for implementation, and also noting a concern regarding the impact on small providers. CMS reportedly is drafting a new proposed rule that would include the sliding scale amount allowed by the ACA.

Notably, home health industry leadership, through a national coalition representing 1500 agencies known as the Partnership for Quality Home Healthcare, now supports the implementation of surety bonds for HHAs. It has proposed a $100,000 surety bond for new providers beginning in 2013, with exceptions to ensure access in underserved areas. The Partnership has a track record of promoting targeted regulations that do not unduly burden existing providers in good standing. For instance, in 2009, it recommended

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a cap on home health outlier payments which was adopted in 2010, and resulted in significant Medicare savings. The Partnership also supports a moratorium on new HHAs in saturated markets, another unimplemented measure authorized by the ACA.

In light of the current aggressive enforcement focus on HHAs, coupled with the OIG Report, industry support for a surety bond and the perceived level of fraud in the home health sector, it is likely that HHA's will soon join durable medical equipment suppliers in posting surety bonds. The details of implementation will have to await CMS regulatory action.