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Telehealth Prescribing Flexibilities for Controlled Substances Extended Through End of 2024

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The rule allowing for providers to prescribe controlled substances via telehealth, set to expire for new patient-provider relationships on November 11, has been extended through the end of 2024.

The U.S. Drug Enforcement Administration (DEA) and Department of Health and Human Services (HHS) issued a second temporary extension on October 10, 2023, of its telehealth prescribing flexibility rule. The new temporary rule is the second extension of a policy DEA and HHS first implemented in 2020 in response to the COVID-19 pandemic.

Under the Ryan Haight Online Consumer Protection Act of 2008, providers were required to conduct an in-person evaluation of a patient prior to prescribing controlled substances.

The onset of the COVID-19 pandemic and the distancing measures that followed led DEA and HHS to issue exceptions to this in-person evaluation requirement, allowing providers to prescribe scheduled medications over audio and visual telemedicine communications. It allowed patients to access medications including opioids like oxycodone, popular medications for attention-deficit/hyperactivity disorder, like brand-name medications Ritalin and Adderall, and medications used to treat substance use disorder, like methadone, after visiting with a provider using telehealth capabilities.

On May 10, 2023, the federal agencies issued a first temporary extension of its exceptions to the in-person patient visit rule,

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allowing providers to prescribe controlled substances to new patients via telehealth through November 11, 2023, or, for established patients, through November 11, 2024, despite the ending of the COVID-19 public health emergency.

On or around October 10, 2023, DEA and HHS issued a second temporary extension of the prescribing flexibilities, which will apply to all patient-provider relationships, regardless of when the relationship was established, through December 31, 2024. The latest temporary rule overrides the November 2023 and 2024 deadlines imposed by the May 2023 temporary rule. In promulgating the temporary rule, DEA and HHS stated that it aimed to "ensure a smooth transition for patients and practitioners that have come to rely on the availability of telemedicine for controlled medication prescription, as well as allowing adequate time for providers to come into compliance with any new standards or safeguards."

This second temporary extension will allow DEA and HHS time to sort through comments that were recently received in response to two notices of proposed rulemaking, published back in March, related to prescribing via telemedicine. DEA and HHS jointly issued two notices of proposed rulemaking on March 1, 2023, that would have allowed prescribers to provide a 30-day supply of a medication to patients via telehealth, requiring providers to evaluate patients in-person to continue prescribing past the initial 30-day period. It would have also excepted certain medications from telehealth prescribing, requiring an initial in-person visit with a patient prior to prescribing Schedule II medications and narcotics listed as Schedule III through V medications.

In response, DEA and HHS received over 38,000 comments, which the DEA noted was among the highest number of public comments in DEA rulemaking history. According to DEA Administrator Anne Milgram, a "significant majority" of commenters expressed concern regarding the restrictiveness of the March 2023 proposed rules on telehealth prescribing capabilities. The agencies continue to review comments to the proposed rules as it works on final regulations.

In addition to the receipt of formal comments to the notices of proposed rulemaking, the agencies hosted two listening sessions in September to solicit industry feedback regarding its controlled substances prescribing policies. On behalf of the American Psychiatric Association and the American Academy of Child and Adolescent Psychiatry, Shabana Khan, an assistant professor and director of telehealth for the Department of Child and Adolescent Psychiatry at New York University Langone Health of the New York University Grossman School of Medicine, noted that telemedicine has not been shown to increase drug diversion rates. "Prescribing practitioners are able to accommodate social determinants of health and other barriers to in-person care, such as employment hours, family care situations, stigma, violence, reducing flexibility in modalities of care, increases in equity, forcing practitioners to cherry-pick patients that have the ability to travel to in-person care," Khan argued, calling for provider-led decisions in mandating in-person care as to specific patients, rather than a federal mandate.

American Telemedicine Association Senior Vice President of Public Policy Kyle Zebley noted that telemedicine improved access to care and argued that a special registration process to track telemedicine prescribing of controlled medications "can be an appropriate mechanism for DEA to fulfill its mission of

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preventing diversion while allowing legitimate telemedicine to occur."

In its new temporary rule, DEA and HHS noted that it is reviewing stakeholder comments to "develop regulations providing access to the practice of telemedicine when consistent with public health and safety, and that also effectively mitigate the risk of possible diversion."

DEA also foreshadowed that it planned to promulgate new standards by fall of 2024.