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Health Industry **Washington Watch**

Updates by Reed Smith on U.S. legislative & regulatory developments affecting the life science & health care industry sector

Congress considers the future of telehealth in the wake of COVID-19

By Alexandra Hussey on 11 March 2021

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It is no secret that the coronavirus pandemic has driven our daily lives digital—work, education, social gatherings, and, of course, health care. Congress and CMS responded to the public health emergency by waiving limitations on reimbursement for telehealth services rendered to Medicare patients. These waivers introduced new flexibility and vastly expanded Medicare patients' access to telehealth. However, it is unclear what role telehealth will play in the Medicare program after the pandemic.

On March 2, the House Committee on Energy and Commerce's Subcommittee on Health held a hearing on "The Future of Telehealth: How COVID-19 is Changing the Delivery of Virtual Care." The subcommittee welcomed health care industry witnesses to comment on the impact of telehealth and to respond to lawmakers' questions about its future. Below are key takeaways from the hearing and predictions for the future of telehealth in a post-pandemic world.

1. There is broad, bipartisan support for reimbursing telehealth services rendered to traditional Medicare beneficiaries—even after the pandemic.

Both witnesses and representatives supported extending access to telehealth for traditional Medicare beneficiaries after the public health emergency ends. The question now is how far Congress is willing to go to cement these changes. Time will tell if legislative action takes the form of stopgap measures or permanent legislation. It is also unclear whether the types of Medicare covered telehealth services, which were expanded during the pandemic, will be scaled back. Expect Congress to advance legislation to prevent the sudden loss of telehealth benefits for traditional Medicare beneficiaries at the end of the public health emergency, including extended waivers—or outright elimination—of the originating and geographic site requirements in Section 1834(m) of the Social Security Act.

2. Medicare reimbursement questions abound.

There is disagreement about whether Medicare providers should be reimbursed at rates equivalent to or lower than those for in-person services. Some believe that telehealth reduces overhead and that savings should be reflected in lower provider reimbursement. Others assert that reimbursement should be based on time and complexity, regardless of whether the encounter occurs in person or via telehealth.

Also unresolved is whether, when, and to what extent, audio-only telehealth should be reimbursed by Medicare. In light of concerns about equitable access, there is some agreement that audio-only telehealth should be, at minimum, a back-up option to protect individuals without access to, comfort with, or ability to use audio-visual technology. Expect ongoing discussion about when audio-only telehealth is appropriate and whether to reimburse audio-only services at the same rate as audio-visual services.

3. Telehealth expansion will necessitate reevaluation of the Medicare fee-for-service payment model.

Several hearing commenters emphasized the need to transition toward a value-based payment model that focuses on clinical outcomes and patient satisfaction while better accommodating care innovations. Increasing the emphasis on value could disincentivize overutilization, thereby addressing concerns that telehealth services are additive rather than substitutive.

Value-based payment is not a new concept, however. Efforts to shift Medicare from fee-for-service to value-based payment have been piecemeal, so it will be worth monitoring to see if any payment model modifications are limited to telehealth or are part of more sweeping payment reform.

4. Any legislative developments will likely incorporate protections to guard against fraud and abuse and to promote privacy and data security.

Many hearing commenters expressed concerns about program integrity, fraud and abuse potential, and cybersecurity and privacy risks. Expect continued scrutiny of fraud and abuse laws and enforcement priorities. In fact, in a letter dated February 26, 2021, OIG directly acknowledged that it is monitoring telehealth developments. Shining a spotlight on telehealth fraud and abuse may ultimately increase legal exposure for telehealth providers and organizations, depending on HHS OIG and DOJ enforcement priorities.

Privacy and cybersecurity issues are also likely to draw legislative attention. There are questions about whether to preserve HIPAA waivers that allow continued access to telehealth resources through less secure, but potentially more accessible, means like Skype and FaceTime. And, as cybersecurity threats from both state and independent actors increase, there will undoubtedly be discussions about how to safeguard sensitive personal health information when more health care encounters occur via telehealth. It remains to be seen whether reporting obligations or penalties will be revised for telehealth practice.

5. Some fear that telehealth will lead to overutilization.

Many hearing commenters expressed concern that the convenience of telehealth would encourage overutilization, but at this time there is insufficient data to determine telehealth's effect on utilization. Others suggested that physician time and provider shortages would serve as guard-rails to limit overutilization. Expect legislative and regulatory attempts to disincentivize overutilization (e.g., cost-sharing requirements, value-based payment models, etc.).

6. Legislators and advocates aim to promote equitable access to telehealth.

With the promise of telehealth expansion come legitimate concerns that the most vulnerable populations will be left behind due to cost, digital literacy, broadband access, and other barriers. Commenters acknowledged the opportunity for telehealth to address health care disparities but recognized that barriers to telehealth access could deepen the divide for some groups. Expect increased scrutiny of access to care and clinical outcomes for rural, minority, low-income, elderly, disabled, and other disadvantaged or underserved populations in addition to:

- Investments in broadband infrastructure
- Programs to make broadband and telecommunications devices more affordable for low-income individuals
- Programs to promote technological literacy
- Telehealth grants to providers

7. Telehealth expansion is bringing attention to physician licensure rules.

The pandemic has drawn attention to the limiting effects of physician licensure rules. Under COVID waivers, patients have been able to access services (particularly specialty and sub-specialty care) that would not otherwise be available in their immediate geographic area due to state-based licensure restrictions that prohibit physicians from practicing across state lines. Expect robust debate about whether physicians should be able to practice across state lines and when interstate practice is appropriate.

Although there is an Interstate Medical Licensure Compact, barriers to interstate licensure remain. Currently, only twenty-nine states, the District of Columbia, and Guam participate in the Compact. Licensure costs also pose a financial barrier to physicians who seek multi-state licensure. Physicians are responsible for an initial fee to participate in the Compact, an initial licensing fee for each licensing state, and renewal fees in future years.

If physician licensure is expanded, it could present opportunities for organizations to provide clinically appropriate services on a broader scale. However, there will likely be significant pushback against attempts to nationalize licensure. Expect ongoing debates about breaking down legal, administrative, and financial barriers to interstate practice.

8. Telehealth presents significant opportunities for mental and behavioral health care.

There was enthusiastic support on both sides of the aisle for access to mental and behavioral telehealth services. Expect legislative efforts to protect and expand access to mental and behavioral telehealth services. This includes reevaluation of the Ryan Haight Act, which limits the prescription of controlled substances via telehealth.

9. There is no simple method for legislating what specialties or services should be accessible via telehealth.

Although there is concern that some services are not conducive to telehealth, it is unclear how to best identify such services without being overinclusive. With rapid technological change and fears of arbitrary designations, some think that these determinations should be left to provider discretion and evaluated against the provider's standard of care, rather than preserved indefinitely in legislation or regulation.

10. Telehealth expansion poses care coordination challenges (as well as new opportunities).

Patients often use telehealth for discrete medical issues, which can result in transactional relationships and breakdowns in care coordination. A few commenters noted that, as telehealth expands, coordination and communication must improve so that providers can better access patient information and see the complete picture of a patient's medical history. Expect conversations about health record interoperability and data-sharing to continue, in addition to discussions about how to best provide comprehensive care.

On the other hand, telehealth presents the opportunity to coordinate care like never before. Using telehealth tools, providers may be better able to collaborate to treat and monitor complicated and chronic conditions. Greater collaboration could save time and reduce the provision of unnecessary or duplicative services.

11. Research on the impact of telehealth will continue long after the pandemic.

With increased emphasis on real-world evidence and data-informed decision-making, expect Congress, HHS, and industry groups to collect and analyze vast amounts of data on clinical outcomes, patient and physician satisfaction, and the cost-effectiveness of telehealth before, during, and after the pandemic to guide the course of telehealth expansion.

Reed Smith is continuing to track telehealth developments. Should you have any questions regarding the impact of these developments on your organization, please contact the Reed Smith health care team.

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