

June 8, 1998

Health Care Financing Administration
Office of Information Services, Information Technology Investment Management Group
Division of HCFA Enterprise Standards, Room C2-26-17
7500 Security Boulevard
Baltimore, MD. 21244-1850
Attn: John Burke HCFA-1152-1-F

Sent via Facsimile/Mail
(410/786-1415)

re: Surety Bond Regulations Published in the June 1, 1998 Federal Register

Dear Mr. Burke:

Per review of the final rule noted above, I have the following questions/comments that I respectfully request a response to:

- Per my understanding, many members of Congress have written your organization regarding the implementation of the surety bond requirement identified in the Balanced Budget Act (BBA) of 1997 (including Karen Thurman of Florida who originally proposed the Bill). The question is: Why are you using the surety bond to cover overpayments (that you feel may not be collected), when the stated intent of the Bill was to protect the program from potentially unscrupulous providers? Was there any correspondence with Ms. Thurman's office regarding Congress's intent for the Surety Bond regulations in the BBA of '97?
- How was the 15% arrived at? What analyses were done to determine this rate?
- Of the 344 comments to the January 5, 1998 final rule, you have included 7 comments in this publication identified above. What about the other 337 comments? When will these comments be published for public viewing (even if not yet responded to by your agency), and when will these comments be responded to? What kind of notification will be given to the public that you are responding to comments (or do we have to access the Federal Register daily for this?)?
- What were HCFA's responses to the letters received from our elected officials regarding their comments/concerns regarding the surety bond regulations promulgated from your offices? Will these responses be made available to the public or will HCFA require the public to contact these officials to find out what HCFA's responses were?

- If a surety bond is written for just one year, how long is the time frame (for an occurrence that creates an overpayment), that the surety is liable? Is it, as it appears, 5+ years (an event that occurred 2-3 yrs. ago currently identified creating an overpayment, the current year the bond is in place and 2 more years after the end of the bond (assuming another bond not obtained)? Additionally, from a Surety's liability perspective, what are the chances of another Surety writing a bond after the prior Surety declined to (and thereby maintaining a liability for an additional 2 years)?
- Since a Surety must follow all jurisdictional and procedural requirements to protect their appeal rights, who will provide this expertise if the Surety and the Home Health Agency have developed an undesirable and/or acrimonious relationship? Will HCFA have a staffed department available at all times to the Surety Companies if this event should occur (would this be a free service)?
- HCFA states that approximately half of the current Medicare overpayments are attributable to HHA's. What support/documentation is there to verify this allegation? How much of these overpayments are being paid back vs. uncollectable (i.e., agency went bankrupt). Has HCFA ever licensed an agency to an owner (ownership group) that had previously taken an agency bankrupt with an overpayment outstanding?
- If HCFA wants the surety bonds to be used as a insurance policy against overpayments, shouldn't the factor be more representative of the ratio of overpayments to total payments (avg. per year)(again, questioning the reasonableness of the 15% rate!)?
- Sec. 489.73 (of new reg.), HCFA states that they will reimburse the Surety the amount collected from the HHA (HHA#1) up to the amount paid by the Surety, provided the Surety has no other liability to HCFA under the bond. Question: does this mean that if another HHA (HHA#2) had an overpayment not paid that the Surety was becoming liable for, HCFA would not withhold HHA#1's pmt. to offset the liability for HHA#2?
- Why are Government-operated HHA's exempt from this law? Does this mean that there has never been a Government operated HHA that has ever been accused of committing any wrongdoing (negligent and/or criminal) or gone bankrupt/dissolved while indebted to the Medicare Program?
- How can HCFA certify that this regulation does not result in a significant impact on a substantial number of small entities? Since HCFA certified the non-significance of the impact of the regulation, HCFA did not prepare an analysis for either the Regulatory Flexibility Act (RFA) or section 1102(b) of the act. Per a study by Health Policy Economics Group, Price Waterhouse LLP (May 1, 1998), home health expenditures would be approximately \$20,000,000,000 for 1998. Therefore, applying the 15% bond factor, the surety bond amount required by the industry would be 3,000,000,000; which would cost between \$30,000,000 and \$150,000,000 (applying a

factor of 1% to 5% on bond face value). Now when you divide the bond costs by the approximate number of home health agencies (10,000); the average non-reimbursable costs to each agency ranges from \$3,000 to \$15,000 on an annual basis. Based on the above, by the year 2005 (the proposed sunset of the 15% bond provision), the average agency would have incurred approximately \$24,000 to \$120,000 in non-reimbursable costs to participate in the Medicare program (Note that this extrapolates to be between \$312 million to \$1.56 billion per year). This would appear to be an extremely significant amount, especially when one considers that a Medicare agency cannot make a profit in the Medicare program. Additionally, when you consider the Medicaid bonding requirements, the amount of the non-reimbursable costs incurred (by agency and industry overall) would be even greater (Note that for chain-organization, this amount could be in the millions). If the industry is bound to reasonableness standard (and rightfully so!), should not that same standard be applicable to the agency overseeing the program?

- Additionally, regarding the Regulatory Impact Statement, how can your agency certify that the Surety Bond Regulations (and the Interim Payment System) will not have a significant impact on a substantial number of small entities, when already, hundreds of small entities are closing up across the country because of these same regulations? What do you deem as a significant impact (is there a \$ threshold) as well as what do you consider a substantial number of small entities?
- HCFA cites (as done in the first release of the Surety Bond Regulations), that you cannot comply with the requirement to provide a 60-day notice in the Federal Register for public comment, because public harm is likely to occur if the Surety Bond requirements are not implemented immediately. The home health industry is part of that public, and you (HCFA) are establishing a harmful environment in which to operate. By ignoring the requests/comments from Congress, the Surety industry and the Home Health Industry, you (HCFA) are ensuring that a reasonable approach to protecting the Medicare program is not done. Your fiduciary responsibility to the Program (which includes the beneficiaries, fiscal intermediaries as well as home health agencies (and all entities operating in the Program)), would seem to require you (HCFA) to ensure that the program is run in a fair and equitable manner for all involved parties. How can this be the case when for the second time you are publishing the Surety Bond regulations without the required 60 day comment period, in that if that approach had been followed when the first regulations were published (Jan. 5, 1998 – almost 6 months ago), the regulations (acceptable to all parties) might have been instituted 2-3 months ago.
- My recommendation would be that your organization meet with members of both the home health and surety industries to establish surety bond regulations that protect the program, ensure the surety industry has regulations that would allow bonds to be written and regulations that do not discriminate against home health agencies that have been operating for years (some, longer than the home health benefit has been in existence), all the while complying with the intent of the surety regulations as stated

(both verbally and in writing to your offices) by the members of Congress that created this piece of Legislation.

If you have any questions, please give me a call @ 901/682-1333.

Sincerely,

John M. Reisinger
Vice President - Reimbursement
Home Health Care Affiliates