TMB Releases Emergency Rules: 
Non-Urgent Surgeries and Procedures

TMA Office of the General Counsel

UPDATED APRIL 22, 2020

*Disclaimer: The information relating to COVID-19 is continually evolving, and the information provided here is subject to change at any time. Please contact the TMA Knowledge Center (contact information provided at the end) or view the appropriate agency’s website for the most up-to-date information.

I. BACKGROUND

On March 24, the Texas Medical Board (TMB) released emergency rules on the provision of non-urgent, elective surgeries and procedures in all licensed inpatient and outpatient facilities and medical settings following Gov. Greg Abbott’s Executive Order GA-09 (EO GA-09), effective March 22. The order directed all licensed health care providers to postpone all surgeries and procedures that “are not immediately necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient’s physician.” The purpose of the order was to preserve the availability of health care personnel, personal protective equipment (PPE), and additional hospital space to care for patients affected by the coronavirus (COVID-19). Accordingly, the governor caveated his directive, stating that “this prohibition shall not apply to any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster.” The TMB emergency rules tracked the order and also contained a mandatory reporting requirement.

Executive Order GA-09 expired at 11:58 pm on April 21, 2020. On April 17, the governor issued Executive Order GA-15 (EO GA-15), effective on April 21, 2020, at 11:59 pm, pertaining to preserving hospital bed capacity and PPE. The order appears to permit more surgeries and procedures deemed medically necessary to prevent a serious adverse medical consequence or death, and it adds one exception that was not in the previous order, discussed in Section II below. Like EO GA-09, EO GA-15 still states that the attorney general may assess a fine up to $1,000; jail time, not to exceed 180 days; or both a fine and jail time for a violation of the order. EO GA-15 expires on May 8, 2020, at 11:59 pm.

After the governor issued the order, in a press release issued April 21, TMB withdrew its previous rules, including the mandatory reporting requirement, and published new emergency rules that track the language of the order, effective 11:59 pm, April 21, 2020. It also updated its FAQs. The most recent emergency rules and updated FAQs are discussed herein in Sections II.B and III. Please remember that the FAQs are fluid and may be changed at any time. Always maintain a copy of past and current FAQs for your record, because what may be permitted or prohibited under an earlier guidance may not be permitted or prohibited in a later guidance.

More information on the new order, TMB’s new emergency rules, and its recently updated FAQs is provided below.
II. WHAT IS NEW

A. EO GA-15

The purpose of EO GA-09 was to avoid a shortage of hospital bed capacity or PPE. That purpose remains the same in EO GA-15. However, the press release for EO GA-15 issued by the governor stated that the new order “loosens restrictions on surgeries” mandated by the old order. The relevant language of EO GA-15 states:

All licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not medically necessary to diagnose or correct a serious medical condition of, or to preserve the life of, a patient who without timely performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient’s physician; provided, however, that this prohibition shall not apply to either of the following:

a) any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster; or

b) any surgery or procedure performed in a licensed health care facility that has certified in writing to the Texas Health and Human Services Commission both: (1) that it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients; and (2) that it will not request any personal protective equipment from any public source, whether federal, state, or local, for the duration of the COVID 19 disaster.

At first glance, the order language appears largely the same as the language in EO GA-09. However, EO GA-15 made the following substantive changes to EO GA-09:

1. It removed certain terms, which may allow the order to be interpreted to expand the types of surgeries and procedures that are medically necessary. Specifically, in the first paragraph, it removed the terms “immediately” and “immediate.” Instead, later in that same paragraph, it adds the word “timely.” It also adds the term “diagnose” to “diagnose or correct a serious medical condition.”

To compare, below is the language from EO GA-09. The bolded language shows what was added or removed in EO GA-15:

[All licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not [immediately] medically necessary to diagnose or correct a serious medical condition of, or to preserve the life of, a patient who without [immediate] timely performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient’s physician;]

2. EO GA-15 also created one new exception for surgeries or procedures that are non-urgent, elective. There are two exceptions in the order that permit a physician to perform a non-urgent, elective surgery or procedure that would otherwise be prohibited: The first exception was already in the old order. Exception one states that the prohibition will not apply to any procedure that, “if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster.”
The second exception is new, and contains two limitations. It states that any surgery or procedure may be performed in a licensed health care facility that has certified in writing to the Texas Health and Human Services Commission (HHSC) both that:

a) it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients; and

b) it will not request any PPE from any public source, whether federal, state, or local, for the duration of the COVID-19 disaster.

The board released guidance in its FAQs to provide further information on what this exception means, which is discussed in Section III.

B. TMB Emergency Rule 190.8(2)(U)

On April 21, effective at 11:59 pm, TMB withdrew its emergency rules 22 T.A.C. §§ 178.4(d) and 187.57 relating to EO GA-09, which included the mandatory reporting requirement (though, as with other alleged violations, anyone may still file a complaint).

It also adopted an emergency amendment to 22 T.A.C. § 190.8, Violation Guidelines, specifically subparagraph 190.8(2)(U), which adds that a violation of EO GA-15 related to the practice of medicine is “Unprofessional and Dishonorable Conduct.” The language mirrors the governor's Executive Order GA-15: “(U) a violation of Texas Executive Order GA-15, issued April 17, 2020, which states, “All licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not medically necessary.”

TMB FAQs

TMB published a new FAQ document on April 21 to assist physicians in understanding how the board will enforce the new executive order, EO GA-15. Some FAQs to highlight include:

FAQ No. 5: For the purpose of the second exception to the governor's order, TMB requires a physician performing a permitted surgery or procedure in a licensed health care facility to “verify with Texas HHSC that the facility where the surgery or procedure will be held has submitted a written certification to the Texas HHSC. This verification must be documented in the medical record.”

TMA notes that this instruction to physicians is unclear, and TMA is seeking clarification on this FAQ. While the FAQ provides a link to information on how a licensed facility can submit its verification, it is unclear how a physician must confirm a verification has been submitted with HHSC. If you have a question about how this exception would apply to your particular facts, you should contact your retained attorney for specific legal advice.

FAQ No. 8: There is no mandatory reporting requirement for TMB licensees for known or suspected violations of EO GA-15. However, the duty to report a continuing threat as defined by TMB Rule 178.4(d) still exists.

FAQ No. 10: As it previously stated in its guidance, the board still states that “a ‘procedure’ does not include physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests.” And in its FAQ 19 analysis, Step 2, the board indicates that other similar medical acts are not a “procedure” – it describes a nonsurgery and nonprocedure as “another medical act, such as a history, physical exam, non-invasive diagnostics, or lab tests.”
FAQ No. 14: This FAQ is particularly helpful. It states that a physician may look to the following resources to help guide his or her decision: Centers for Disease Control and Prevention guidelines; Centers for Medicare & Medicaid Services guidelines; the guidance from American College of Surgeons (ACS), American Society of Anesthesiologists (ASA), Association of Perioperative Registered Nurses (APRN), and American Hospital Association (AHA) – Joint Statement: Roadmap for Resuming Elective Surgery after COVID-19 Pandemic; specialty society guidance; and recognized scientific or medical journals, research, or other literature.

There are links to some of these entities on the board’s FAQ. TMA also prepared a helpful document with a compilation of links to resources providing guidance on non-urgent, elective surgeries or procedures, including links to many of the entities listed above, as well as links to guidance from national medical specialty societies.

Note, TMB also states in FAQ No. 17, regarding how TMB will determine if the surgery or procedure was permitted, that, when reviewing the patient’s medical records, the board will make its decision based on whether the documentation shows the surgery or procedure complied with EO GA-15, and it will determine whether the standard of care was met, in part, by looking to applicable guidance, including the guidance referenced above.

FAQ No. 15: Non-urgent elective cases are being defined as instances where there is no anticipated short-term nor long-term negative impact on the patient because of delaying a procedure or surgery. Examples include screening for “non-life-threatening, chronic condition and most cosmetic procedures.” (Emphasis added).

FAQ No. 16: Regarding documentation, the board states that “[i]n the context of the clinical practice exception, it is very important that the medical record clearly reflects why the physicians determined a surgery or procedure was urgent and necessary to prevent serious adverse medical consequences or death, as well as the impact on hospital bed availability and usage of PPE.”

It is unclear what the board means here, and TMA is also seeking clarification on this FAQ. If a surgery or procedure is urgent and necessary to prevent serious adverse medical consequences or death, then it does not fall into the first exception because it is not prohibited by the order at all – it is a permissible surgery or procedure. Thus, while it may be generally good risk management to document why the procedure was urgent and necessary, it should not require documentation on availability of hospital beds and PPE because no exception is being relied on. The exception for hospital bed availability/PPE usage is for non-urgent, elective surgeries and procedures. If the surgery or procedures is urgent, it does not matter under the governor's order or the board's emergency rule whether it affects hospital bed availability or PPE. The board's analysis later in the FAQ correctly makes this distinction, so it is likely that the confusion in this FAQ was unintended. TMA will update its white paper when it has clarification from the board.

Another helpful note is that TMB expressly recognizes throughout the FAQs that a physician's judgment in this determination is important. See FAQ Nos. 2 (citing the order), 4, 6, and 15, and Tip No. 1.

The board also provided a new analysis to assist physicians in making these decisions based on TMB's interpretation of the order. This analysis has been incorporated and restructured for additional clarity, below in Section A.

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1 Please continue to check the board’s website for the most updated information as information is constantly changing to address the impact of the coronavirus.
A. Decision Analysis

If you are deciding whether you can perform a surgery or procedure under the new order, it may be helpful to walk through this analysis, while also referring to applicable guidance as TMB recommends, discussed in the previous section.

**Step One:** Does this prohibition apply to me or my practice location?

1. The prohibition applies to ALL licensed physicians and health care providers and their delegates, and licensed health care facilities.
2. If you answered **yes** to this question, proceed to **Step Two**.

**Step Two:** Is the medical act a surgery or procedure?

1. If you are performing another medical act, such as a history, physical exam, non-invasive diagnostics, or lab test, the answer is **no**, and you may proceed with the medical act.
2. If you answered **yes** to this question, please proceed to **Step Three**.

**Step Three:** If it is a surgery or procedure, is it medically necessary based on at least one of the following two questions?

1. Is the surgery or procedure medically necessary to diagnose or correct a serious medical condition of a patient who without timely performance of the surgery or procedure would be at risk for serious adverse medical consequences or death? If you answered **yes**, then you may proceed with the surgery or procedure. If you answered **no**, then proceed to the next question.
2. Is the surgery or procedure medically necessary to preserve the life of a patient who without timely performance of the surgery or procedure would be at risk for serious adverse medical consequences or death? If you answered **yes** to this question, then you may proceed with the surgery or procedure.
3. If you answered **no** to both questions, then you need to proceed to **Step Four**.
4. **If you decide the surgery or procedure is medically necessary by answering yes to one or more of the questions under Step Three, TMB states that you “should” document the medical necessity and serious risk in the patient’s medical record.**

**Step Four:** If you are performing a procedure, can it be performed in accordance with the commonly accepted standard of clinical practice and can it be performed without depleting the hospital capacity or the PPE needed to cope with COVID-19?

1. If the answer is **yes**, you may perform the procedure.
2. If the answer is **no**, are you performing a surgery or procedure in an unlicensed health care facility? If you answered **yes, stop**. You **cannot** perform the surgery or procedure. TMB interprets the order to mean that a physician who performs a surgery or procedure in an unlicensed health care facility can only perform non-urgent, elective procedures if he or she can meet the first exception.
3. If you answered **no** because you are performing the surgery or procedure in a licensed health care facility, proceed to **Step Five**.

**Step Five:** If you are performing a procedure or surgery in a licensed health care facility, has the facility certified in writing to the Texas Health and Human Services Commission both that: (1) it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients, and (2) it will not request any personal protective equipment from any public source, whether federal, state, or local, for the duration of the COVID-19 disaster?

1. If you answered **yes** to both questions, you may proceed with the procedure or surgery.
2. If you answered **no** to either (1) or (2), the surgery or procedure is prohibited under the order.

**B. Documentation**

The board stresses that in these fact-specific cases, documentation in the patient's medical record is “key.” For example, for exception one, the board states it is “very important” to document in the patient's medical record why the procedure will not deplete hospital bed capacity or PPE. TMB also mandates certain documentation relating to exception two under the governor’s order in the medical record as explained in FAQ Nos. 5 and 16.

Also, when a physician determines a surgery or procedure is medically necessary at that time to prevent a serious adverse medical consequence or death, the board states a physician “should” document the basis for the physician's decision in the patient's file. This documentation could include information on “the patient’s medical history, prescriptions, lab results, imaging, or other relevant factors used to help make the determination of the necessity of the surgery or procedure.” See FAQ No. 16. Please note that boilerplate language or rubber-stamping a patient's file is likely insufficient.

This guidance also applies to a physician being delegated tasks. He or she should document in the patient's record the information communicated if the delegate agrees the surgery or procedure is medically necessary at that time to prevent a serious adverse medical consequence or death to the patient (or if the delegate does not believe it is medically necessary and decides not to perform the delegated task).

Further, it may be helpful, given the uncertainty at this time, to document the basis for a physician's decision to delay a procedure or surgery. For example, a physician might include the factors for his or her decision and cite to the executive order and board's emergency rules, as well as any specific board FAQ the physician may be relying on for the delay. Proper documentation may provide the physician support in the event a patient suffers an unanticipated negative consequence due to the delay mandated by the governor's order and the board's emergency rules. Whether the physician ultimately determines to perform the procedure or surgery or delay it, the physician should document any applicable guidance the physician used as part of his or her decisionmaking process.

Please note, though, that while board uses the term “should” in its guidance for some documentation and “must” for others, it is important to document the factors that affect the physician's decision to perform or not to perform a surgery or procedure in the patient's medical record, because the medical record is one of the key pieces of information the board uses to determine whether a violation has occurred. Indeed, the board specifically states in FAQ 17 that, “[w]hen reviewing the medical records, TMB will determine, based on the medical record documentation, if the surgery or procedure complied with the requirements of EO GA-15.”
course, to meet exception two, the medical record must note that the physician verified that the licensed health care facility made a certification to HHSC as discussed above in FAQ 5.

The board may continue to update its FAQs or release other guidance as it obtains new information. It is good risk management practice to retain a copy of each FAQ or other guidance. Each FAQ and other guidance is generally dated. This is important, because a physician may have made a decision on a date an earlier FAQ was in place that may or may not be permissible under a new FAQ.

**Maintaining a copy of each update, as well as a copy of each executive order and any related press releases by TMB, the governor's office, and the Office of the Attorney General is a good risk management practice during this ever-changing time.**

**C. TMB’s 10 Tips**

TMB also provided 10 tips to help physicians navigate the board’s new emergency rule and governor's order:

1. The governor's order and TMB’s rules allow physicians to use their judgment in determining whether timely performance of a surgery or procedure is needed to prevent serious adverse medical consequences or death.

2. If a physician normally could or would wait a few weeks to provide the surgery or procedure being considered for a specific patient based on the patient's unique circumstances, then that might help the physician decide what to do.

3. If a physician normally could not or would not wait a few weeks to provide the surgery or procedure being considered for a specific patient based on the patient's unique circumstances, then that might help the physician decide what to do.

4. If a physician proceeds with a surgery or procedure during this time, then he or she should clearly document why the decision was made (also revisit TMA’s recommendation on documentation for delaying surgeries or procedures in Section III.B above).

5. Referencing legitimate literature and guidelines, such as those of the Centers for Disease Control and Prevention and Centers for Medicare & Medicaid Services; the Joint Statement from ACS, ASA, APRN, and AHA; or other specialty guidelines will be very helpful.

6. TMB cannot put anyone in jail.

7. The decision to hold a temporary suspension or restriction hearing will meet the same standard as before the COVID-19 disaster.

8. TMB understands the importance of having as many safe licensees available as possible during this time.

9. TMB board members include 12 physicians who also must navigate these times, the Executive Order, and the rules while providing safe patient care.

10. TMB is and will continue to be understanding that these are unprecedented times.
IV. ADDITIONAL INFORMATION

Please remember that the board's FAQ is intended to provide guidance – the FAQ is not law; however, it reflects the board's view on its enforcement authority and how it intends to apply its rules. Note also that the board's FAQ does not govern how the attorney general will enforce the governor's order. There is no additional information from the Office of the Attorney General at this time on enforcement. TMA will continue to update you on developments from TMB regarding its rules and guidance. For a specific fact analysis under the new emergency rule and order, please contact your retained attorney for legal advice. For general questions on the rule and order, please contact the TMA Knowledge Center by email at knowledge@texmed.org or by phone at (800) 880-7955.

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