Health Care Alert: Changes Affecting Telehealth Due to COVID-19 Pandemic

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In response to the evolving COVID-19 pandemic, the federal government and states have reviewed requirements affecting the ability of health care providers to use and receive reimbursement for the provision of services via telemedicine.

Centers for Medicare & Medicaid Services

On March 6, 2020, the *Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020* (the Act) was signed into law. The Act provides emergency funding for various federal agencies to respond to the outbreak domestically and internationally, including the Department of Health and Human Services (HHS), the Small Business Administration, and the United States Agency for International Development. Additionally, the Act includes provisions that permit the relaxation of certain telehealth requirements, which would allow more Medicare beneficiaries to receive services at home to avoid placing themselves and others at greater risk of infection.

Prior to the outbreak, Medicare would reimburse for telehealth only if the services met certain requirements and if the services were listed on Medicare's annual Covered Telehealth Services list. Reimbursement for telehealth services required the following:

- The use of a two-way synchronous telecommunications system;
- Services furnished by a qualified practitioner; *and*
- Services furnished at a qualified originating site, which must be located in: (1) an area designated as a rural health professional shortage area, in a county not included in a Metropolitan Statistical Area, or from an entity that participates in a Federal telemedicine demonstration project; and (2) a physician or practitioner office, a critical access hospital, a rural health clinic, a federally qualified health center, a hospital, a skilled nursing facility, and other certain health care sites of care.

Under the Act, the HHS Secretary has the authority to temporarily waive or modify the application of certain Medicare requirements with respect to telehealth services. Specifically, the HHS Secretary may waive the originating site requirement for telehealth services provided by a qualified provider to Medicare beneficiaries in any identified emergency area during emergency periods. An "emergency area" is a geographical area in which, and an "emergency period" is the period during which, there exists: (a) an emergency or disaster declared by the president pursuant to the National Emergencies Act or the Robert T. Stafford Disaster Relief and Emergency Assistance Act; and (b) a public health emergency declared by the secretary. The Act also allows telehealth services to be provided to Medicare beneficiaries by phone, but only if the phone allows for audio-video interaction between the provider and the beneficiary. This waiver is limited to qualified providers who have furnished Medicare services to the individual in the three years prior to the telehealth service (or, alternatively, another qualified provider under the same tax identification number that has provided services within three years).

On March 17, 2020, CMS announced the expansion of Medicare telehealth coverage. Under the expansion, during the emergency period, Medicare will pay clinicians to provide telehealth services for beneficiaries residing across the entire country. On March 13, 2020, President Trump announced an emergency declaration under the Stafford Act and the National Emergencies Act. Consistent with the emergency declaration, CMS will expand Medicare's telehealth benefits under the 1135 waiver authority and the Act. Now, Medicare beneficiaries will be able to receive various services through telehealth including office visits, mental health counseling, and preventive health screenings. Clinicians can begin billing for dates of service starting March 6, 2020. Telehealth services will be paid under the Physician Fee Schedule at the same rate as in-person services. Medicare coinsurance and deductible requirements will still apply for these services. However, the HHS Office of Inspector General is providing flexibility for providers to reduce or waive cost-sharing for telehealth visits.

These temporary measures will allow providers to utilize telehealth services in response to COVID-19, and allow Medicare beneficiaries, many of whom are in high-risk categories, to receive health services without risk of exposure, while also limiting the risk of exposure to practitioners. However, it is important to note that this expansion is limited to the period during which the federal government has declared a national public health emergency. Additionally, the waiver is limited to designated "emergency areas" and to qualified providers. While these measures significantly loosen current Medicare telehealth reimbursement requirements, it is still quite limited and it is unclear how these temporary changes will impact telehealth reimbursement after the COVID-19 epidemic is over.

HIPAA

Effective immediately, OCR will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under HIPAA against covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency.

According to OCR, a covered health care provider that wants to use audio or video communication technology to provide telehealth to patients during the COVID-19 nationwide public health emergency can use any non-public facing remote communication product that is available to communicate with patients. OCR is exercising its enforcement discretion to not impose penalties for noncompliance with the HIPAA

Rules in connection with the good faith provision of telehealth using such non-public facing audio or video communication products during the COVID-19 nationwide public health emergency. This exercise of discretion applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19.

For example, a covered health care provider may request to examine a patient exhibiting COVID- 19 symptoms, using a video chat application connecting the provider's or patient's phone or desktop computer in order to assess a greater number of patients while limiting the risk of infection of other persons who would be exposed from an in-person consultation. Likewise, a covered health care provider may provide similar telehealth services in the exercise of their professional judgment to assess or treat any other medical condition, even if not related to COVID-19, such as a sprained ankle, dental consultation or psychological evaluation, or other conditions.

State Activities

In addition to the activities discussed above, states have also promulgated waivers or executive orders related to the provision of telemedicine services.

Ohio

On March 18, 2020, the State Medical Board of Ohio (Medical Board) voted to suspend enforcement of any regulations requiring in-person visits between providers and patients, including regulations related to providers prescribing to patients not seen in-person by the physician. This enforcement discretion is effective as of March 9, 2020, the day the State of Ohio Declared an Emergency, and will conclude upon expiration of Executive Order 2020-01D. Providers must act in good faith in establishment or continuance of the provider-patient relationship. The Medical Board will provide advance notice prior to resuming enforcement of the temporarily suspended regulations.

We understand the Ohio Department of Medicaid and other agencies are also working to develop a comprehensive telehealth and telephone rule package. We continue to monitor for the release of these rules, and will provide additional information once we receive it. In the meantime, the Ohio Department of Insurance has published a bulletin encouraging all insurance plans to implement early adoption of certain pending statutory requirements, which – effective January 1, 2021 – will:

- Prohibit insurers from excluding coverage for a service that is otherwise covered under the health plan solely because it is delivered as a telemedicine service; and
- Require insurers to cover telemedicine services on the same basis and to the same extent that the plan provides coverage for in-person services.

Texas

On March 14, 2020, the Governor directed the Texas Medical Board to temporarily suspend Sections 111.005 (a)-(b) Texas Occupation Code and Title 22, Chapter 174.6 (a)(2)-(3) of the Texas Administrative Code. Specifically: (1) physicians may use telemedicine, including the use of telephone only, to establish a physician-patient relationship and (2) the use of telemedicine may be used for diagnosis, treatment,

ordering of tests, and prescribing for all conditions. Additionally the suspension does not affect the requirement that the health care provider meet his/her standard of care when providing services via telemedicine. This suspension is in effect until terminated by the Governor or until the March 13, 2020 disaster declaration is lifted or expires.

On March 17, 2020, the Governor directed that the Texas Department of Insurance (TDI) issue an emergency rule relating to telemedicine care for patients with state-regulated insurance. This emergency rule (1) requires health benefit plans to provide coverage for covered services or procedures delivered by telemedicine on the same basis and to the same extent that the plan provides coverage for the same service or procedure in an in-person setting; and (2) prohibits health benefit plans from limiting, denying, or reducing coverage based on the telemedicine platform used by the physician, with limited exceptions. It should be noted that this emergency rule only applies to individuals with state-regulated insurance and does not affect ERISA employer sponsored plans.

Pennsylvania

On March 17, 2020, the Pennsylvania Department of Human Services' Office of Mental Health and Substance Abuse Services (OMHSAS) announced the temporary suspension of certain requirements for providing behavioral health services via telehealth. Changes to existing telehealth regulations include the following:

- Providers may use telephonic video technology commonly available on smart phones and other electronic devices. Telephone only services may be utilized in situations where video technology is not available.
- Staff trained in the use of the telehealth equipment and protocols to provide operating support and staff trained to provide in-person clinical intervention will not be required to be present with the individual while they are receiving services.
- The practitioner types that can provide services through telehealth will be expanded beyond what is typically permitted.
- Both Behavioral HealthChoices and fee-for-service providers may bill for telehealth.
- Program requirements for the number or percentage of face-to-face contacts for various behavioral health services may be met with the use of telehealth.
- Program limits on the amount of service that can be provided through telehealth are temporarily suspended.

These temporary measures still require adherence to other requirements that apply to the service being delivered as they would when delivered face-to-face. Providers that are currently approved to provide telehealth services may immediately begin to implement the expanded use of telehealth. Providers that are not currently approved to provide telehealth services may also immediately begin to implement the use of telehealth but are required to submit the Attestation Form as required by Bulletin OMHSAS-20-02 within 5 business days of initiation of telehealth services.

Vorys is continuing to monitor the COVID-19 outbreak and related guidance to clients in the health care industry. We also strongly urge providers to continually monitor developments that pertain to your specific organization. If you have questions about COVID-19 or its impact on your organization, please contact Jonathan Ishee, Liam Gruzs, Jolie Havens, Nita Garg, Mari Mull or your regular Vorys attorney.

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Vorys COVID-19 Task Force

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We are taking significant steps to ensure we remain proactive during this extremely fluid environment. The business and legal challenges our clients are facing are changing each day.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.