



AMERICAN ACADEMY OF
ORTHOPAEDIC SURGEONS

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June 23, 2020

Megan Worstell
Director, Office of Financial Management
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850

Re: The Advance and Accelerated Payment Program during the COVID-19 pandemic

Dear Ms. Worstell,

On behalf of over 34,000 orthopaedic surgeons and residents represented by the American Association of Orthopaedic Surgeons (AAOS), I would like to thank you for your efforts to protect the health of our nation's seniors while mitigating the financial impact of the COVID-19 pandemic on physicians. I am writing today to respond to your letter to me dated May 21, 2020. In that letter, you described the statutory obligations that the Centers for Medicare and Medicaid Services (CMS) has regarding the COVID-19 Advance and Accelerated Payment (CAAP) Program.

As you know, AAOS has expressed its serious concerns about the exorbitant interest rate that will be applied to the balance of advance payments that remain following a relatively brief period of recoupment. AAOS strongly believes that CMS can rely on existing authorities to waive or substantially reduce this interest rate.

In your May 21, 2020 letter, you stated that CMS could not waive or reduce the imposition or collection of interest because it is specifically bound by Sections 1815(d) and 1833(j) of the Social Security Act ("Act") and its implementing regulation, 42 C.F.R. § 405.378. You further stated that 42 C.F.R. § 405.378 does not provide any discretion to use a lower interest rate. These laws and regulations, however, do not apply to advance payments; they apply only to overpayments. Amounts owed under CMS's Advance Payment Program are a debt. In fact, in your letter you correctly referred to these amounts as debts as opposed to overpayments. Section 1815(d) of the Act requires interest to be applied to "the amount of payment made under this part to a provider of services [that] was in excess of or less than the amount of payment that is due."¹ This is consistent with the common industry understanding of an "overpayment." An overpayment is a billing error. The advance

¹Section 1833(j) of the Act has very similar language and applies to Supplementary Medical Insurance Benefits for the Aged and Disabled.

payments made to providers were not “in excess” of what was due. The advance payments were calculated in accordance with regulations and with the expectation of a future recoupment. If an amount remains after an arbitrary recoupment period, it does not mean that the provider received more than it should have and that the full amount would not have eventually been recouped. It just means that a debt is owed to CMS.

Under the Federal Claims Collection Act (“FCCA”), CMS is, as a general rule, required to collect and charge interest on debts owed to it. However, Section 3717(h) of the FCCA is an exception to that rule and states that an agency “may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges.”² The Department of Health and Human Services (“HHS”) has already prescribed such a regulation at 45 C.F.R. § 30.18(g). Under Section 30.18(g)(2)(ii), the HHS Secretary may “waive interest, penalties, and administrative charges charged under this section, in whole or in part, without regard to the amount of the debt, based on . . . (ii) a determination by the Secretary that collection of these charges is: (A) [a]gainst equity and good conscience; or (B) [n]ot in the best interests of the United States.” If there were ever a time that equity and good conscience would justify a waiver in whole or in part of interest owed on advance payments, easing the financial hardships of medical providers attributed to a once-in-a-century pandemic is the time.

Other similar financial assistance that has been offered to healthcare providers during the COVID-19 pandemic has either no interest applied or an interest rate that is much lower to the one applied under the Advance Payment Program. The Provider Relief Fund payments were provided as grants, subject to certain terms and conditions. The Paycheck Protection Program has a 1% interest rate on amounts that are not forgiven. A 10.25% interest rate on amounts that are not recouped under the Advance Payment Program is simply inequitable by comparison. Many commercial loans would not even be this high. Given the fact that many of the providers represented by the AAOS were forced to shut down by government mandate, it seems to undermine the intended benefit of the Advance Payment Program in the first place to charge such a high interest rate. The financial impact on the AAOS members has been staggering. Accordingly, AAOS respectfully requests CMS to waive or substantially reduce the interest rate that applies to the Advance Payment Program.

Thank you again for considering my comments on this important issue. AAOS is committed to working with CMS in addressing the impacts of the 2019 Novel Coronavirus on the healthcare

² Even if CMS were to conclude that an amount owed after the recoupment period were an overpayment, this exception would still apply. 42 C.F.R. § 405.378(a) states that its authority is derived from the FCCA, and 31 U.S.C. § 3717(h) is an exception to the requirement to collect interest under the FCCA.



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community. We would welcome the opportunity to speak with you in more detail and answer any questions you have regarding these comments. Please contact Shreyasi Deb, PhD, MBA (deb@aaos.org) to facilitate further discussions.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Bosco, III, MD, FAAOS'.

Joseph A. Bosco, III, MD, FAAOS
President, AAOS

cc: Seema Verma, MPH, Administrator, CMS
Daniel K. Guy, MD, FAAOS, First Vice-President, AAOS
Felix H. Savoie, III, MD, Second Vice-President, AAOS
Thomas E. Arend, Jr., Esq., CAE, CEO, AAOS
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