Preparing an Off-Ramp for the End of the Federal PHE: What Telehealth Providers Should Know

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On January 30, 2023, the Biden Administration announced its intent to end the federal Public Health Emergency (the "PHE") in response to the COVID-19 pandemic. Shortly following the White House's statement, the U.S. Department of Health & Human Services ("HHS") renewed the PHE for a final 90-day term (effective February 11 through May 11). HHS also issued a fact sheet titled "COVID-19 Public Health Emergency Transition Roadmap" that outlines some of the many implications of the PHE's upcoming expiration for providers.

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Initially declared in January 2020, the PHE provided HHS with administrative authority to waive or modify certain regulatory requirements, offering health care providers with expanded flexibility to respond to the pandemic – particularly through the adoption and expansion of telehealth. While many of the telehealth flexibilities have been made permanent and will therefore survive the end of the PHE, a number of key flexibilities will expire and no longer be available starting on May 12th.

While not an exhaustive list, below are some of the more notable takeaways for telehealth providers to be aware of in navigating the end of the PHE. Health care providers taking advantage of expiring PHE waivers would be well-advised to begin preparations for compliance with the upcoming renewed regulatory requirements once the PHE ends.

Flexibilities Extended through December 31, 2024

Medicare Telehealth Flexibilities and HDHPs. The Consolidated Appropriations Act of 2023 extended a number of Medicare telehealth flexibilities through the end of calendar year 2024, including:

- The "originating site" requirement for Medicare fee-for-service (FFS) beneficiaries will continue to encompass telehealth consultations between a provider and a FFS beneficiary at any site in the United States at which the patient is located, including the patient's home or at a healthcare facility, regardless of whether the patient is located in a rural area. Prior to the pandemic, Medicare only reimbursed for telehealth services provided to residents of rural areas (including health professional shortage areas, or HPSAs) or to patients located at an eligible originating site facility.
- Federally qualified health centers and rural health clinics may continue to serve as distant site facilities (i.e., the place where the treating

practitioner is located) for the delivery of telehealth services, rather than being limited to being an originating site provider (i.e., the place where the patient is located).
- The list of eligible telehealth providers will continue to include physical therapists, occupational therapists, speech language pathologists, and audiologists.
- Medicare will continue to cover audio-only telehealth visits.
- The in-person visit requirement is waived for mental health services provided to patients via video or audio-only telehealth.
- Telehealth can be used to conduct recertification of eligibility for hospice care.
- The acute hospital care at home program can continue to be utilized to provide hospital services via telehealth to patients in their homes.

HDHPs. High deductible health plans that are eligible for Health Savings Accounts ("HSAs") may continue to waive the deductible for any telehealth services and allow patients to utilize first dollar coverage without losing HSA coverage.

Medicaid. Even prior to the PHE, states had significant flexibility with respect to covering and reimbursing for Medicaid services delivered via telehealth. Such flexibilities are intended to continue and CMS has developed a State Medicaid & CHIP Telehealth Toolkit to assist states in their efforts to expand the use of telehealth.

Access to buprenorphine for opioid use disorder treatment in Opioid Treatment Programs ("OTPs"). Early in the pandemic, the Substance Abuse and Mental Health Services Administration ("SAMHSA") released guidance allowing patients to start buprenorphine in an OTP by telehealth without the required in-person physical examination first. SAMHSA proposed to make this flexibility permanent as part of changes to OTP regulations in a Notice of Proposed Rulemaking that it released in December 2022, and has committed to providing an interim solution if the proposed OTP regulations are not finalized prior to May 11.

Flexibilities Ending After May 11, 2023

Medicare Payment Parity. During the pandemic, the Centers for Medicare & Medicaid Services ("CMS") reimbursed for telehealth services as if they were provided in-person, which meant higher-than-normal telehealth reimbursement rates. Although these rates will remain in effect through the end of 2023 (rather than terminating along with the PHE), it is likely that they will return to lower, pre-PHE levels in 2024, absent action by lawmakers in the interim to make the policy permanent.

State Medicaid Program Flexibilities. At the start of the PHE, CMS encouraged state Medicaid programs to take advantage of waivers and Medicaid expansion strategies to increase coverage and reimbursement of telehealth services. Many of these changes will expire at the end of the PHE, including program modifications implemented through Section 1115 and 1135 waivers or Medicaid Disaster Relief State Plan Amendments. CMS has released provider-specific guidance documents regarding active waivers and expiration timelines, available here.

"Hospitals Without Walls" Hospital Outpatient Services in Patient Homes. During the PHE, hospitals were able to provide certain behavioral health and educational services to patients in the home after registering the patient's home a provider-based location. CMS announced that this flexibility will terminate when the PHE ends.

HIPAA Enforcement Discretion. During the PHE, the HHS Office for Civil Rights (OCR) exercised its enforcement discretion to not impose penalties for noncompliance with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and implementing regulations in connection with the "good faith provision of telehealth" using non-public facing audio or video communication products during the PHE. These flexibilities are generally expected to sunset at the end of the PHE, meaning OCR will resume enforcement of penalties on providers for noncompliance. In advance of the PHE's expiration, OCR released this clarifying guidance discussing the appropriate utilization of audio-only telehealth under HIPAA.

Flexibilities Concerning Health Care Fraud and Abuse. At the start of the pandemic, HHS's Office of Inspector General (the OIG) issued a statement notifying providers that for the duration of the PHE it will not be subject to administrative sanctions under the federal Anti-Kickback Statute or Civil Monetary Penalty and exclusion laws for "reducing or waiving any cost-sharing obligations Federal health care program beneficiaries may owe for telehealth services furnished consistent with the then applicable coverage and payment rules." These flexibilities are generally expected to expire at the end of the PHE. For health care providers offering telehealth or remote patient monitoring (RPM) services to Medicare beneficiaries, the expiration of these flexibilities means that patients' cost-sharing obligations for such services may no longer be waived or reduced.

What About Prescribing Controlled Substances via Telehealth?

Prescribing Controlled Substances Without an In-Person Exam. In response to the COVID-19 pandemic, the United States Drug Enforcement Agency (DEA) took quick action to waive the in-person exam requirement under the Ryan Haight Act. This allowed providers to establish patient-provider relationships via telehealth and to prescribe medically necessary medication to patients in the safety of their home. The DEA recently issued proposed rules which would create modest flexibilities in this area post-PHE, which we summarized in a prior alert, available here. In most situations, however, patients will need to arrange for in-person examinations to receive treatment involving controlled substances under federal law once the PHE terminates.

Conclusion

Telehealth laws and reimbursement requirements quickly evolved in response to the pandemic in the US, and both providers and patients have come to depend upon many of the telehealth-specific flexibilities offered. However, with the end of the PHE rapidly approaching, it is critical to be aware of those flexibilities that have been extended and those that will expire – meaning that the more restrictive, pre-pandemic rules will return.

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