

THE ORTHOTIC AND PROSTHETIC ALLIANCE

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Submitted via email

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Deputy Administrator and Director
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Centers for Medicare and Medicaid Services
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RE: **Concerns Involving CMS Contractors' Reaction to OIG Report OEI-03-11-00350 – Surety Bonds Remain an Underutilized Tool to Protect Medicare from Supplier Overpayments**

Dear Director Blum:

On behalf of the Orthotic & Prosthetic Alliance (the O&P Alliance), a coalition of the five major national orthotic and prosthetic organizations representing over 10,000 O&P professionals and 3,000 accredited O&P facilities, we are writing to express our concerns regarding the actions of CMS's contractors in the wake of a report issued by the Department of Health and Human Services Office of the Inspector General (OIG) in March 2013 regarding use of surety bonds to achieve repayment of Medicare overpayments.

As representatives of the O&P provider community and on behalf of the patients we serve, we support CMS' efforts to combat fraud and abuse within the system and to protect the Medicare Trust Fund from unscrupulous individuals. However, we are also concerned by the ramifications of OIG report OEI-03-11-00350 for legitimate orthotic and prosthetic providers and suppliers.

The OIG report on surety bonds concluded that the Centers for Medicare and Medicaid Services (CMS) and its contractors were not making enough claims to recoup outstanding overpayment amounts against the surety bonds held by durable medical equipment, prosthetic, orthotic and supplies (DMEPOS) suppliers. These surety bonds are required under the DMEPOS supplier standards for the majority of DMEPOS suppliers, with limited exceptions.¹ OIG noted a number of alleged deficiencies in CMS' handling of the surety bond requirement and ultimately recommended that CMS immediately begin

¹ See 42 C.F.R. § 424.57(d).

making claims against the surety bonds to recover outstanding Medicare debt. From recent contractor activity, it appears CMS is implementing this recommendation through its contractors.

Contractor claims against DMEPOS supplier surety bonds are subject to rules set forth in the Medicare Program Integrity Manual (PIM). Section 15.21.7.1 of chapter 15 sets forth the procedures involved in making such a claim. Specifically, with respect to overpayments tied to claim denials, after 101 days have passed from the date of the initial demand letter without any repayment, the contractors are authorized to contact the surety for payment.²

The PIM guidance does not address the situation where a claim is subject to an ongoing appeal, nor does it address any limitations on recoupment that may be in place as a result of the appeal process. By failing to take such circumstances into consideration, the guidance on claims against surety bonds improperly treats all overpayments as final determinations, even those claims that are currently being challenged. Treating the overpayment determination as final and requiring full repayment impermissibly circumvents the Congressionally-mandated administrative appeals process and the limits on recoupment.³ We view a Medicare contractor's claim against the surety bond in this instance as an improper "end run" to payment.

In addition, the PIM also indicates that a claim against the surety bond is to be initiated only when "full or partial payment has not been received . . ." ⁴ This statement implies that, if at least some payment on the overpayment amount has been made (i.e., partial payment), then the contractor may not make a claim against the surety bond. However, we are aware that at least one contractor recently issued a demand for payment from a surety where the O&P provider had already made substantial repayment of the alleged overpayment amount.⁵ We believe that this is contrary to the guidance in the PIM and that the contractor should have continued to recoup the overpayment amount through offset instead of exercising the surety bond.

We request that CMS revise the language of § 15.21.7.1 of chapter 15 of the PIM. Specifically, we request that the PIM be revised to prohibit claims against a DMEPOS supplier's surety bond until any applicable appeals have concluded. In the alternative, we request that CMS revise the manual provision to prohibit contractors from issuing demands to a surety at any time when recoupment is otherwise stayed under the provisions of 42 C.F.R. § 405.379. We also request that CMS instruct its contractors to comply with the prohibition on making a claim against a surety bond when full or partial payment has been made.

We appreciate your time and attention on this important matter. If you have any questions or would like to discuss our concerns, please contact our Washington counsel, Peter Thomas, at 202-466-6550.

² See PIM, CMS Pub. 100-08, ch. 15, § 15.21.7.1.A.2. Recovery of outstanding civil monetary penalty amounts through claims against a surety bond is addressed separately. See *id.* at § 15.21.7.1.B.

³ See 42 U.S.C. § 1395ddd(f)(2)(A); see also 42 C.F.R. § 405.379; Medicare Financial Management Manual, CMS Pub. 100-06, ch. 3, § 200 *et seq.*

⁴ See PIM, CMS Pub. 100-08, ch. 15, § 15.21.7.1.A.2. (emphasis added).

⁵ The claim was also the subject of an ongoing administrative appeal.

Sincerely,



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