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MEMORANDUM

To: Hospital Clients

From: John Ward Weiss
Cheairs M. Porter

Re: Final EMTALA Regulations

Date: September 11, 2003

On September 9, 2003 the Center for Medicare and Medicaid Services (CMS) issued the final rules (the "Rules") to clarify policies related to the responsibilities of Medicare-Participating Hospitals in treating individuals with emergency medical conditions under the Emergency Medical Treatment and Active Labor Act ("EMTALA"). The Rules and comments published with the Rules (the "Comments"), primarily address the following topics: seeking authorization from insurers for services, emergency patients presenting at off campus outpatient clinics that do not routinely provide emergency services, the applicability of the EMTALA provisions to hospital inpatients and outpatients, and issues with on call lists and the responsibilities of hospital owned ambulances.

1. Authorization from Insurer: The Rules provide that a hospital may seek information about an individual from an insurer as long as the information does not concern payment. Additionally CMS provides in the Comments that as long as it does not cause delay in providing stabilizing treatment or screening services, that a hospital may also seek authorization for all services concurrently with providing stabilizing treatment. Additionally, the Comments clarify that an emergency physician may contact the patient's physician at any time to seek advice or information regarding the patient's needs or history relevant to medical screening or treatment.

2. Presenting on Hospital Property other than the Emergency Department: The Rules clarify where an individual must present on hospital property in order for EMTALA to be triggered, i.e. when an individual presents on property which is not in the hospital's emergency department. The Rules explain that an individual can come to the emergency department creating an EMTALA obligation on the part of the hospital in one of two ways: the individual can present at the hospital's "dedicated emergency

department" and request an examination or treatment for a <u>medical condition</u>; or the individual can present elsewhere on hospital property and request examination or treatment for what he believes to be an <u>emergency medical condition</u>.

The Rules provide that a department or facility of a hospital will be considered to be a "dedicated emergency department" if: 1) it is licensed by state law as an emergency department; 2) it is held out to the public as a place that provides care for emergency medical conditions on an urgent, nonappointment basis; or 3) based upon a representative sample of patient visits that occurred during the calender year immediately preceding the year, it provides at least one-third of all of its outpatient visits for treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment. (CMS explains in the Comments that individuals who suffer from an emergency medical condition after they arrive at the hospital for an outpatient visit, but before they begin an outpatient encounter, and individuals whose appearance or behavior would cause a prudent layperson observer to believe they need examination or treatment for an emergency medical condition, would be counted toward the one-third standard). The Comments provide that objective criterion relating to a set percentage of visits will provide hospitals with a measure of predictability.

The Comments go on to provide that a hospital's dedicated emergency department would encompass departments of the hospital, such as labor and delivery departments and psychiatric units, that provide emergency or labor and delivery services to individuals who may present as unscheduled ambulatory patients and are routinely admitted to be evaluated and treated. CMS uses the following example:

> [I]f a man with cold symptoms or another medical condition were to seek treatment in the obstetrics and gynecology department rather than the general emergency department, this presentation would create an EMTALA obligation for the hospital, but the hospital would not be prohibited from transporting the individual to its general emergency department for screening and stabilization if that action were medically indicated.

Significantly, CMS explains that the "prudent layperson standard" is not an appropriate measure for the assessment of whether an area of the hospital is a dedicated emergency department. Instead the agency has adopted the three options mentioned above as the sole standard for what qualifies as a dedicated emergency department. Furthermore, because the prudent layperson standard has been removed, the Comments explain that terms "specialized staff" and "specialized equipment" as used in the proposed rule are eliminated.

In the Comments, CMS goes on to provide that EMTALA applies to off-campus departments only if they qualify as a dedicated emergency department. However, hospitals are instructed to have appropriate protocols in place for dealing with individuals who come to off-campus non-emergency facilities to seek emergency care.

3. Presenting to the Dedicated Emergency Department for Non Emergency Services: The Rules provide:

> If an individual comes to a hospital's dedicated emergency department and a request is made on his or her behalf for an examination or treatment for a medical condition, but the nature of the request makes it clear that the medical condition is not of an emergency nature, the hospital is required only to perform such screening as would be appropriate for any individual presenting in that manner, to determine that the individual does not have an emergency medical condition.

The Comments clarify that hospitals are obligated to provide screening services (not necessarily performed by an M.D. or a D.O.), but not beyond those needed to determine that there is no emergency medical condition. CMS reiterates that a medical screening examination is a process required to reach with reasonable clinical confidence, a determination about whether a medical emergency does or does not exist. But CMS explains that while EMTALA does apply to an individual who presents to a hospital's dedicated emergency department with a medical condition, it applies only to the extent that the individual must be screened for emergency medical conditions and supplied stabilizing treatment.

According to the previous rules, a hospital's obligation to provide a medical screening examination is triggered by a request made by or on behalf of the individual coming to the emergency department for examination or treatment for a medical condition. In the Comments, CMS explains that if the individual's appearance or behavior would cause a "prudent layperson observer" to believe that examination or treatment for a medical condition is needed and that the individual would request that examination or treatment if he was able to do so, then EMTALA is triggered. However, CMS limits the application of this obligation by providing that when an individual presents to a dedicated emergency department for preventative care services the hospital is not obligated to provide a medical screening examination. In other words, EMTALA does not apply to individuals who pass through the hospital's emergency department but do not request examination or treatment for a medical condition. The Comments provide that specific presentments, such as requests by law enforcement authorities for medical clearance of persons who are about to be incarcerated are to be evaluated on a case by case basis.

4. Presenting to an Area of the Hospital's Main Campus other than the Dedicated Emergency Department: The Rules re-address the applicability of EMTALA to an individual who presents to an area of the hospital main campus other than the dedicated emergency department. CMS provides that if an individual has begun to receive outpatient services before the individual presents to the hospital for examination or treatment for an emergency medical condition, EMTALA does not apply. In other words, any individual who comes to a hospital to receive nonemergency services and the individual has begun to receive those services when he or she suffers an emergency medical condition, is not protected by EMTALA's medical screening requirement, (but note that the individual may be covered by the hospital's conditions of participation). In the Comments, CMS warns that the EMTALA application does not end just because the individual has begun an outpatient encounter. The agency reminds hospitals that only the screening, and where necessary, stabilization, admission for inpatient services, or appropriate transfer, end the hospital's EMTALA obligation.

Significantly CMS clarifies that EMTALA does not apply to on-campus hospital property other than the dedicated emergency department unless "emergency medical services" are requested (as opposed to requests simply for "medical services" in the dedicated emergency department). For example, EMTALA is not triggered by a request for physical therapy, (i.e. a medical condition), at the hospital's on campus physical therapy department. But if the same request for physical therapy is made in the dedicated emergency department, EMTALA is triggered.

Whether a request is made by, or on behalf of, an individual is also subject to the prudent layperson standard. In the Comments, CMS clarifies that the prudent layperson standard is to be relied upon only in circumstances where the individual is unable to make the request for examination or treatment of himself.

5. Hospital Inpatients: The Rules generally provide that EMTALA does not apply to hospital inpatients, unless the hospital did not admit the individual in good faith with the intention of providing treatment, but instead used the hospital admission as a means to avoid EMTALA. CMS explains in the Comments that because EMTALA does not apply to inpatients admitted in good faith, hospitals are not required to post signs or maintain logs on inpatients.

6. Hospital Departments and Non-Hospital Entities: In the Rules, CMS clarifies that EMTALA only applies to off-campus departments if they qualify as dedicated emergency departments. The Rules set out that hospitals must develop appropriate protocols for dealing with individuals who come to off-campus nonemergency facilities seeking emergency care. Significantly CMS clarifies that EMTALA is applicable to hospitals, and the obligations do not extend to nonhospital entities, such as rural health clinics or physician offices, even where those entities are located adjacent to the hospital and owned and/or operated by the hospital. The Comments confirm that restaurants, shops, or other nonmedical facilities are excluded from the reach of EMTALA.

7. On-Call Requirements: The Rules provide the following:

> (1) Each hospital must maintain an on-call list of physicians on its medical staff in a manner that best meets the needs of the hospital's patients who are receiving services required under this section in accordance with the resources available to the hospital, including the availability of on-call physicians.
>
> (2) The hospital must have written policies and procedures in place– (i) [t]o respond to situations in which a particular specialty is not available or the on-call physician cannot respond because of circumstances beyond the physician's control; and (ii) [t]o provide that emergency services are available to meet the needs of patients with emergency medical conditions if it elects to permit on-call physicians to schedule elective surgery during the time that they are on call or to permit on-call physicians to have simultaneous on-call duties.

The Comments address the on-call requirements for hospitals by providing that a hospital must have polices and procedures to be followed when a particular specialty is not available or an on-call physician cannot respond because of situations beyond his control, but physicians generally are not required to be on call at all times. Importantly and dispelling a common rumor, CMS states in the Comments that the agency has no rule stating that when there are three physicians in a specialty, the hospital must provide 24 hour/7 day coverage in that specialty, i.e. the "rule of three." CMS does elaborate that the Medicare State Operations Manual provides that if a hospital offers a service to the public, the service should be available through on-call coverage of the emergency department. But the Comments explain that adopting the State Operations Manual's position in the final rules could cause an unrealistically high standard that all hospitals could not meet. Therefore, CMS explains, it has adopted in the Rules the position espoused in a Survey and Certification Letter No. S&C-02-34 and Certification Letter No. S&C-02-35, both issued by the agency on June 13, 2002, providing that hospitals should have flexibility in adopting specific policies and procedures in meeting their EMTALA responsibilities, so long as they meet the needs of the individuals who present for emergency care.

CMS also explains in the Comments that it may be appropriate, but it is not required under EMTALA, for a hospital to have a referral agreement with other hospitals to facilitate appropriate transfers.

Under the Rules, physicians are allowed to be on-call at more than one hospital at one time. However, the Comments provide that hospitals should develop and implement policies and procedures for when an on-call physician is simultaneously on-call at another hospital and is not available to respond. CMS provides that it may be appropriate for a physician assistant to respond to an emergency call. However, the decision of whether to respond in person, or allow a physician assistant to respond, should only be made by the responsible on-call physician, based on the individual's medical needs and the capabilities of the hospital.

8. Hospital Owned Ambulances: The Rules add an exception to the definition of "comes to the emergency department" with respect to a hospital owned ambulance. Specifically, an individual who is not a patient is considered to come to the emergency department of a hospital for EMTALA purposes if the individual is in a ground or air ambulance owned and operated by the hospital, regardless of whether or not the ambulance is on hospital property. In the Rules, CMS has carved out an exception to this general principle, in that when an ambulance is operating under community wide emergency medical service protocols that direct it to transport the individual to a hospital other than the hospital that owns the ambulance, the individual will not have "come to the emergency department" for EMTALA purposes.

9. Conditions of Participation: The Rules also add a requirement under the Medicare Conditions of Participation that if emergency services are provided at the hospital but are not provided at an off-campus department, the governing body of the hospital is responsible to make sure that the medical staff has written policies and procedures in effect with respect to the off-campus department for when a referral is appropriate.