

Surety Bond Requirement for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS)

(CMS-Final Rule 6006)

As of July 22, 2009

Surety Bond General Information

1. What is a DMEPOS surety bond?

A DMEPOS surety bond is a bond issued by an entity (the surety) guaranteeing that a DMEPOS supplier will fulfill an obligation or series of obligations to a third party (the Medicare program). If the obligation is not met, the third party will recover its losses via the bond.

2. How do I obtain a surety bond?

You should contact one of the sureties identified on the U.S. Department of Treasury's "Listing of Certified (Surety Bond) Companies;" the Web site for this listing is www.fms.treas.gov/c570/c570_a-z.html. For purposes of the surety bond requirement, these sureties are considered "authorized" sureties, and are therefore the only sureties from which a bond may be obtained.

If the surety determines that your supplier poses a higher risk of loss, some sureties may choose not to offer you a bond, or may offer you a bond but only at an elevated cost.

3. How much will the bond cost?

We estimate that the average annual bond cost is approximately 3 percent of the value of the bond. Thus, the annual cost to the supplier of a \$50,000 bond will be around \$1,500, though CMS stresses that this figure could vary by surety.

4. When will the surety bond requirement become effective?

Suppliers enrolling in the Medicare program for the first time, existing suppliers undergoing a change of ownership, or existing suppliers establishing a new practice location are required to submit a surety bond to the National Supplier Clearinghouse (NSC) with their CMS-855S enrollment application on or before May 4, 2009. Absent an exception to the bonding requirement, the NSC will reject a pending supplier's enrollment application if the supplier has not submitted a valid surety bond by May 4, 2009.

Enrolled DMEPOS suppliers subject to the bonding requirement are required to submit a valid surety bond to the NSC by October 2, 2009.

5. I am an existing supplier who is subject to the October 2, 2009 date. Should I obtain a bond now, or should I wait until that date to obtain one?

We recommend that suppliers that have to meet the October 2, 2009 implementation date should begin the work for the bonding as soon as possible.

6. What should the dollar amount of the bond be?

The bond must be in an amount not less than \$50,000; however, a higher bond amount will be required if the DMEPOS supplier has had a final adverse action imposed against it within the past 10 years; specifically, the necessary bond amount will be raised by an additional \$50,000 for each final adverse action that has been imposed against the supplier within the previous 10 years. For purposes of the surety bond requirement, a “final adverse action” is defined as any of the following:

- A Medicare-imposed revocation of any Medicare billing privileges;
- Suspension or revocation of a license to provide health care by any State licensing authority;
- Revocation or suspension by an accreditation organization;
- A conviction for a Federal or State felony offense (as defined in §424.535(a)(3)(i)) within the last 10 years preceding enrollment, revalidation, or re-enrollment; or
- An exclusion or debarment from participation in a Federal or State health care program.

For purposes of the surety bond requirement, a revocation of Medicare billing privileges that is reversed on appeal does not qualify as a final adverse action vis-à-vis the elevated bond amount.

7. I have multiple DMEPOS supplier locations. Do I need to obtain a bond for each location?

Yes. Suppliers subject to the bonding requirement are required to obtain a surety bond for each practice location that has a separate National Provider Identifier (NPI). Thus, if a supplier has two separately-enrolled DMEPOS locations, each with its own NPI, it must obtain \$50,000 worth of bond coverage for each location. This can be accomplished by obtaining two \$50,000 bonds or a single \$100,000 bond.

8. What events must the bond cover?

The supplier is required to submit a bond that - on its face - reflects the requirements of the surety bond final rule. Specific terms that the bond must contain include:

- A guarantee that the surety will - within 30 days of receiving written notice from CMS containing sufficient evidence to establish the surety's liability under the bond of unpaid claims, civil monetary penalties, or assessments - pay CMS a total of up to the full penal amount of the bond in the following amounts:
 - (A) The amount of any unpaid claim, plus accrued interest, for which the DMEPOS supplier is responsible.
 - (B) The amount of any unpaid claims, civil monetary penalties, or assessments imposed by CMS or the Office of Inspector General on the DMEPOS supplier, plus accrued interest.
- A statement that the surety is liable for unpaid claims, civil monetary penalties, or assessments that occur during the term of the bond.
- A statement that actions under the bond may be brought by CMS or by CMS contractors.
- The surety's name, street address or post office box number, city, state, and zip code.

The bond must also name the DMEPOS supplier as the Principal, CMS as the Obligee, and the surety (and its heirs, executors, administrators, successors and assignees, jointly and severally) as surety.

9. Are non-participating (“non-par”) DMEPOS suppliers subject to the bond requirement to the same extent as participating DMEPOS suppliers?

Yes. A DMEPOS supplier is not exempt from the bond requirement merely because it is “non-par.”

10. If - prior to the May 4, 2009 date – a DMEPOS supplier submits a CMS-855S change of address, reactivation or reenrollment application, is it subject to the May 4 date or the October 2, 2009 date?

Address changes, reactivations and reenrollments do not fall within the categories of applications that are subject to the May 4 date. The October 2 date henceforth applies.

11. Where can I find a listing of DMEPOS suppliers that are subject to the surety bond requirement?

There is no publicly-available “master list” of suppliers that are subject to the bond requirement. The public can, however, search for participating Medicare DMEPOS suppliers at www.cms.hhs.gov/center/dme.asp under “Enrollment/Participation.”

12. For purposes of the surety bond requirement, is any change in the DMEPOS supplier ownership – no matter how minor - considered to be a “change of ownership?”

Ownership changes that: (1) do not involve a change in the status of the legal entity as evidenced by no change in the tax identification number, or (2) result in the same ownership at the level of individuals (corporate reorganizations and individuals incorporating), are not considered to be “changes of ownership” for purposes of the May 4, 2009 effective date. These suppliers are considered to be “existing” suppliers and are thus subject to the October 2, 2009 date.

13. For purposes of the surety bond requirement, what is considered to be a chain DMEPOS supplier?

A chain DMEPOS supplier, for purposes of the bond requirement, is one that has at least 25 **enrolled** locations.

14. Will there be a Web site for a surety to confirm a supplier’s history with the CMS? Will a surety be able to see whether the supplier has been the subject of any disputes, investigations, complaints, etc., in the past?

No such Web site is or will be available. CMS believes that the supplier-surety relationship is between those two parties and we trust that a surety will ask the supplier for adequate evidence of the latter’s background.

15. What must the surety do if it discovers that there is a lapse in its bond coverage of the DMEPOS supplier?

The surety must immediately notify the NSC if there is a lapse in the surety’s coverage of the DMEPOS supplier.

16. How will a surety know that a DMEPOS supplier’s appeal of a provider enrollment revocation or a claim denial has been successful and that CMS has repaid the DMEPOS supplier, if applicable?

CMS or its contractors will notify the surety.

17. CMS will perform a review as to whether a DMEPOS supplier should be subject to an elevated bond requirement in excess of \$50,000. If CMS determines that a DMEPOS supplier is not subject to an elevated bond amount, does CMS intend that determination to indicate whether the DMEPOS supplier is creditworthy to obtain a surety bond?

No. CMS’ review of the DMEPOS supplier’s history is only for the purpose of determining whether CMS believes the supplier should be subject to an elevated bond requirement in excess of \$50,000; the surety should make its own determination as to the DMEPOS supplier’s creditworthiness to obtain a surety bond.

18. I am a DMEPOS supplier looking to obtain a bond. What is the general process involved? What steps must I take?

Though it obviously will vary from case to case, the general bond process is as follows:

- The supplier contacts his or her insurance agent (preferably an agent that specializes in surety bonds).
- The agent requests the information that the surety will need. Essentially, the information goes toward the issue of the supplier's financial and operational abilities to meet the obligations under the bond. This information includes:
 - a. Corporate and personal financial statement
 - b. Tax returns
 - c. Billing policies and procedures
 - d. Organization chart/resumes
 - e. Application for NPI
 - f. Surety Application
 - g. Agreement of indemnity. In most cases, the surety will require the entity and the owners (if business is closely held) to provide their indemnity – agreement to repay surety in the event the surety pays a claim.
- The surety application likely will make the following inquiries:
 - a. Basic information –name and location of business
 - b. Ownership information
 - c. Nature of business – description of “equipment” supplied
 - d. Number of years in business
 - e. Annual Medicare billings
 - f. Information regarding accreditation
 - g. Information regarding audit and disciplinary history

When all the information is submitted, the surety will make a determination regarding whether to issue the bond. If the surety agrees to issue the bond, the insurance agent generally signs the bond on behalf of the surety. The supplier signs the bond and submits a copy to NSC.

19. Who should be listed as the Obligee on the bond form?

The Centers for Medicare & Medicaid Services (CMS). CMS' address is 7500 Security Boulevard, Baltimore MD 21244.

20. Who within the DMEPOS supplier organization must sign the surety bond form?

An authorized or delegated official (as these terms are defined in 42 CFR § 424.502) of the supplier must sign the form. However, if the supplier is one with 25 or more distinct practice locations, the corporate controller or treasurer may sign the bond form if he or she is listed in section 6 of the CMS-855S.

21. In completing Section 12 of the CMS-855S, must the supplier furnish the tax identification number (TIN) and legal business name (LBN) of the surety company and the agency/broker?

Neither the TIN nor LBN of either entity must be listed. However, if the supplier does not provide the LBN(s), it must list the surety company/agency's "doing business as" name.

22. Must the surety or agent list its tax identification number (TIN) on the bond form?

No.

23. How and to what address do I send bond paperwork to the NSC?

The applicable bond paperwork should be submitted along with: (1) Section 12 of the 03/09 version of the CMS-855S and (2) a signed and dated certification statement from that application. (A cover letter that explains the purpose of the submission is suggested, but not required.) If the supplier has multiple locations, it may submit one set of bond paperwork, one certification statement, etc., encompassing all of its locations.

The address to which the bond and associated CMS-855S paperwork should be sent is as follows:

National Supplier Clearinghouse,
P.O. Box 100142
Columbia, SC 29202-3142

24. For purposes of the surety bond requirement, must the surety be licensed in the state in which the supplier/principal is located?

While the surety must be licensed in the state in which the bond is executed/issued, there is no requirement that the surety be licensed in the state in which the supplier/principal is located.

Surety Bond Exemptions

25. Are there any DMEPOS supplier types that are exempt from obtaining a surety bond?

Yes. The following DMEPOS suppliers are exempt from the surety bond requirement found in 42 CFR 424.57(c)(26):

Government-operated DMEPOS suppliers are provided an exception to the surety bond requirement if the DME supplier has provided CMS with a comparable surety bond under State law.

State-licensed orthotic and prosthetic personnel in private practice making custom- made orthotics and prosthetics are exempted from the surety bond requirement if: (1) the business is solely-owned and operated by the orthotic and prosthetic personnel, and (2) the business is only billing for orthotics, prosthetics, and supplies.

Physicians and non-physician practitioners, as defined in section 1842(b)(18) of the Social Security Act, are exempted from the surety bond requirement when items are furnished only to the physician or non-physician practitioner's own patients as part of his or her own service.

Physical and occupational therapists in private practice are exempted from the surety bond requirement if: (1) the business is solely-owned and operated by the physical or occupational therapist; (2) the items are furnished only to the physical or occupational therapist's own patients as part of his or her professional service; and (3) the business is only billing for orthotics, prosthetics, and supplies.

All other DMEPOS suppliers are subject to the surety bond requirement.

26. I am a State-licensed prosthetist in solo private practice. For purposes of the exception for State-licensed protestists identified in 42 CFR 424.57(d)(15)(i)(B), does it make a difference if my practice is set up as a solely-owned corporation or LLC, rather than as a sole proprietorship?

No. So long as the prosthetist owns 100 percent of his/her business, it is immaterial whether the business is organized as a sole proprietorship or a solely-owned LLC or corporation.

27. Can group practices avail themselves of the exceptions to the surety bond requirements? In other words, are the exemptions for physicians, non-physician practitioners, prosthetists, etc., identified in 42 CFR 424.57(d)(15)(i)(B) through (D) limited to sole proprietorships and solely-owned LLCs and corporations?

As a general rule, a group practice is eligible for an exemption to the surety bond if each member of the group would – if he/she was operating as a solo practitioner – qualify for the exemption on his/her own. Thus, for instance, if three prosthetists are in private practice together, each prosthetist must be licensed by the State and have an ownership interest in the business; moreover, the three prosthetists must be the only owners and operators of the business. Likewise, if two physicians operate their own group practice, each physician in the practice must furnish DMEPOS items only to his or her own patients as part of his or her own service in order for the physician group to qualify for the bond exemption.

28. With respect to the exemption for government-operated DMEPOS suppliers that furnish CMS with a comparable surety bond under State law, what is meant by the phrase “comparable surety bond under State law?”

It means that if the supplier furnishes to CMS a copy of a surety bond that: (1) is currently in effect, (2) the supplier was required to obtained pursuant to State law, and (3) otherwise meets all of the criteria required under 42 CFR 424.57(d)(26) (e.g., \$50,000 amount; same bond terms), the supplier need not obtain an additional \$50,000 in bond coverage for its Medicare DMEPOS enrollment.

29. If a physical or occupational therapist bills for DMEPOS items such as wheelchairs and oxygen equipment, can he or she still qualify for an exemption to the bond requirement?

No. The therapist must only be billing for prosthetics, orthotics and supplies.

30. Does the exemption for State-licensed orthotists in private practice apply regardless of the type of orthotics he or she provides? For instance, can an orthotist who furnishes only “prefabricated” and “off-the-shelf” items and services be exempt from the bond requirement?

The language in 42 CFR 424.57(d)(15)(i)(B) states as follows: “State-licensed orthotic and prosthetic personnel in private practice making custom-made orthotics and prosthetics are provided an exception to the surety bond requirements.....” The practitioner must therefore be

“making custom-made orthotics and prosthetics,” which would therefore exclude persons who furnish only “prefabricated” and “off-the-shelf” items from the purview of the exemption.

Note, however, that if the orthotist provides both custom-made and pre-fabricated orthotics and prosthetics, the exception can still apply. It is not necessary for the individual to be furnishing only custom-made items.

31. The exemptions for prosthetists, orthotists, physical therapists and occupational therapists require the individual practitioner to own 100% of the business. Does the physician/non-physician practitioner exemption have a similar ownership requirement?

No. The physician/non-physician practitioner need not own the practice in order to qualify for the exemption.

32. Are mastectomy boutiques exempt from the surety bond requirement?

No.

33. Most of the exceptions to the bond requirement mandate that the individual furnish items and services only to his or her own patients. If the practitioner sees non-Medicare patients, does this disqualify him/her from an exception to the bond requirement?

No. The practitioner can still qualify for the exemption if he/she treats non-Medicare patients, even if those patients are not his/her own. The term “patient,” as used in the exceptions, is limited to Medicare patients. Thus, in order to satisfy the exceptions, the practitioner must be furnishing services to his/her own Medicare patients.

34. Suppose a skilled nursing facility (SNF) subcontracts with a DME company to furnish DMEPOS supplies to the SNF's patients. Must the SNF obtain a surety bond?

It depends on which entity is the enrolled DMEPOS supplier and is furnishing the DMEPOS. If it is the DME company, the SNF need not obtain a bond. If it is the SNF that is enrolled as the DMEPOS supplier, then the DMEPOS supplier that is owned and/or controlled by the SNF must secure a bond.

(NOTE: The same rationale applies to a home health agency (HHA) or hospice. If the DME company, rather than the HHA/hospice, is enrolled as the DMEPOS supplier, the HHA/hospice need not obtain a bond.)

35. Suppose a physical therapist, occupational therapist, prosthetist or orthotist (hereinafter referred to as “the practitioner”) is employed by a physician practice. The practitioner is enrolled as a DMEPOS supplier. The practitioner performs all of his/her services as an employee of the physician practice – that is, he/she only services the physicians’ patients. Must the practitioner obtain a surety bond?

The practitioner must obtain a bond to maintain his/her enrollment as a DMEPOS supplier. He/she does not meet the requirements for the PT/OT or P/O exemptions (e.g., 100% ownership of the business), and there is no exception in the regulation for PT/OTs and P/Os that work exclusively within the physician practice setting.

36. Are Tribally owned and/or operated DMEPOS suppliers exempt from the surety bond requirement?

Yes.

37. I am a prosthetist or orthotist in a State that does not license such individuals. Does this automatically make me ineligible for the prosthetist/orthotist exemption?

No. The State licensure requirement applies only to prosthetists and orthotists in states that license such individuals. However, prosthetists/orthotists in States that do not license such individuals must still meet all other criteria identified in 42 CFR 424.57(d)(15)(i)(B) in order to qualify for the exemption.

38. With respect to the surety bond exemption for prosthetists and orthotists in 42 CFR 424.57(d)(15)(i)(B), what are considered "supplies," as that term is used in 42 CFR 424.57(d)(15)(i)(B)(2)?

For purposes of the surety bond exception for prosthetists and orthotists, "supplies" are those items that are related to custom-made orthotics and prosthetics. Prosthetic devices - such as compression garments, mastectomy items and diabetic shoes - are considered supplies for purposes of this exception only if they are related to the provision of custom-made prosthetics and orthotics.

39. With respect to the surety bond exemption in 42 CFR 424.57(d)(15)(i)(B), what does the term "orthotic and prosthetic personnel" mean?

"For purposes of the surety bond exemption in 42 CFR 424.57(d)(15)(i)(B), the term "orthotic and prosthetic personnel" is limited to orthotists and prosthetists that meet the definition of "qualified practitioner" in either Section 1834(h)(1)(F)(iii)(II) or (III) of the Social Security Act."

40. If I know that I am exempt for the surety bond requirement, must I officially notify the NSC of this?

No.

Surety Bond Information- Multiple Locations/NPIs

41. I am a DMEPOS supplier with only one practice location. However, I have three NPIs – one to bill Medicare as a DME supplier and the other two to bill Medicare for drugs and enteral nutrition, respectively. Since the surety bond requirement is predicated on the NPI, must I obtain three surety bonds?

No. While it is true that the bond requirement is based on the NPI, as a general rule a DMEPOS supplier will not need to submit more than one bond per enrolled location – even if that site has multiple NPIs tied to it. In the scenario described above, therefore, only one bond would be necessary.

42. If a DMEPOS supplier is established as a sole proprietorship and has three separately-enrolled sites, must it obtained three surety bonds?

No. If the DMEPOS supplier is set up as a sole proprietorship, it will only need to submit one \$50,000 bond - regardless of the number of enrolled sites it has. This is because sole proprietorships only receive one NPI.

43. Our single-site pharmacy has two NPIs. One is used to bill for DME supplies, and the other is to bill Medicare Part B for drugs. Since the surety bond requirement is predicated on the number of NPIs the supplier has, must our pharmacy obtain two surety bonds?

No. Only one bond is required. While it is true that the bond requirement is based on the NPI, as a general rule a DMEPOS supplier will not need to submit more than one bond per enrolled location – even if that site has multiple NPIs tied to it.

44. We are a very large chain supplier with hundreds of locations. We open new locations quite frequently. Are we still subject to the May 4 deadline for pending applications for our new locations?

No. Pending applications for new locations that were submitted by suppliers with at least 25 enrolled locations (chain suppliers) are subject to the October 2 date, not the May 4 date. This also means that if a chain supplier submits an application for a new location after May 4 but before October 2, the deadline for the submission of a bond for that location is October 2. We stress that this policy applies only to chain suppliers.

45. Suppose a surety issues a single \$2 million bond for a chain supplier that has 40 locations – or \$50,000 for each of the 40 sites. Is the surety’s liability limited to \$50,000 per location, even though the bond is for \$2 million in the aggregate?

Yes.

46. We know that a single bond can cover multiple locations. Yet can a single location be covered by multiple bonds? For instance, suppose a supplier has one location that requires a \$50,000 bond. Can the supplier obtain two \$25,000 bonds?

No. A single location cannot be covered by multiple bonds.

47. Suppose a DMEPOS supplier has a \$100,000 surety bond to cover losses for a health plan other than Medicare. Can the supplier add \$50,000 to this bond (thus making it a \$150,000 bond) to cover Medicare losses? Or must it obtain a separate and distinct \$50,000 bond?

The supplier must obtain a separate and distinct \$50,000 bond.

48. We are a large chain pharmacy with 100 locations. We understand that we can obtain one \$5,000,000 bond to encompass all locations. Must we list the name, address and NPI of each and every location covered there under on the bond? If we only had one location, what identifying information would have to be listed on the bond?

For each location covered by the bond, the bond must identify the location’s: (1) TIN, (2) legal business name, (3) address, (4) NPI, and (5) NSC/PTAN number (if the location has one). Thus, if a single bond covers 100 locations, the aforementioned identifying information for all 100 sites

must be listed on the bond.

49. I am a supplier with multiple enrolled practice locations but I have less than 25 practice locations. Do I have to submit a separate CMS-855S for each enrolled practice location?

No. You can submit one CMS-855S for all enrolled practice locations. You can submit separate surety bonds for each location or one surety bond for all locations. However, if you submit one surety bond it must clearly provide all required information for each enrolled practice location and be in the amount of \$50,000 for each location.