UPDATED 3/18/20: Congress Enables HHS to Relax Telehealth Restrictions to Help Fight COVID-19

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PROFESSIONAL

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As public health officials and policy makers respond to the coronavirus disease 2019 ("COVID-19") pandemic, increased attention has been paid to ways in which modern technology—including telehealth technologies—can be deployed to increase the health care system's capacity and permit treatment in ways that minimize exposure. Along these lines, Congress enacted the "Telehealth Services During Certain Emergency Periods Act of 2020" as part of the $8.3 billion emergency relief legislation recently signed into law. In connection with President Trump's declaration of a national emergency, the statute authorizes the United States Secretary of the Department of Health and Human Services (the "Secretary") to waive certain Medicare coverage restrictions for telehealth services in areas impacted by the outbreak of COVID-19. On March 17, Secretary Alex Azar took advantage of this temporary authority. Following the Secretary's activation of the waiver, CMS provided guidance on implementation to providers to encourage the use of telehealth as well virtual check-ins and e-visits.[1]

Generally, Medicare fee-for-service ("FFS") beneficiaries are only eligible to receive covered services via telehealth that satisfy certain statutory requirements in the Social Security Act ("Medicare telehealth services") concerning the locations, technology, providers, and services involved. [2] In relevant part, under the "originating site" requirement, the Medicare patient must be at an approved type of facility (e.g., a doctor's office, skilled nursing facility, or hospital), which is located in a rural health professional shortage area ("HPSA") (unless an exception applies).[3] In addition, telehealth services must be provided via synchronous, two-way, audio-video communication (except in the case of a demonstration program in Alaska or Hawaii, which may be via asynchronous technologies). Telehealth treatment is typically facilitated through the use of an originating site's telecommunications equipment, as opposed to patient-owned technology like a smart phone, as Medicare beneficiaries generally cannot receive telehealth services from their own home.

The Telehealth Services During Certain Emergency Periods Act of 2020 loosens these restrictions for all Medicare beneficiaries, allowing the Secretary to waive the "originating site" and communication device requirements, meaning that telehealth consultations between a provider and a Medicare FFS patient may now take place while the patient is in his or her home or at a healthcare facility, regardless of whether the patient is located in a rural area, and via the patient's

smart phone, as long as the communication is a live, two-way, audio-video communication. [4]

Provider facilities may now take advantage of this opportunity to expand their use of telehealth as a tool to fight the COVID-19 outbreak given the Secretary's activation of the waiver, which takes effect retroactively to March 6, 2020. Providers that do so should keep in mind that the Medicare reimbursement standards, aside from the originating site restrictions, still apply to any services provided via telehealth, as do all applicable legal requirements, such as medical staff credentialing requirements and state-level scope of practice standards. However, as to the latter, the federal emergency declaration allows for a waiver of the federal requirement, so long as the clinician's certification is similar to that of the state in which the beneficiary resides.

Telehealth Waiver Provisions for Fee-for-Service Medicare:

- *Applicability*. The emergency legislation applies in an "emergency area" during an "emergency period." Secretary Azar declared the existence of a public health emergency nationwide in January 2020, which remains in effect as of the time that this alert is being published. In other words, now that the Secretary's authority has been exercised, the telehealth provisions of the legislation apply nationwide as long as a public health emergency remains in effect.
- *Qualified provider rules.* Traditionally, Medicare telehealth services must be rendered by a "qualified provider," meaning a clinician who has treated the patient within the last three years, or another member of the practice of a clinician who has treated the patient in the last three years.
    - Established Relationship: In the waiver, CMS noted that it would follow a policy of enforcement discretion for Medicare telehealth services furnished pursuant to the waiver that normally requires that the patient have a prior established relationship with a particular practitioner, and will ***not*** conduct audits to ensure that such a prior relationship existed for claims submitted during the public health emergency.
    - Eligible Providers: The waiver does not change qualified providers who are permitted to furnish Medicare telehealth services, which still include physicians and certain non-physician practitioners such as nurse practitioners, physician assistants and certified nurse midwives. Other practitioners, such as certified nurse anesthetists, licensed clinical social workers, clinical psychologists, and registered dietitians or nutrition professionals may also furnish telehealth services within their scope of practice and consistent with Medicare benefit rules that apply to all services.
- *Originating Site Requirements*. The waiver replaces the current "eligible originating site" requirements allowing for telehealth services to be delivered in all settings – including a patient's home regardless of any rural or HPSA designation.
- *Originating Site Facility Fees.* While these "originating site" restrictions are waived, if a patient still receives telehealth in a facility, that facility is eligible to receive facility fees from CMS using HCPCS code Q3014.
- *Necessary Telehealth Equipment.* The waiver allows the Secretary to authorize use of telephones that have audio and video capabilities for the furnishing of Medicare telehealth services. In addition, the HHS Office for Civil Rights (OCR) has issued guidance stating that it will exercise enforcement discretion and waive penalties for HIPAA violations against health care providers that serve patients in good faith through everyday communications technologies, such as FaceTime or Skype, during the COVID-19 nationwide public health emergency.
- *Cost-Sharing for Beneficiaries.* The use of telehealth does not change the out-of-pocket costs for beneficiaries with FFS Medicare, who remain liable for their deductible and coinsurance; however, the HHS Office of Inspector General (OIG) has stated in guidance it is "providing flexibility for healthcare providers to reduce or waive cost-sharing for telehealth visits paid by federal healthcare programs."

For additional information, please see CMS's Telemedicine Health Care Fact Sheet and Medicare Telehealth Frequently Asked Questions (both issued 3/17/20).

Other Payor Guidance

- *Medicare Advantage Organizations.* CMS issued guidance to Medicare Advantage Organizations ("MAOs") regarding the utilization of telehealth services in the "unique circumstances resulting from the outbreak of COVID-19." CMS clarified

that MAOs can provide Medicare Part B services to MA beneficiaries via telehealth in any geographic region and from a variety of places (e., originating sites), including the beneficiary's home. Additionally, CMS will permit MAOs to expand coverage of telehealth services beyond those approved in the MAO's benefit package for similarly situated individuals impacted by the COVID-19 outbreak. CMS explained that it will "exercise its enforcement discretion" on this issue until the outbreak necessitating such discretion has passed. After consulting with the Department of Health and Human Services Office of Inspector General, CMS also determined that such an expansion of telehealth benefits would satisfy the "increased coverage" safe harbor to the federal Anti-Kickback Statute.

- *Medicaid*. CMS has also issued guidance to Medicaid state plans including sample state plan language applying to Medicaid fee-for-service payments and options for consideration.

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For further information, please contact Andrea Frey in San Francisco, Jeremy Sherer in Boston, Marty Corry or Monica Massaro in DC, or your regular Hooper, Lundy & Bookman contact.

[1] For further information, please see the Fact Sheet and FAQ issued by CMS, which includes details on billing and coding of telehealth services under the waiver.

[2] This statement is specific to "Medicare telehealth services" and does not relate to other digital health services that CMS covers as "communication technology-based services."

[3] 42 C.F.R. § 410.78.

[4] See OCR's Notification of Enforcement Discretion for telehealth remote communications during the COVID-19 nationwide public health emergency for further information.

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