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July 11, 2014

Daniel R. Levinson, Inspector General
Office of Inspector General
Department of Health and Human Services
Attention: OIG–403–P
Cohen Building
330 Independence Avenue, SW
Room 5541C
Washington, DC 20201

Re: Medicare and State Health Care Programs: Fraud and Abuse; Revisions to the Office of Inspector General's Civil Monetary Penalty Rules

Dear Mr. Levinson,

On behalf of the American Association of Neurological Surgeons (AANS) and the Congress of Neurological Surgeons (CNS), we appreciate the opportunity to comment on the above referenced Office of Inspector General proposed rule. We will limit our comments to the provisions related to the Emergency Medical Treatment and Labor Act (EMTALA) and the definition of "responsible physician."

The language in the proposed rule discusses physician obligations created by EMTALA, including the responsibilities for on-call physicians. In changing the definition of "responsible physician," the OIG states that it is seeking to clarify that:

> [O]n-call physicians at any participating hospital subject to EMTALA, including the hospital the individual initially presented to and the hospital with specialized capabilities or facilities has received a request to accept an appropriate transfer, face potential CMP and exclusion liability under EMTALA…The current definition of 'responsible physician' also provides for on-call physician liability. We propose to revise the definition to clarify the circumstances when an on-call physician has EMTALA liability. An on-call physician that fails or refuses to appear within a reasonable time after such physician is requested to come to the hospital for examination, treatment, or transfer purposes is subject to EMTALA liability. This includes on-call physicians at the hospital where the individual presents initially and requests medical examination or treatment as well as on-call physicians at a hospital with specialized capabilities or facilities where the individual may need to be transferred. In addition, an on-call physician at the hospital with specialized capabilities or facilities may violate EMTALA by refusing to accept an appropriate transfer.

The AANS and CNS acknowledge the requirements that EMTALA places on physicians who are on-call to the emergency department. While not made clear in the proposed rule, we urge the OIG to ensure that enforcement of EMTALA's rules regarding "responsible physician" are consistent with the regulations promulgated by the Centers for Medicare & Medicaid Services, including the Interpretive Guidelines — particularly Tag A-2404/C-2404. Under this section of the Interpretive Guidelines, it is clear that the

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obligation is on the hospital to develop written policies and procedures regarding the availability of on-call physicians, including steps to be taken if a particular specialty is not available or the on-call physician cannot respond due to circumstances beyond his or her control. With regard to the availability of on-call physicians, the guidelines specifically state:

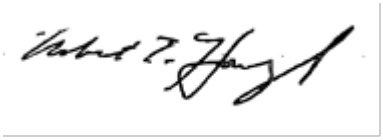
> **§489.24(j) - Availability of On-call Physicians**
>
> In accordance with the on-call requirements specified in §489.20(r)(2), a hospital must have written policies and procedures in place—
>
> (1) To respond to situations in which a particular specialty is not available or the on-call physician cannot respond because of circumstances beyond the physician's control;
>
> (2) To provide that emergency services are available to meet the needs of individuals with emergency medical conditions if a hospital elects to—
>
> (i) Permit on-call physicians to schedule elective surgery during the time they are on call;
>
> (ii) Permit on-call physicians to have simultaneous on-call duties;
>
> (iii) Participate in a formal community call plan. Notwithstanding participation in a community call plan, hospitals are still required to perform medical screening examinations on individuals who present seeking treatment and to conduct appropriate transfers. The formal community call plan must include the following elements:
>
> (A) A clear delineation of on-call coverage responsibilities; that is, when each hospital participating in the plan is responsible for on-call coverage.
>
> (B) A description of the specific geographic area to which the plan applies.
>
> (C) A signature by an appropriate representative of each hospital participating in the plan.
>
> (D) Assurances that any local and regional EMS system protocol formally includes information on community-call arrangements.
>
> (E) A statement specifying that even if an individual arrives at a hospital that is not designated as the on-call hospital, that hospital still has an obligation under §489.24 to provide a medical screening examination and stabilizing treatment within its capability, and that hospitals participating in the community call plan must abide by the regulations under §489.24 governing appropriate transfers.
>
> (F) An annual assessment of the community call plan by the participating hospitals.

Consistent with the above guidelines, we urge the OIG to recognize that in many areas of the country there simply aren't enough physicians, particularly neurosurgeons, available to serve on-call at hospital emergency departments. There are approximately 5,700 hospitals in the U.S., and of these, over 4,000 have emergency departments. At the same time, there are only 3,700 actively practicing board certified neurosurgeons. It is obvious that there are not enough neurosurgeons to provide full on-call emergency coverage to all the hospitals with dedicated emergency rooms in this country 24 hours per day, 7 days per week, 365 days per year. As a result many neurosurgeons provide emergency call coverage

simultaneously at more than one hospital and typically perform elective surgery when they are on-call. It is therefore critical to keep this in mind when determining whether or not a neurosurgeon's response time was reasonable. Furthermore, it is the obligation of the hospital, not the on-call physician, to have an adequate back-up plan in place when the physician is not available to respond for the many legitimate reasons recognized by the EMTALA regulations and interpretive guidelines. From our reading of the proposal, this fact needs to be further clarified when defining "reasonable physician."

The AANS and CNS believe that the current EMTALA rules and regulations reflect a balanced approach that recognizes the public's need to timely access to emergency services, as well as the realities on-call physicians face in providing such services. We appreciate the opportunity to comment on this proposed regulation. In the meantime, if you have any questions or need further information, please contact us.

Sincerely,



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