

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Health Care Financing Administration**

**42 CFR Parts 441 and 489**

[HCFA-1152-F]

RIN 0938-AI31

**Medicare and Medicaid Programs; Surety Bond Requirements for Home Health Agencies**

**AGENCY:** Health Care Financing Administration (HCFA), HHS.

**ACTION:** Final rule.

**SUMMARY:** The Balanced Budget Act of 1997 (BBA '97) requires each home health agency (HHA), in order to participate in either the Medicare or the Medicaid program, to secure a surety bond. On January 5, 1998, we published a final rule with comment period that requires that each Medicare-participating HHA obtain from an acceptable authorized Surety a surety bond that is the greater of \$50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program, as reflected in the HHA's most recently accepted cost report. The rule also requires that an HHA participating in Medicaid must furnish a surety bond in an amount that is the greater of \$50,000 or 15 percent of its Medicaid revenues to the Medicaid State agency in each State in which it operates. The rule also requires submittal of the initial bond to HCFA or the State Medicaid agency, or both—as applicable—by February 27, 1998. Because some HHAs have not been able to obtain a surety bond in time to meet the February 27 date, we are removing the date by which HHAs are required to submit the bonds to HCFA and/or the State Medicaid Agency.

**EFFECTIVE DATE:** This final rule is effective on March 4, 1998.

**FOR FURTHER INFORMATION CONTACT:** Ralph Goldberg, (410)786-4870 (Medicare Provisions). Mary Linda Morgan, (410)786-2011 (Medicaid Provisions).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Balanced Budget Act of 1997 (BBA '97) requires each home health agency (HHA) to secure a surety bond in an amount of at least \$50,000 in order to participate in either the Medicare or the Medicaid program. This requirement applies to all participating Medicare and Medicaid HHAs, regardless of the date their participation began. We published in the **Federal Register** a final rule on

January 5, 1998 (63 FR 292-355) to implement the surety bond requirements. The comment period on that final rule continues until March 6, 1998.

Generally, the rule requires each HHA participating in Medicare to obtain from an acceptable authorized Surety and then to furnish to the fiscal intermediary a surety bond in an amount that is the greater of \$50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program, as such annual amount appears in the HHA's most recently accepted cost report.

The rule also prohibits payment to a State for home health services furnished to Medicaid recipients unless the HHA has furnished the Medicaid State agency with a surety bond similar to one that meets Medicare requirements. The date for submittal of an initial surety bond to HCFA and/or the State Medicaid agency is February 27, 1998.

**II. Provisions of this Final Rule**

Concerns about Surety liability issues have been raised by representatives of the surety industry as well as by home health agency representatives. We address these concerns in a notice published elsewhere in this edition of the **Federal Register**. Those issues were not apparent during our previous discussions with the representatives prior to the publication of the final rule on January 5, 1998. Therefore, because of resultant delays in the ability of some HHAs to secure surety bonds in time to meet the February 27, 1998 date for submittal to HCFA and/or the state Medicaid agency, we believe it is now prudent to extend the February 27, 1998 effective date for HHAs to furnish a bond. This final rule deletes the February 27, 1998 effective date for all HHAs to furnish a surety bond. The new compliance date will be 60 days after the date of publication of the final rule that implements the technical changes discussed in the notice appearing elsewhere in this edition of the **Federal Register**.

**III. Waiver of Proposed Rulemaking**

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite prior public comment on proposed rules. The notice of proposed rulemaking can be waived, however, if an agency finds good cause that notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and it incorporates a statement of the finding and its reasons in the rule issued.

We find good cause to waive the notice-and-comment procedure with respect to this rule because it is

impracticable to employ notice and comment procedures and issue a rule on or before the current effective date for bond submission. We also find good cause to waive notice and comment procedures with respect to this rule because employing such procedures would, in this instance, be contrary to the public interest. We believe that some reputable HHAs are unable to secure the surety bond in time to meet the date currently specified in the regulations, which could result in HHAs being unable to participate in Medicare or Medicaid. Such a result could reduce significantly access to care by program beneficiaries and that outcome would be contrary to the public interest.

For these reasons, we find good cause to waive notice-and-comment and to issue this final rule.

**IV. Waiver of 30-Day Interim Period Before Rule is Effective**

We ordinarily make the effective date of a final rule at least 30 days after the publication of the rule in the **Federal Register**. However, the 30-day interim period can be waived if an agency finds good cause for making the effective date of the rule earlier than 30 days after the publication of the rule and the agency publishes a brief statement with the rule of its findings and the reason therefore.

We find good cause to make the provisions of this rule effective on publication in the **Federal Register**. For the reasons discussed above in section III. of this preamble, "Waiver of Proposed Rulemaking," i.e., because we find it necessary to amend the requirement for the submission of a surety bond to delay the effective date beyond February 27, 1998, it would be both impracticable and contrary to the public interest to delay the effective date of this rule. Therefore, we find good cause to waive the 30-day interim period for this rule. Therefore, we have made the effective date the date of publication in the **Federal Register**.

In accordance with the provisions of E.O. 12866, this document was reviewed by the Office of Management and Budget.

**List of Subjects**

*42 CFR Part 441*

Family planning, Grant programs—health, Infants and children, Medicaid, Penalties, Reporting and recordkeeping requirements.

*42 CFR Part 489*

Health facilities, Medicare, Reporting and recordkeeping requirements.

42 CFR Chapter IV is amended as set forth below:

**PART 441—SERVICES:  
REQUIREMENTS AND LIMITS  
APPLICABLE TO SPECIFIC SERVICES**

A. Part 441 is amended as follows:

1. The authority citation for part 441 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 441.16(i)(1)(i) is revised to read as follows:

**§ 441.16 Home health agency requirements for surety bonds; Prohibition on FFP.**

\* \* \* \* \*

(i) *Submission date and term of the bond.*

(1) \* \* \*

(i) *Initial term:* The term of the initial bond is from January 1, 1998 through a

date specified by the State Medicaid agency.

\* \* \* \* \*

**PART 489—PROVIDER AGREEMENTS AND SUPPLIER APPROVAL**

B. Part 489 is amended as follows:

1. The authority citation for part 489 continues to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

2. Section 489.67(a)(1) is revised to read as follows:

**§ 489.67 Submission date and term of the bond.**

(a) \* \* \*

(1) *Initial term:* The term of the initial bond is from January 1, 1998 through the end of the HHA's fiscal year.

\* \* \* \* \*

(Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh)) (Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program, and Program No. 93.778, Medical Assistance Program)

Dated: February 26, 1998.

**Nancy-Ann Min DeParle,**  
*Administrator, Health Care Financing Administration.*

Dated: February 26, 1998.

**Donna E. Shalala,**  
*Secretary.*

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