

defined at § 410.2) with a health professional at the outpatient department.” (Emphasis added.)

The commenter then compared this language in the preamble to the proposed regulatory text at § 489.24(b) that would hold a hospital accountable under EMTALA when an individual has presented on hospital property other than a dedicated emergency department, “and requests examination or treatment for what may be an emergency medical condition, or has such a request made on his or her behalf. * * *” The commenter was concerned that neither of the preamble’s purported tests for EMTALA’s applicability outside of the dedicated emergency department that are quoted above is referenced in the proposed regulatory text: neither the test of whether the individual came to the hospital in an attempt to gain access to the hospital for emergency care, nor the objective test of whether the patient has begun an encounter with a health professional at the outpatient department. This commenter believed that the regulatory text should be revised to clearly state that EMTALA is not applicable to outpatients who have initiated an encounter with a health professional in a hospital outpatient department other than a dedicated emergency department.

Another commenter suggested that we substitute the term “member of the public” for “outpatients” in the definition of dedicated emergency department (“a dedicated emergency department would mean a specially equipped and staffed area of the hospital that is used a significant portion of the time for the initial evaluation and treatment of *outpatients* for emergency medical conditions”). The commenter believed that the clear implication of the definition is that an outpatient may be covered under EMTALA, a conclusion that is inconsistent with other provisions in the proposed rule.

Other commenters requested that we clarify that EMTALA would not apply when individuals arrive on the orders of their physicians, such as when a pregnant woman or a psychiatric patient arrives upon a physician’s order either for testing or because he or she is in need of immediate medical care. In addition, some commenters believed that CMS should clearly state that only the Medicare hospital CoPs and not EMTALA would apply to individuals with scheduled outpatient appointments or procedures.

Another commenter disagreed with the CMS statement in the preamble to the proposed rule that EMTALA does not apply to “established patients” who

need emergency care while on hospital property. The commenter stated that it may be impossible to distinguish such a patient from anyone else experiencing a similar emergency also on hospital property, and was concerned that the concept of excluding an established patient from EMTALA will raise many definitional and logistical issues.

One commenter believed that we intended for EMTALA not to apply in situations where the individual has arrived for an appointment, even if they had not yet been assisted. The commenter urged clarification on this issue.

One commenter stated that there may be occasions where individuals present to the hospital for outpatient services where *no* orders are necessary to provide services to the individual, such as annual mammograms or health fairs. The commenter requested that EMTALA should not apply to individuals in these circumstances.

Response: As we describe above, in the preamble to the May 9, 2002 proposed rule, we proposed that EMTALA would *not* apply to an individual who experiences what may be an emergency medical condition if the individual is an outpatient (as that term is defined at 42 CFR 410.2) who has come to a hospital outpatient department for the purpose of keeping a previously scheduled appointment. In response to the comments requesting further clarification of the text of the regulations, and in consideration of the role of the Medicare hospital CoPs in protecting the health and safety of hospital outpatients, we are revising the final rule to state that EMTALA does not apply to any individual who, *before* the individual presents to the hospital for examination or treatment for an emergency medical condition, has begun to receive outpatient services as part of an encounter, as defined in 42 CFR 410.2, other than an encounter that the hospital is obligated by EMTALA to provide. We believe this revised language sufficiently encompasses any individuals who come to a hospital to receive nonemergency services and have begun to receive those services. Such individuals would be included under this policy, regardless of whether or not they began the nonemergency encounter in order to keep a previously scheduled appointment or under orders of a physician or other medical practitioner. We also assume that specific mention of outpatient registration is unnecessary in the revised language because we believe all individuals who have begun an encounter under § 410.2 are registered outpatients in the hospital’s records. This change is reflected in the revision

of the proposed definition of “patient” under § 489.24(b) in this final rule. As we stated in the preamble to the proposed rule, we believe it is inappropriate to consider such individuals, who are hospital outpatients who have protections under the CoPs, to have “come to the hospital” for purposes of EMTALA as well, even if they subsequently experience an emergency medical condition.

We note that individuals who are already patients of a hospital and who experience emergency medical conditions are protected by existing Medicare hospital CoPs. We discuss these CoPs in greater detail in section XIII. of this final rule. Hospitals that fail to provide treatment to these patients could face termination of their Medicare provider agreements for a violation of the CoPs. In the January 24, 2003 **Federal Register** (68 FR 3435 through 3436), we describe the process by which we enforce compliance with these CoPs. For example, we explained that if our surveyors discover noncompliance with the hospital CoPs, “the hospital will be scheduled for termination from the Medicare and Medicaid programs.” Thus, for violations of the CoPs, as well as for violations of EMTALA (compliance with which is a Medicare participation requirement) hospitals face the extreme sanction of termination from the Medicare program. In addition, as patients of a health care provider, these individuals are accorded protections under State statutes or common law as well as under general rules of ethics governing the medical professions.

In response to the comment concerning the individual who comes to the hospital for purposes of an annual mammogram or health fair, with or without an order or referral by a physician, that individual is not presenting to the hospital with a particular emergency medical condition. Therefore, EMTALA would not apply. We believe this is consistent with our policy stated elsewhere in this preamble.

Of course, where EMTALA applies to a particular individual who has presented to the hospital for examination or treatment for an emergency medical condition, EMTALA’s application does not end just because the individual has begun an outpatient encounter; *only* screening and, where necessary, stabilization, admission for inpatient services, or appropriate transfer end the hospital’s EMTALA obligation to the individual (see section VIII. of this preamble for further discussion of the issue of when an EMTALA obligation ends). The fact