Client Alert: Telehealth Waivers – Where are we now?

Exactly one year ago, in March 2020, Founding Partner Harry Nelson gave a webinar on the telehealth waivers issued by the Centers for Medicare and Medicaid (CMS) which were followed shortly thereafter by parallel telehealth coverage expansions from individual and group insurers in response to the critical need for access to care during the COVID-19 pandemic.[1]

Although the CMS waivers for Medicare beneficiaries, summarized here, are still in effect through April 21, 2021, they are due to expire at the end of the year in which the federally declared public health emergency (PHE) ends, likely December 31, 2021.[2] The Department of Health and Human Services (HHS) has promised to provide State Governors with at least 60 days' notice prior to termination of the PHE.[3]

Despite the embrace of telehealth offerings by healthcare providers and patients alike and a dramatic increase in utilization, uncertainty surrounds the future of telehealth coverage beyond the PHE. To date, no federal legislation has been proposed that would extend the telehealth waivers or otherwise expand telehealth reimbursement. Understandably, providers are wondering what to expect and to what extent they can count on the continued coverage for telehealth beyond the PHE.

This Client Alert addresses some of the questions about the future of telehealth. In reviewing industry, executive and congressional actions being taken to maintain and advance telehealth beyond COVID-19, several key trends are discernible.

Specifically, there have been several recent developments in which the Government and key stakeholders have indicated a need to overhaul the current healthcare system in favor of the expansion of telehealth services beyond the PHE.

In December 2020, CMS released the annual Physician Fee Schedule (PFS) final rule, adding more than 60 services to the Medicare telehealth list that will continue to be covered beyond the end of the PHE.[4] One significant and newly covered benefit is the permanent code (HCPCS code G2252) describing 11-20 minutes of medical discussion to determine the necessity of an in-person visit, which can be conducted via audio only technology and is similar to a virtual check-in.[5] The code is limited to a qualified healthcare professional who can report evaluation and management (E/M) services to the patient, has an established relationship with the patient, and has not provided the related E/M service in the past 7 days or within the next 24 hours or soonest available appointment. [6]

Notably, CMS limited these telehealth additions to Medicare beneficiaries in rural areas who are in a medical facility (such as a hospital or physician's office), as CMS lacks statutory authority to reimburse for telehealth outside of rural areas or for services in a beneficiary's home.[7] Without legislative authority, CMS cannot permanently extend telehealth coverage more broadly as it has done by interim action during the PHE. In addition, CMS lacks authority to control state licensing laws for the physicians and other practitioners who are federally qualified to provide telehealth services.[8]

Currently, about 144 services are covered by CMS waivers, and about one-third of those are certain to end with the end of the PHE, as CMS lacks sufficient data to support permanent adoption.[9] There are an additional 50 or so telehealth services in which CMS could, but has not yet decided, to approve for reimbursement by end of year 2021 or in the years that follow.

Another significant federal development is the enactment of the Consolidated Appropriations Act of 2021, which allows Medicare beneficiaries to utilize telehealth for purpose of diagnosis, treatment, or evaluation of mental health disorders without geographic restrictions.[10] The new law also permits Medicare beneficiaries to receive treatment in the home.[11] Previously, these services were available only to patients receiving treatment for substance use disorders with or without a co-occurring mental health condition, under the 2018 SUPPORT for Patients and

Communities Act.[12]

Last month, the California Department of Health Care Services (DHCS) announced its support for broad and permanent changes to Medi-Cal covered benefits and services involving telehealth modalities across all delivery systems, when clinically appropriate.[13] The DHCS proposal enhances telehealth coverage via synchronous and asynchronous telehealth, as well as other virtual communication systems, including remote patient monitoring.[14] The only services that DHCS recommends be discontinued are certain payment modalities for telephone/audio-only telehealth and PHE flexibilities for Tribal 638 clinics.[15]

Earlier this month, the House Energy and Commerce Subcommittee on Health held a hearing to address "The Future of Telehealth: How COVID-19 is Changing the Delivery of Virtual Care"[16] during which Representatives heard testimony from Harvard, Stanford, the American Medical Association, among others, and set forth priorities for removing the following barriers to telehealth:

1. Originating Site Requirements – not reimbursing telehealth services provided to the beneficiary while at home unless the beneficiary qualifies for one of CMS's special programs (including Accountable Care Organizations and Medicare Advantage plans) or otherwise are addressed by separate legislation.[17]
2. Audio and Visual Capabilities (two-way) – not covering virtual check-ins, remote monitoring, or audio-only services.[18]
3. Specified Set of Practitioners – limiting telehealth services to physicians, nurse practitioners, physician assistants, nurse midwives, clinical nurse specialists, certified registered nurse anesthetists, clinical psychologists, clinical social workers, or registered dietitians.[19]
4. Specified Set of Services – amending the reimbursable list of services on an annual basis through the Physician Fee Schedule (PFS).[20]

As part of the congressional hearing, the American College of Physicians submitted a Statement for the Record summarizing clinical evidence and articles in support of the continuation of CMS waivers for the following: (1) pay parity for audio-only telehealth, (2) geographic site restriction waivers, (3) telehealth cost-sharing waivers, (4) flexibilities for direct supervision by physicians in teaching hospitals, (5) revised policies for remote patient monitoring and (6) interstate licensure flexibility for telehealth and promotion of state-level action.[21]

The next day, a new coalition of healthcare providers called "Moving Health Home" announced that it will push for federal and state policy changes to make the home a permanent site for care for telehealth and remote patient monitoring.[22] According to Moving Health Home, the COVID-19 pandemic "exposed the untapped potential of home-based clinical care, and the opportunity for a robust set of services ranging from primary care to hospital-level treatment."[23]

All of the foregoing reflect significant momentum for permanent expansion of telehealth in government programs, with commercial and employer-sponsored plans expected to follow suit. The expanded coverage parallels a dramatic increase in direct-to-consumer telehealth resources and utilization. Taken together, these developments reflect that the expansion in telehealth during the pandemic is unquestionably a permanent transformation in U.S. healthcare. Under the circumstances, we anticipate a new federal bill in the near future making permanent expanded telehealth coverage in Medicare and other government programs.

For more information on how the expansion of telehealth services affects your practice or how to participate in advocacy efforts related to telehealth, please reach out to kbowles@nelsonhardiman.com for further information and/or resources.

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[1] CMS issued guidance to the individual and group market indicating that insurers could make mid-year modifications to expand coverage for telehealth services, without fear of federal enforcement action. https://www.healthsystemtracker.org/brief/how-private-insurers-are-using-telehealth-to-respond-to-the-pandemic/.
[2] Acting Secretary of HHS Letter to the Governors dated January 22, 2021. https://ccf.georgetown.edu/wp-content/uploads/2021/01/Public-Health-Emergency-Message-to-Governors.pdf.
[3] Id.
[4] CMS Newsroom Press Release "Trump Administration Finalizes Permanent Expansion of Medicare Telehealth Services and Improved Payment for Time Doctors Spend with Patients" dated December 1, 2020. https://www.cms.gov/newsroom/press-releases/trump-administration-finalizes-permanent-expansion-medicare-telehealth-serv
[5] Id.
[6] https://hcpcs.codes/g-codes/G2252#
[7] CMS Newsroom Press Release, cited above.
[8] Id. For a state-by-state breakdown of PHE waivers during COVID-19, see https://www.fsmb.org/siteassets/advocacy/pdf/states-waiving-licensure-requirements-for-telehealth-in-response-to-covid-19.p
[9] At present, the research demonstrates that telehealth is beneficial for specific uses and patient populations,

such as remote home monitoring for chronic conditions, communicating and counseling patients with chronic conditions, and for psychotherapy services. Memorandum from Chairman Pallone to the Subcommittee on Health dated February 26, 2021.
https://energycommittee.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Briefing%20Memo_HE%20
[10] Text of H.R. 133 “Consolidated Appropriations Act of 2021” dated December 21, 2020.
https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR133SA-RCP-116-68.pdf.
[11] Id.
[12] Center for Connected Health Policy, The National Telehealth Policy Resource Center, “Telehealth and Medicare.” https://www.cchpca.org/telehealth-policy/telehealth-and-medicare.
[13] State of California Health and Human Services Agency, Department of Health Care Services, “Post-COVID-19 Public Health Emergency Telehealth Policy Recommendations: Public Document” dated February 2, 2021.
https://www.dhcs.ca.gov/services/medi-cal/Documents/DHCS-Telehealth-Policy-Proposal-2-1-21.pdf.
[14] Id.
[15] Id.
[16] Hearing on “The Future of Telehealth: How COVID-19 is Changing the Delivery of Virtual Care” dated March 2, 2021.
https://energycommerce.house.gov/committee-activity/hearings/hearing-on-the-future-of-telehealth-how-covid-19-is-changing
[17] Memorandum from Chairman Pallone to the Subcommittee on Health, cited above.
[18] Id.
[19] Id.
[20] Id.
[21] American College of Physicians Statement for the Record, Hearing before the House Energy and Commerce Subcommittee on Health, “The Future of telehealth: How COVID-19 is Changing the Delivery of Virtual Care” dated March 2, 2021.
https://www.acponline.org/acp_policy/testimony/acp_statement_for_the_record_to_the_house_energy_and_commerce_comm
[22] Cision PR Newswire, “Leading Health Innovators Launch Alliance To Advance Care In The Home” dated March 3, 2021.
https://www.prnewswire.com/news-releases/leading-health-innovators-launch-alliance-to-advance-care-in-the-home-3012396
[23] Id.