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October 1, 2007

Kerry N. Weems, Acting Administrator  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
Attention: CMS-6006-P  
P.O. Box 8017  
Baltimore, Maryland 21244-8017

Re: **Medicare Program; Surety Bond Requirement for Suppliers of Durable  
Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS);  
CMS- 6006-P-1**

Dear Acting Administrator Weems:

On behalf of more than 37,000 occupational therapy professionals, the American Occupational Therapy Association (AOTA) submits the comments below in response to the proposed rule on the Surety Bond Requirement for Suppliers of DMEPOS published in the Federal Register on August 1, 2007 (See 72 Fed. Reg. 42001). AOTA appreciates the opportunity to comment on this regulation in connection with occupational therapists' role as suppliers of DMEPOS, namely orthotics, as an integral part of their ongoing patient care. Occupational therapy practitioners who supply orthotics typically operate as small businesses or independent providers and, therefore, AOTA is requesting an exception for occupational therapy practitioners from the surety bond requirement.

## **I. Background**

Occupational therapy is a health, wellness, and rehabilitation profession working with people experiencing stroke, spinal cord injuries, brain injury, congenital conditions, developmental delay, joint replacements and surgeries, mental illness, and other conditions. Occupational therapists help people regain, develop, and build skills that are essential for independent functioning, health, and well-being in the home and community. Occupational therapy professionals have unique expertise in evaluating participation and enabling engagement in meaningful occupations (e.g., activities of daily living). Specifically, occupational therapy evaluation and treatment often is used pre- or post- orthopedic surgery or injury as well as to manage the negative effects of chronic conditions. It includes a multifaceted evaluation of a patient's range of motion, functional abilities, limitations (sensory, motor function, judgment, etc.), home and community needs, and other elements.

AOTA wants to assure that CMS is clear regarding the manner in which occupational therapists are involved in the evaluation for, selection and fitting of, design and fabrication of, training for use of, and provision of DMEPOS items. The major examples of occupational therapists' roles include (1) the role of occupational therapists with patients requiring off-the-shelf (OTS) orthotics, (2) the role of occupational therapists with custom fabricated orthotics, and (3) the role of occupational therapists with patients requiring wheelchairs, scooters and related mobility devices.

### Orthotics and Occupational Therapy

Often a patient's occupational therapy plan of care includes the use of orthotics to help perform activities of daily living, or as a preparatory tool to enable a patient to regain functional abilities and range of motion. Medicare-covered occupational therapy services include the design, fabrication, fitting, provision of, and training in the use of orthotics as part of a Medicare patient's occupational therapy plan of care. In addition, Medicare pays for the device itself as DMEPOS. Currently, occupational therapists who work in private practice settings and who supply orthotics to Medicare beneficiaries are permitted to supply orthotics by obtaining a supplier number from the National Supplier Clearinghouse in order to submit claims for orthotics that are billed using HCPCS Level II codes. Specifically, the DMEPOS item is billed using a HCPCS code and the separate occupational therapy services are billed using CPT codes. In this scenario, the occupational therapist is involved in: (1) evaluating the patient's need for the orthotic (2) selecting and providing the orthotic to the patient, which may involve fitting and training for the orthotic, and (3) providing continuing occupational therapy under a written plan of care as it concerns the orthotic and any additional appropriate occupational therapy services.

### Wheeled Mobility and Occupational Therapy

In addition, occupational therapists work in a variety of settings to evaluate Medicare beneficiaries' seating and position needs for wheelchairs, mobility devices, and assistive technology. The mobility-related equipment may be provided to the beneficiary in one of two ways: (1) an outside mobility device supplier provides the device directly to the beneficiary and bills the Medicare program or (2) the occupational therapist is a device supplier by virtue of having obtained his or her own supplier number and bills Medicare directly. While an occupational therapist in theory could be a commercial supplier of wheelchairs, an occupational therapist in practice rarely obtains a billing number for the sole purpose of supplying and billing for mobility-related equipment and rarely supplies this equipment directly to the beneficiary. Rather, the occupational therapist typically performs seating and positioning evaluations and assesses the home environment for potential modifications related to the mobility-related equipment. In this practice scenario, the beneficiary obtains the mobility-related equipment from a commercial supplier, and the occupational therapist provides ongoing treatment, evaluating functional needs and enabling engagement in activities of daily living. The occupational therapy evaluation and treatment is directly concerned with the appropriateness of the device for the individual as well as with the individual's other occupational needs and goals.

We hope that this background information is helpful in reviewing and considering the following comments on the proposed rule.

## **II. Occupational Therapy Practitioners Should be Exempt From the Surety Bond Requirement for DMEPOS Suppliers**

In the Proposed Rule, CMS specifically solicits comments on whether it should consider establishing an exception to the surety bond requirement for certain physicians and non-physician practitioners, such as those that “occasionally furnish DMEPOS items for the convenience of their patients.” This is explicitly permitted under the governing statute; Section 1834(16) allows the Secretary to waive the requirement of a surety bond to physicians and other practitioners who furnish DMEPOS. *AOTA strongly urges CMS to except occupational therapists from the surety bond requirement.*

### **A. Occupational Therapists, Like Physicians, Furnish DMEPOS Items for the Convenience of their Patients**

CMS should waive the surety bond requirement for occupational therapists who furnish DMEPOS items that would ordinarily be furnished as an integral part of occupational therapy services. Previously, CMS agreed to except occupational therapists from the competitive bidding requirement for those items that would ordinarily be furnished as an integral part of occupational therapy services (See 72 Fed. Reg.17992 dated April 10, 2007). Specifically, CMS modified the relevant regulation in that case by adding a section to give occupational therapists the option to furnish competitively bid items without participating in the Medicare DMEPOS competitive bidding program. CMS stated, “we have determined that these are the items that would ordinarily be furnished as an integral part of occupational therapy and physical therapy services” (72 Fed. Reg. 17992, 18029). CMS should apply the same logic from its decision regarding DMEPOS competitive bidding to the surety bond requirement; namely that occupational therapists, like physicians, are not “commercial suppliers.” Like physicians, occupational therapists furnish DMEPOS items only for the convenience of their patients, are regulated in every State, and furnish the full range of Medicare-covered services and items pursuant to the State scope of practice laws. *The DMEPOS surety bond requirement program should be limited to “commercial suppliers” and should not be applied to physicians and non-physician practitioners, including occupational therapists, who furnish DMEPOS items as an integral component of a written plan of care specifically established to treat a particular beneficiary.*

### **B. Requiring the Posting of a Surety Bond Will Unduly Burden Occupational Therapists**

Requiring the posting of a \$65,000 surety bond will unduly burden occupational therapists. It is estimated that posting a surety bond in this amount would cost a small practice a minimum of \$2,000 per year, per occupational therapist with a DMEPOS supplier number. Many occupational therapists in private practice are sole practitioners or work in small practices. Occupational therapists are not “commercial suppliers” with warehouse-like facilities that ship volumes of DMEPOS items. Occupational therapists are health care professionals treating patients using various clinical techniques, including the use of DMEPOS items. CMS must develop and implement steps that would proactively assist small suppliers, including occupational therapists, so that they may participate in the Medicare

program as orthotics suppliers. AOTA requests that CMS carefully consider the role of and impact on small suppliers like occupational therapists in creating exceptions to the surety bond requirement. ***AOTA urges CMS to use its authority in Section 1847(b)(6)(D) to protect small suppliers such as occupational therapists in private practice from the burdens of posting this bond.***

### **C. Requiring Occupational Therapists to the Post a Surety Bond Will Not Help CMS Achieve its Objectives**

There are a number of reasons why the burden to occupational therapists in requiring them to post this bond is far greater than the benefit CMS would realize. CMS' has four goals in requiring the surety bond for DMEPOS suppliers:

- 1) Limit the Medicare program risk to fraudulent DME suppliers;
- 2) Enhance the Medicare enrollment process to help ensure that only legitimate DME suppliers are enrolled or are allowed to remain enrolled in the Medicare program;
- 3) Ensure that the Medicare program recoups erroneous payments that result from fraudulent or abusive billing practices by allowing CMS or its designated contractor to seek payments from a Surety up to the penal sum; and
- 4) Help ensure that Medicare beneficiaries receive products and services that are considered reasonable and necessary from legitimate DME suppliers.

Occupational therapists furnish DMEPOS items that would ordinarily be furnished as an integral part of occupational therapy services and are distinct from commercial suppliers. Since they either must enroll in the Medicare program as an occupational therapist in private practice, or must be employed by an enrolled provider (such as a hospital, rehab agency or the like); there are a number of regulatory requirements already in place to ensure that occupational therapists are legitimately educated, credentialed, and meeting state practice act requirements such as licensure. Furthermore, CMS will only pay for occupational therapy services that meet the medical necessity requirements under the Medicare regulations. ***For these reasons, occupational therapists already are of low fraud and abuse risk to CMS. There is no further compelling reason to require them to post this surety bond.***

### **III. Conclusion**

AOTA appreciates the opportunity to submit these comments on CMS' proposed rule on the Medicare Surety Bond Requirement for Suppliers of DMEPOS. AOTA urges CMS to consider the impact of the proposed rule on occupational therapists as well as physicians, physical therapists, and other Medicare practitioners who supply DMEPOS items to their Medicare patients, but do not operate as commercial suppliers. AOTA strongly recommends that CMS specifically treat occupational therapists in the same manner CMS has agreed to treat occupational therapists, physical therapists, and physicians under the competitive acquisition program by granting occupational therapists an exception to the surety bond requirement.

AOTA requests that due consideration be given to these comments. Thank you, again, for the opportunity to comment on the proposed rule. We look forward to a continuing dialogue with CMS on these issues.

Sincerely,

Sharmila Sandhu, Esq.  
Regulatory Counsel

cc: Kristin Smith, CAE, Executive Director, American Society of Hand Therapists