THORN RUN PARTNERS
GOVERNMENT RELATIONS

Memorandum *May 4, 2020*

TELEHEALTH POLICIES IN RESPONSE TO THE COVID-19 OUTBREAK

INTRODUCTION

Since the beginning of the COVID-19 outbreak, Congress and the Trump administration have issued a number of policies and waivers designed to lower restrictions on and encourage telehealth services. These policies address opioid treatment services, doctor visits, Health Insurance Portability and Accountability Act (HIPAA) regulations, Medicare conditions for telehealth services, and more. Under each heading below, policies are arranged in order of announcement. Additionally, a list of actions by states is available here.

CONGRESS

- **Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020 (link, TRP Note)** — Authorizes the HHS Secretary to waive telehealth restrictions in the Medicare program during the COVID-19 outbreak. Medicare providers may furnish telehealth services to beneficiaries regardless of geography for the duration of the outbreak. *Signed into law March 6, 2020*

- **Families First Coronavirus Response Act (link, TRP Note) —** Makes a technical correction the Coronavirus Preparedness and Response Supplemental Appropriations Act to clarify that, for the purposes of establishing a relationship with a provider to waive current prohibitions surrounding the furnishing of telehealth services in the Medicare program, during the current public health emergency, furnishing a service allowable under the Medicare program, even if the program did not pay for such service, is a qualifying relationship. *Signed into law March 18, 2020*

- **Coronavirus Aid, Relief, and Economic Security Act (link, TRP Note)** — Reauthorizes and provides $180 million for HRSA rural health and telehealth initiatives, including funding for HRSA telehealth resource centers grant programs. It also provides $200 million for the Federal Communications Commission's Connected Care Pilot Program, which supports providers rendering care through telehealth. The bill further relaxes Medicare telehealth requirements, removing any need for a telehealth provider to have seen the patient in the past three years. It also allows federally qualified health centers (FQHC) and rural health centers (RHC) to furnish telehealth to Medicare beneficiaries in their home and allow for many check-ups to be done via telehealth.

CMS

- **Medicare Advantage and Part D Guidance (link)** — CMS announced that it would permit MA plans to waive cost-sharing for telehealth services. It also announced that MA plans could expand the scope of services that they currently offer via telehealth. *Published March 10, 2020*

- **Waiver or Modification of Requirements Under Section 1135 of the Social Security Act (link)** — Secretary Azar waived requirements for physicians or other health care professionals to hold licenses in the state in which they provide services with respect to Medicare and Medicaid services for the duration of the public health emergency. This does not pre-empt state-specific requirements. Medicaid programs may request 1135 waivers but do not get blanket waivers. *Signed March 13, 2020*

- **1135 Wavier Authority and New Congressional Authority (fact sheet)** — CMS implemented the telehealth provisions of the Coronavirus Preparedness and Response Supplemental Appropriations Act and expanded telehealth with an 1135 waiver. Under the waiver, Medicare can pay for office, hospital, and other visits furnished via telehealth regardless of geography. Providers may reduce or waive cost-sharing for telehealth visits paid by federal health care programs. Visits provided by telehealth are considered office visits and are reimbursed at the same rate as regular, in-person visits. First visits may be provided through telehealth for the duration of the public health emergency. CMS emphasizes that no federal approval is needed for state Medicaid programs to reimburse providers for telehealth services in the same manner or at the same rate that states pay for face-to-face services. *Published March 17, 2020, but effective March 6, 2020*

- **FAQ for Medicaid and CHIP State Agencies (link)** — CMS notes that federal financial participation (FFP) is available for "telephonic services" provided by FQHCs and RHCs, subject to limitations of the state plan. In addition, FQHC and RHC services may be provided offsite, also subject to limitations of the state plan. CMS also encourages states to adopt the same telehealth flexibilities they offer in fee-for-service in their managed care contracts and clarifies that states may retroactively adjust capitation rates based on such a change. *Published March 18, 2020*

- **Telehealth Toolkits for General Providers and ESRD Providers (General, ESRD)** — CMS released a pair of telehealth toolkits to assist general practitioners and those working with patients with end-stage renal disease. These toolkits do not contain new policy but do provide a list of resources for providers to use. It also reiterates CMS' intention to not enforce policy on the use of consumer video conferencing technologies for telehealth services for the duration of the crisis and provides information about other CMS telehealth policies to providers that may use such flexibilities. *Published March 20, 2020*

- **Interim Final Rule: Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency (link, TRP Summary)** — CMS

identified over 80 additional services that may be provided via telehealth, including nursing facility initial and discharge visits, home visits, and evaluation services. A complete list of newly payable telehealth services can be found in the IFR. Additionally, CMS is temporarily eliminating frequency limitations and other requirements associated with particular services furnished via telehealth and clarifying several payment rules that apply to other services that are furnished using telecommunications technologies that can reduce exposure risks. Providers will be allowed to evaluate beneficiaries who have audio phones only, and CMS is allowing telehealth to fulfill many face-to-face visit requirements for clinicians to see their patients in inpatient rehabilitation facilities, hospice and home health. During the pandemic, individuals can use commonly available interactive apps with audio and video capabilities (such as Skype or FaceTime) to visit with their clinician. Home Health Agencies will be able to provide more services to beneficiaries using telehealth, so long as it is part of the patient's plan of care and does not replace needed in-person visits as ordered on the plan of care. The rule also implements CARES Act provisions permitting federally qualified health centers (FQHC) and Rural Health Centers (RHC) \ to provide telehealth services to beneficiaries in their homes. Virtual Check-In services, or brief check-ins between a patient and their doctor by audio or video device, will be offered to patients that had an established relationship with their doctor and new patients. Clinicians can provide remote patient monitoring services for patients during the crisis, regardless of if it is for the COVID-19 disease or a chronic condition. *Published March 30, 2020*

- **Guidance on Medicaid Telehealth access for substance abuse disorders (link)** – CMS guidance identifies opportunities for telehealth delivery methods to increase access to Medicaid services and federal reimbursement for services and treatment for substance use disorders under Medicaid using services delivered via telehealth, including in school-based health centers. The guidance provides state Medicaid agencies and other interested stakeholders information about options to facilitate access to services through the use of telehealth delivery methods as specifically outlined in 1009(b) of the SUPPORT Act, but these telehealth delivery methods could also be used in other circumstances, for example, to help respond to the COVID-19 public health emergency, as applicable. *Published April 2, 2020*

- **Waivers to Maximize Frontline Workforces (link)** – CMS temporarily suspended a number of regulations so that hospitals, clinics, and other healthcare facilities can boost their frontline medical staffs. The workforce changes apply immediately and address supervision, licensure and certification, and other limitations in healthcare settings such as Rural Health Clinics and Skilled Nursing Facilities. Now, doctors can directly care for patients at rural hospitals, across state lines if necessary, via phone, radio, or online communication with the help of nurse practitioner coordination. Nurse practitioners can also perform some medical exams. Also, occupational therapists can perform initial assessments on some homebound patients, and hospice nurses will be able to switch from hospice aide-in services to more direct patient care. *Published April 9, 2020*

- **Telehealth Toolkits for State Medicaid and CHIP Programs (press release, toolkit)** — CMS released a telehealth toolkit to accelerate the use of broader telehealth coverage policies in state Medicaid and CHIP programs. While CMS has taken steps to expand Medicare payment for 80 additional telehealth services, the toolkit encourages states to take similar steps to expand access by identifying policies which may impede the rapid deployment of telehealth when providing care. Although CMS Administrator Seem Verma did not mandate states to take certain actions, she urged states to use the toolkit "to make sure our Medicaid patients, particularly our children, can continue to receive needed care from the safety of their homes." CMS provides states with issues to consider as they evaluate their need for expanded telehealth capabilities; including patient populations eligible for telehealth; coverage and reimbursement policies; providers and practitioners eligible to provide telehealth; technology requirements; and pediatric considerations. The toolkit aims to assist states in identifying restrictions on telehealth eligibility, as well as which services could be delivered through telehealth and appropriate reimbursement rates to facilitate care. The toolkit also aims to help states to evaluate whether state practice acts or regulations limit the ability for certain providers to deliver services through telehealth, what technology may be needed for all forms of telehealth, and special considerations around consent and privacy in telehealth for children. Additionally, the toolkit included a compilation of frequently asked questions and other resources available to states. *Published April 23, 2020.*

- **Interim Final Rule and Additional Blanket Waivers (Rule, Waiver List)** — CMS waived limitations on the types of practitioner that may furnish Medicare telehealth services, expanding the benefit to therapists, including physical therapists, occupational therapists, and speech language pathologists. Medicare will now be able to pay for additional audio-only services, including behavioral health services, and will pay for them at a similar rate to office and outpatient visits. These payments will be retroactive to March 1. Furthermore, CMS will now modify its list of telehealth services through subregulatory guidance rather than through rulemaking.

DEA

- **Guidance on Controlled Substance Initial Prescriptions (Q&A)** — The HHS Secretary and DEA designated that practitioners may issue initial prescriptions for all schedule II-V controlled substances to patients for whom they have not conducted an in-person medical evaluation due to the declaration of a public health emergency by the HHS Secretary. The following conditions must be met:
    - The prescription is issued for a legitimate medical purpose by a provider acting in the usual course of her professional practice.
    - The telehealth communication is conducted using an audio-visual, real-time, two-way interactive communication system.
    - The provider acts in accordance with applicable federal and state law.

  The provider may issue a prescription electronically (for schedules II-V), by calling in an emergency schedule II prescription to the pharmacy. Emergency schedule II prescriptions

must be followed up with a paper prescription within 15 days. If it is impossible to deliver such a paper prescription, the provider may send a fax, photo, or scan of the prescription in its place. *Effective March 16, 2020*

- **Guidance on State Reciprocity (link)** — DEA released a guidance stating that DEA-registered practitioners are not required to obtain additional DEA registrations for additional states where they prescribe for the duration of the public health emergency. DEA-registered practitioners therefore can prescribe in any state if they are registered with DEA in at least one state and have permission *under state law* to prescribe controlled substances in the state where dispensing occurs. This applies to the prescription of controlled substances via telemedicine. *Published March 25, 2020*

FCC

- **COVID-19 Telehealth Program (press release, Report and Order)** — In accordance with the CARES Act, FCC announced a plan for a $200 million fund appropriated by the Act to bolster telehealth services. The program will assist eligible health care providers in purchasing telecommunications services, information services, and devices necessary to enable telehealth services.

FDA

- **Guidance on Devices for Remote Patient Monitoring (link)** — FDA released guidance noting that it would not object to proposed limited modifications to the indications, claims, functionality, or hardware or software of FDA-cleared non-invasive remote monitoring devices that are used to support patient monitoring during the declared public health emergency. *Published March 20, 2020*

HRSA

- **FAQ Document (link)** — HRSA notes that due to the public health emergency, health centers may provide in-scope telehealth services to patients that were not previously patients of the health center. HRSA encourages health centers to focus on individuals within their service areas. Health center providers may also generally provide telehealth services from a location that is not an in-scope service site of the health center. *Published March 19, 2020*

OCR

- **Notification of Enforcement Discretion (link)** — OCR announced that it will exercise enforcement discretion and will not impose penalties for HIPAA noncompliance against covered health care providers in connection with the good-faith provision of telehealth services during the COVID-19 nationwide public health emergency. Covered health care providers may use consumer video chat applications such as FaceTime, Google Hangouts, or

Skype for telehealth services. Public-facing applications such as Facebook Live, Twitch, and TikTok may not be used. *Published March 17, 2020*

SAMHSA

- **Telemedicine Prescribing of Controlled Substances (SAMHSA site, DEA site)** — With the Drug Enforcement Agency (DEA), SAMHSA released guidance that, following Secretary Azar's declaration of a public health emergency, DEA-registered practitioners may prescribe controlled substances without an in-person medical evaluation. *Effective January 27, 2020*

- **Opioid Treatment Program (OTP) Guidance (link)** — Provides that states with declared states of emergency may request blanket exemptions for all stable patients in an OTP to receive a 28-day supply of take-home doses. This is reduced to 14 days for less stable patients. For states without a declared state of emergency, individual OTPs pay request blanket exemptions to provide 28-day supplies to stable patients and 14-day supplies to less stable patients. *Published March 16, 2020*

- **Part 2 Privacy Guidance (link)** — Under an emergency exception to Part 2 privacy rules for individuals with a substance use disorder, due to the difficulty of obtaining written consent to release substance use disorders in the current environment, providers may disclose patient records in the event of a bona fide health emergency. Disclosures must be documented. *Published March 19, 2020*