American Hospital Association™
Advancing Health in America

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April 6, 2020

The Honorable Alex M. Azar
Secretary
Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
200 Independence Avenue, S.W., Room 445-G
Washington, D.C. 20201

Dear Secretary Azar and Administrator Verma:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, our clinician partners – including more than 270,000 affiliated physicians, 2 million nurses and other caregivers – and the 43,000 health care leaders who belong to our professional membership groups, **the American Hospital Association (AHA) urges the Department of Health and Human Services (HHS) and the Centers for Medicare & Medicaid Services (CMS) to exercise existing authorities to waive interest or substantially reduce the interest rate on any balance owed on accelerated/advanced payments made under section 3719 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act and the March 28 expansion announcement by CMS. Together, HHS and CMS have at least four mechanisms available to waive or reduce interest on accelerated/advanced payments owed and none requires rulemaking. These include:**

- **Waiving the imposition or collection of interest utilizing HHS' existing waiver authority;**
- **Employing CMS authority to refrain from issuing a demand letter;**
- **Announcing that HHS will use the 2% interest rate set by the Secretary of the Treasury; or**
- **Entering into a contract/repayment arrangement that uses a lower interest rate.**

Financial struggles continue to mount as providers prepare and care for the influx of patients with suspected or diagnosed COVID-19. Many of our member hospitals, especially those in rural areas, have expressed very serious concerns about a lack of cash flow, and thus the ability to keep their doors open. In fact, several have shared that their current resources will not last them *through the rest of the month.* The accelerated/

advanced payment program will offer some much-needed relief in the short term for these providers, and we appreciate the efforts of Congress and CMS to expand the eligibility for these payments and offer more flexible repayment arrangements. Importantly, however, neither the CARES Act provision nor the expansion by CMS lowered the rate of interest on monies owed.

Based on information provided to AHA in response to our March 30 letter and during CMS' April 2 conference call, any outstanding balance at the end of the recoupment period is subject to interest. The process is initiated when a demand letter is sent to the provider for the remaining balance at the end of the recoupment period – either 12 months or seven months, depending on the provider type. The provider then has a 30-day grace period from the issuance of the demand letter to send a direct payment to CMS in order to fulfill its repayment without interest. Interest accrues beginning on the 31st day after the demand letter. The program applies the "prevailing rate set by the Treasury Department,"[1] which is currently set at 10.25%.[2] **This high interest rate can put hospitals at further financial risk while they are already vulnerable, and may prevent hospitals from requesting crucial accelerated/advanced payments.** The AHA has previously urged that interest on this program be waived.

Both HHS and CMS have the ability to take actions that would ultimately forgo the collection of interest on accelerated/advanced payments. In addition, HHS has authority to lower the interest rate on these payments. The following outlines four approaches available to HHS and CMS to eliminate or reduce the interest on accelerated/ advanced payments.

WAIVE THE IMPOSITION OR COLLECTION OF INTEREST UTILIZING HHS'S EXISTING WAIVER AUTHORITY

HHS' regulation governing interest contains broad waiver authority. First, 45 CFR 30.18(g)(2)(ii) allows the HHS Secretary to "waive interest, penalties, and administrative charges charged under this section, in whole or in part, without regard to the amount of the debt" where he determines collecting the interest is "(A) [a]gainst equity and good conscience; or (B) [n]ot in the best interest of the United States." Similarly, 45 CFR 30.18(g)(1) allows the HHS Secretary to "waive the collection of interest and administrative charges imposed pursuant to this section on the portion of the debt that is paid within 30 days after the date on which interest began to accrue. The Secretary may extend this 30-day period on a case-by-case basis if the Secretary determines that such action is in the best interest of the Government, or otherwise warranted by equity and good conscience." **In the context of the accelerated payment process, the HHS**

[1] Medicare Financial Management Manual, Chapter 3, 150.3 – Recoupment of the Accelerated Payment.
[2] Pub 100-06 Medicare Financial Management, Transmittal 334, CR 11653, Jan. 13, 2020

Secretary could therefore waive interest completely or waive collection of interest on the portion of the debts that have not been paid beyond 30 days – for example, for a year or more -- from the date that interest began to accrue.[3] Moreover, the HHS Secretary can waive interest under this authority without engaging in rulemaking.

EMPLOY CMS AUTHORITY TO REFRAIN FROM ISSUING A DEMAND LETTER

As noted above, the issuance of a demand letter initiates the process for charging interest on the outstanding balance on repayment. Under Medicare regulations, a "written demand for payment" is necessary to make a final determination that an overpayment has in fact occurred, 42 CFR 405.378. The final determination of overpayment then triggers interest, as required by statute. Specifically, section 1815(d) of the Social Security Act (SSA) states, "Whenever a *final determination* is made that the amount of payment made under [Part A][4] to a provider of services was in excess of or less than the amount of payment that is due, and payment of such excess or deficit is not made (or effected by offset) within 30 days of the date of the determination, interest shall accrue on the balance . . . owed at a rate determined in accordance with the regulations of the Secretary of the Treasury applicable to charges for late payments." (Emphasis added.)

CMS could refrain from sending a demand letter for remaining balances on accelerated/advanced payments. Without the letter, no final determination would be made, and as a result, no interest would begin to accrue.

No statute or regulation requires issuance of a demand letter by a specific time. First, while the Federal Claims Collection Act (FCCA) dictates that an agency must engage in recovery of overpayments or other monies owed, the final determination of overpayment remains within the agency's purview.[5] The agency would remain in compliance with the FCCA by electing not to make a final determination. Second, the agency would continue to comply with section 3719 of the CARES Act, which sets a floor, but not a ceiling on the time for requiring repayment. Congress made clear that the HHS Secretary must "[a]llow ***not less than 12 months*** from the date of the first accelerated payment before requiring that the outstanding balance be paid in full." (Emphasis added.) In setting only a repayment floor, Congress recognized that hospitals would need adequate time to be able to repay any accelerated payments owed. Congress gave the HHS Secretary discretion to decide when to make the repayment request – as long as the request comes no sooner than 12 months from the first accelerated payment. By forbearing from making a written demand for payment

[3] The Secretary could deny waivers of interest in cases of, for example, bad faith and thereby maintain the "case-by-case basis" waiver contemplated under the current regulation.
[4] SSA section 1833(j) contains substantively identical language governing Part B overpayments.
[5] *See generally* 31 CFR 901. ("The specific content, ***timing***, and number of demand letters shall depend upon the type and amount of the debt and the debtor's response . . . ." 31 USC 901.2(a).)

until some date not less than 12 months from the date of the first accelerated payment, CMS could avoid making interest due while fulfilling the CARES Act requirement. Rulemaking is not needed for CMS to delay sending a written demand letter. To the extent that the agency needs to advise its contractors how to proceed, CMS could take action through a program transmittal or other form of guidance. However, the agency could also choose to promulgate an interim final rule to amend 42 CFR 405.378 to make explicit that there is no final determination of overpayment - as demonstrated by no demand letter - for accelerated payments during the emergency time period.

ANNOUNCE THAT THE STATUTORILY AUTHORIZED TREASURY RATE OF 2% WILL BE USED

If the HHS Secretary elects not to waive interest, the statutorily authorized Treasury rate of 2% should be used in lieu of the current 10.25% rate. HHS possesses authority to lower the interest rate for accelerated/advanced payments that hospitals are unable to repay timely. Under 45 CFR 30.18(b)(2), "Unless a different rate is prescribed by statute, contract, or a repayment agreement, the rate of interest charged shall be the rate established annually by the Secretary of the Treasury pursuant to 31 U.S.C. 3717. The Department may charge a higher rate if necessary to protect the rights of the United States and the Secretary has determined and documented a higher rate for delinquent debt is required to protect the Government's interests."

Thus, under current regulations, the HHS Secretary may *choose* to use the current value of funds rate (CVFR) rate set by the Secretary of the Treasury pursuant to 31 U.S.C. 3717, which is currently 2%,[6] or use a higher rate if he determines it is necessary "to protect the Government's interests." In these circumstances, the choice should be clear – 2% is the appropriate interest rate for any accelerated/advanced payments that have not been repaid.[7]

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[6] *See* https://fiscal.treasury.gov/reports-statements/cvfr/.

[7] The Medicare regulation at 42 CFR 405.378(d) requires that the interest rate on *overpayments* be the higher of the CVFR or the rate set by the Secretary of Treasury after considering prevailing private consumer rates. However, that regulation, by its terms, is limited to overpayments. *See also* 42 CFR 405.301 (scope of subpart containing the interest regulation is limited to "incorrect payments and recovery of overpayments"). In the absence of a definition of "overpayment" in that subpart (or in the general Medicare definitions section), the Secretary can conclude that any accelerated/advanced payments are a loan ("an advance") and not an overpayment. Moreover, even if delay in repayment of accelerated/advanced payments were considered an overpayment, CMS could promulgate an interim final rule amending its regulations to permit use of the CVFR. The Medicare statute does not prescribe a particular interest rate. Instead, it says only that "interest shall accrue . . . at a rate determined in accordance with the regulations of the Secretary of the Treasury applicable to charges for late payments." SSA §§ 1815(d), 1833(j). Thus, CMS has authority to use the CVFR as the interest rate on Medicare debts..

The HHS Secretary previously *elected* to use a higher interest rate for all debts owed to HHS. However, that higher rate is not required, and the CVFR can be used instead without a change in regulation.[8] All that is needed is *publication* of the new lower interest rate.[9]

ENTER INTO A REPAYMENT ARRANGEMENT THAT USES A LOWER INTEREST RATE

As noted above, 45 CFR 30.18(b)(2) gives HHS authority to lower the interest rate by contract or repayment agreement: "Unless a different rate is prescribed by statute, *contract, or a repayment agreement*, the rate of interest charged shall be the rate established annually by the Secretary of the Treasury pursuant to 31 U.S.C. 3717." (*Emphasis added*.) **Under this authority, HHS could issue a response to providers' requests for accelerated/advanced payments that defines a new interest rate, e.g., the 2% CVFR, as a contract term or repayment obligation that applies to said accelerated payments.**

We appreciate your consideration of these approaches to use existing authorities to waive or reduce the interest rate on accelerated/advanced payments. Such modification will help ensure that providers have the resources they need at this crucial time, and remain able to provide essential patient care throughout the COVID-19 pandemic that the U.S. is facing. Please contact me if you have questions or feel free to have a member of your team contact Erika Rogan, AHA senior associate director for policy, at (202) 626-2963 or erogan@aha.org.

Sincerely,

/s/

Richard J. Pollack
President and Chief Executive Officer

[8] *See* https://www.hhs.gov/about/agencies/asfr/finance/financial-policy-library/interest-rates/index.html.
[9] The higher "interest rate will be applied to overdue debt until the Department of Health and Human Services publishes a revision." *Id.*