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**FROM:** /S/ Stuart Wright  
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**SUBJECT:** Early Alert Memorandum Report: *Use of Surety Bonds to Recover Overpayments Made to Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies: Early Findings*, OEI-03-11-00351

This memorandum report provides early findings from our study evaluating the extent to which the Centers for Medicare & Medicaid Services (CMS) uses surety bonds to recover overpayments made to durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) suppliers.

#### SUMMARY

We found that CMS does not have finalized procedures for recovering DMEPOS overpayments through surety bonds. In addition, as of July 2011, no overpayments had been recovered through surety bonds since October 2, 2009, the date the surety bond requirement became effective for all suppliers. A full report, to be issued at a later date, will provide additional information on the number of DMEPOS suppliers that received overpayments, the amount of unrecovered overpayments, and the extent to which DMEPOS overpayments could have been recovered if CMS had sought collection through surety bonds.

#### BACKGROUND

Historically, Medicare Part B payments for DMEPOS have been highly vulnerable to fraud and abuse. The ease and low expense of acquiring a supplier number coupled with the potential for high revenue have, for years, attracted unscrupulous DMEPOS suppliers (hereinafter suppliers) to Medicare.<sup>1</sup> From April 2006 through March 2007, CMS

<sup>1</sup> Office of Inspector General (OIG), *Medical Equipment Suppliers: Assuring Legitimacy*, OEI-04-96-00240, December 1997.

estimated that \$1 billion of the \$10 billion in Medicare payments for DMEPOS supplies were improper, due in part to fraud.<sup>2</sup>

A 2005 GAO report concluded that Medicare's standards were too weak to be used effectively for screening DMEPOS suppliers wanting to enroll in the program.<sup>3</sup> In 2006, OIG conducted unannounced site visits in South Florida and provided further evidence of this insufficiency by finding that nearly half of the 1,581 suppliers visited were not in compliance with basic supplier standards.<sup>4</sup>

### **Surety Bonds for DMEPOS Suppliers**

In recent years, steps have been taken to improve the supplier enrollment process. New accreditation and supplier enrollment standards were implemented and certain suppliers are now required to obtain surety bonds.<sup>5</sup> A DMEPOS surety bond is an agreement between the supplier and the surety guaranteeing that the surety will fulfill financial obligations to Medicare, up to the surety bond amount, in the event that the supplier does not fulfill these obligations. Generally, a surety bond enables CMS to recover overpayments when other methods of collection are unsuccessful.

In section 4312(a) of the Balanced Budget Act of 1997, P.L. 105-33, Congress amended Social Security Act § 1834(a) to require as a condition of enrollment that DME suppliers "provide the Secretary on a continuing basis with a surety bond ... in an amount that is not less than \$50,000." CMS ultimately promulgated a final rule on January 2, 2009, requiring certain Medicare suppliers to obtain a surety bond.<sup>6</sup> The final rule became effective on March 3, 2009. New suppliers were required to obtain a bond by May 4, 2009, whereas existing suppliers had until October 2, 2009, to obtain a surety bond.<sup>7</sup>

According to the final rule, the purpose of the surety bond requirement is to (1) limit Medicare's risk from fraudulent suppliers; (2) enhance the enrollment process to ensure that only legitimate suppliers are enrolled or remain enrolled; (3) ensure recovery of erroneous payments that result from fraudulent or abusive billing practices; and (4) ensure that beneficiaries receive products and services that are reasonable and necessary from legitimate suppliers.<sup>8</sup>

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<sup>2</sup> Government Accountability Office (GAO), *Covert Testing Exposes Weaknesses in the Durable Medical Equipment Supplier Screening Process*, GAO-08-955, July 2008.

<sup>3</sup> GAO, *More Effective Screening and Stronger Enrollment Standards Needed for Medical Equipment Suppliers*, GAO-05-656, September 2005.

<sup>4</sup> OIG, *South Florida Suppliers' Compliance with Medicare Standards: Results from Unannounced Visits*, OEI-03-07-00150, March 2007.

<sup>5</sup> CMS, *Provider Enrollment Regulation*. Accessed at [http://www.cms.gov/medicareprovidersupenroll/09\\_providerenrollmentregulation.asp](http://www.cms.gov/medicareprovidersupenroll/09_providerenrollmentregulation.asp) on July 14, 2011; CMS, *DMEPOS Accreditation*. Accessed at [http://www.cms.gov/medicareprovidersupenroll/07\\_dmeposaccreditation.asp](http://www.cms.gov/medicareprovidersupenroll/07_dmeposaccreditation.asp) on August 24, 2011.

<sup>6</sup> 42 CFR 424.57(d); 74 Fed. Reg. 166 (Jan. 2, 2009).

<sup>7</sup> 42 CFR § 424.57(d)(1).

<sup>8</sup> 74 Fed. Reg. 166, 167 (Jan. 2, 2009).

All nonexempt suppliers are required to obtain a surety bond from an authorized surety.<sup>9, 10</sup> The surety bond must be in the amount of at least \$50,000 for each practice location.<sup>11</sup> However, suppliers against which final adverse actions have been taken are considered to pose a higher than average risk to the program and must obtain an elevated surety bond, at a rate of an additional \$50,000 for each final adverse action imposed against them.<sup>12</sup> For example, if a supplier's billing privileges had been revoked or suspended in the preceding 10 years, the supplier would need to secure an elevated surety bond in the amount of \$100,000 (i.e., the base amount of \$50,000 plus an additional \$50,000 because of the final adverse action). Provisions in the Patient Protection and Affordable Care Act of 2010 also give the Secretary of Health and Human Services the authority to increase surety bond requirements for suppliers based on the company's billing volume.<sup>13</sup>

The surety bond requirement was added (as standard number 26) to the list of supplier standards that DMEPOS suppliers must meet for enrollment in Medicare.<sup>14</sup> All nonexempt suppliers are required to provide a copy of their surety bond as part of the Medicare enrollment application (Form CMS-855S).

### **Related Study by OIG**

In May 2010, OIG reported on the collection status as of June 2008 for overpayments identified by Program Safeguard Contractors that had been made to South Florida suppliers and that had been referred for collection in 2007. OIG found that the collection rate for those overpayments was 1 percent, lower than the national DMEPOS collection rate of 3 percent. Additionally, the report found that Medicare would have recovered an additional \$15 million, or 6 percent, of South Florida DMEPOS overpayment dollars if the surety bond had been in place at the time of the study.<sup>15</sup>

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<sup>9</sup> 42 CFR § 424.57(d)(15)(i) provides exceptions from the surety bond requirement, under certain specified conditions, for the following types of DMEPOS suppliers: Government-operated DMEPOS suppliers, State-licensed orthotic and prosthetic personnel in private practice, physicians and nonphysician practitioners providing items to their own patients, and physical and occupational therapists in private practice.

<sup>10</sup> 42 CFR § 424.57(d)(2).

<sup>11</sup> 42 CFR § 424.57(d)(2)(iii); CMS, *Medicare Program Integrity Manual*, Pub. 100-08, ch. 10, § 21.7(A)(3). Suppliers generally pay a fee of approximately \$1,500 (or 3 percent of the value of a \$50,000 bond) to obtain the bond.

<sup>12</sup> 42 CFR § 424.57(d)(3); 42 CFR § 424.57(a); CMS, *Medicare Program Integrity Manual*, Pub. 100-08, ch. 10, § 21.7. Final adverse actions include Medicare-imposed revocation of any Medicare billing number; revocation or suspension of a license to provide health care by any State licensing authority; revocation or suspension by an accreditation organization; conviction of a Federal or State felony offense within the 10 years preceding enrollment, revalidation, or reenrollment; or exclusion or debarment from participation in a Federal or State health care program.

<sup>13</sup> Patient Protection and Affordable Care Act, P.L. 111-148, § 6402(g) (amending Social Security Act, § 1834(a)(16)(B)).

<sup>14</sup> CMS, *DMEPOS Supplier Standards*. Accessed at [https://www.cms.gov/medicareprovidersupenroll/10\\_DMEPOSsupplierstandards.asp](https://www.cms.gov/medicareprovidersupenroll/10_DMEPOSsupplierstandards.asp) on August 24, 2011.

<sup>15</sup> OIG, *Collection Rate for Overpayments Made to Medicare Suppliers in South Florida*, OEI-03-09-00570, May 2010.

## **METHODOLOGY**

From CMS, we requested written procedures outlining how overpayments made to suppliers are recovered through surety bonds. CMS stated that these procedures were still in draft form, but they did provide documentation showing that the draft procedures were sent to Medicare contractors for review and comment. We also interviewed CMS staff regarding the draft procedures. In addition, we asked CMS to provide us with the total amount of DMEPOS overpayments recovered from the surety bonds as of July 2011.

This study was conducted in accordance with the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency.

## **RESULTS**

### **CMS Has Not Finalized Procedures for Recovering DMEPOS Overpayments Through Surety Bonds**

In late August 2010 and early June 2011, CMS sent draft procedures to the National Supplier Clearinghouse (the contractor responsible for accrediting and enrolling DMEPOS suppliers) and the durable medical equipment Medicare administrative contractors (the contractors responsible for processing DMEPOS claims) for comment. However, CMS reported that significant personnel changes within CMS have delayed the finalization of these procedures. Therefore, CMS currently does not have finalized procedures for recovering DMEPOS overpayments through surety bonds.

### **CMS Has Not Recovered Any DMEPOS Overpayments Through Surety Bonds Since the Surety Bond Requirement Was Implemented**

Since October 2009, all nonexempt suppliers have been required to maintain a surety bond as a term of their enrollment in Medicare. However, as of July 2011, CMS had not sought payment from holders of surety bonds, and as a result, it had not recovered any overpayments through surety bonds.

## **CONCLUSION**

This memorandum report provides early findings from our study to review CMS's procedures for using surety bonds to recover overpayments made to suppliers and determine the extent to which overpayments have been recovered through surety bonds. We determined that CMS has not finalized procedures for contractors to recover overpayments through surety bonds. As of July 2011, CMS had not collected any overpayments through surety bonds in the nearly 2 years that suppliers had been required to obtain them.

Requiring surety bonds is an important program integrity tool that not only limits fraudulent suppliers' access to the program, but also serves as a means for Medicare to

guarantee recoupment of some overpayments. Not using this program integrity tool leaves Medicare vulnerable to losses from fraudulent suppliers.

We are currently conducting another study (OEI-03-11-00350) to determine the number of suppliers with outstanding unrecovered overpayments since October 2, 2009, and the amount of these overpayments. We will also determine the amount that could have been recovered if CMS had sought recovery of these overpayments through surety bonds. Further, we will provide information on the number of these suppliers whose billing privileges have been revoked or have become inactive since October 2, 2009.

This report is being issued directly in final form because it contains no recommendations. If you have comments or questions about this report, please provide them within 60 days. Please refer to report number OEI-03-11-00351 in all correspondence.