



## Health Care ADVISORY ■

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### Congress Expands Medicare Telehealth Benefit Amid Coronavirus Concerns

Today, Congress sent legislation to the President to provide \$8.3 billion in emergency funds to be used to fight COVID-19, known as the coronavirus. Included in this package is a significant change to the telehealth statute that promises to expand Medicare beneficiaries' access to care and providers' reimbursement opportunities under Medicare for services provided via telemedicine. Despite many champions within Congress for advancing digital medicine and expanding Medicare coverage of telehealth, concerns about federal budget implications have, until now, slowed statutory changes.

However, in today's coronavirus emergency appropriations bill, Congress has allowed the Department of Health and Human Services (HHS) to waive long-standing constraints on the use of telehealth under Medicare Part B—with certain limitations. In particular, the bill:

- Waives the "originating site" requirement so that telehealth could be used (and reimbursed) in nonrural areas and even in patients' homes or other nontraditional sites (as opposed to the approved list of originating sites only in rural areas).
- Permits the use of telephones to provide telehealth services if the telephones have two-way, real-time interactive audio and video capabilities.

These waivers apply in the following circumstances:

- During the public health emergency for the 2019 novel coronavirus, which was declared nationwide by the Secretary of Health and Human Services on January 31, 2020 (including any renewals).
- When the distant site practitioner—or a practitioner within his or her same practice—has a pre-existing relationship with the patient within the last three years (as demonstrated by having provided a Medicare reimbursed service or item).

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Because all of the United States is currently under this public health emergency designation, any Medicare beneficiary would now be eligible for care from a provider via a two-way audio-video mechanism, including a smartphone. This applies anywhere in the U.S. for any Medicare-reimbursable telehealth service—not just for treatment of the coronavirus. Note also that, although the originating-site requirement may be waived, a facility fee is still available only to the previously approved types of eligible originating sites (e.g., hospitals, physician offices, nursing facilities).

Also, although telephones with interactive audio-video capabilities may now be used for the delivery of telehealth services to Medicare beneficiaries, neither Congress nor the Office for Civil Rights (OCR), which enforces the Health Insurance Portability and Accountability Act (HIPAA), have relaxed privacy or security standards. In fact, the OCR [recently stated](#) that “the protections of the [HIPAA] Privacy Rule are not set aside during an emergency”; even in “an emergency situation, covered entities must continue to implement reasonable safeguards to protect patient information against intentional or unintentional impermissible uses and disclosures.”

Accordingly, physicians treating coronavirus patients via telehealth, even over smartphone per the new rules, should still seek to disclose protected health information only as permitted by the HIPAA Privacy Rule, such as for treatment purposes, to public health authorities, pursuant to other applicable HIPAA Privacy Rule provisions, or as required by law. Additionally, covered entities should continue to “apply the administrative, physical, and technical safeguards of the HIPAA Security Rule to electronic protected health information.” Practitioners desiring to take advantage of the new rules should consider implementing secure videoconferencing solutions with vendors via signed, HIPAA-compliant business associate agreements. Indeed, a number of videoconference service providers are now offering their services for free (generally on an extended trial basis).

HHS is authorized to implement these provisions by instruction or otherwise, meaning implementing guidance could come out very quickly.

In addition to advising clients on how to comply with this and other telemedicine changes, Alston & Bird has established a [multidisciplinary task force](#) to aid clients in answering the wide array of questions arising from the coronavirus.

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