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Telehealth Compliance Amidst COVID-19

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NEW ENGLAND HEALTHCARE INTERNAL AUDITORS (NEHIA)
HEALTHCARE FINANCIAL MANAGEMENT ASSOCIATION (HFMA)
ANNUAL COMPLIANCE AND AUDIT CONFERENCE

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Medicare Telehealth
Prior to Public Health Emergency (PHE)

- Must use 2-way real-time telecommunications system between established patient and physician or practitioner
- Telehealth by telephone not permitted
- Restrictions on originating and distant sites;
- Consent required, including making patient aware of cost-sharing responsibilities (verbal ok; consent at least once per year; consent covers all Communication Technology-Based Services)
- Copayments and deductibles required

Telehealth Originating and Distant Sites (Before PHE)

- **Originating site = patient's location**
  - No health care provider required to be present unless medically necessary
  - Must be in area designated as Rural Health Professional Shortage Area, or in a county not in Metropolitan Statistical Area, or entity participating in approved demonstration project.
  - Must be on list of originating site types (e.g., physician office, hospital, rural health clinic, critical access hospital, etc.); originating site can bill facility fee.
  - Exceptions for diagnosis, evaluation or treatment of acute stroke, substance use disorder and co-occurring mental health disorder, and home dialysis.
- **Distant site = provider's location**
  - Provider reimbursement -- same rate as in-person visit

Medicare Telehealth During PHE

- Medicare will consider two-way, real-time telehealth visits the same as in-person visits and reimburse at the same rate as in-person visits under Physician Fee Schedule (PFS)
- Payment will be made for professional services furnished to beneficiaries via telehealth in all areas of the country in all settings, i.e., outside of RHPSA
- Payment will be made for the telehealth services furnished to beneficiaries in any healthcare facility as well as in their home, i.e., no restrictions on originating sites (BUT, subject to state law, and neither physician nor patient may be outside of the country)
- Patients and their health care providers will be able to use a range of communication tools, including telephones with audio and video capabilities

Medicare Telehealth During PHE

- Expanded practitioner types who can provide and receive reimbursement for telehealth (subject to state law): e.g., physicians, NPs, PAs, nurse midwives, CNAs, clinical psychologists, CSWs, RDs and nutrition professionals
- For 1135 waivers, CMS will not enforce established patient requirement, to the extent applicable (i.e., new patients can access telehealth as well as established patients)
- Practitioners may bill Medicare for certain audio-only telehealth using designated codes with corresponding reimbursement rates
  - CMS added over 100 CPT & HCPCS codes for the PHE
  - See https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes

Audio-only Codes Added to Telehealth List for PHE Only

99441-99443: Telephone evaluation and management service by a physician or other qualified health care professional who may report E/M services provided to an established patient, parent, or guardian not originating from a related E/M service provided within the previous 7 days nor leading to an E/M service or procedure within the next 24 hours or soonest available appointment.

- **99441:** 5-10 minutes medical discussion – RVU .25 initially then increased to .48
- **99442:** 11-20 minutes medical discussion – RVU .50 initially then increased to .97
- **99443:** 21-30 minutes medical discussion – RVU .75 initially then increased to 1.50

Reimbursement for audio-only E/M codes increased to closely match similar in-person visits

See https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes

Facility Fees for Telehealth

- A hospital may serve as the originating site, and can bill for an originating site facility fee for a registered hospital outpatient who is receiving a telehealth service
- A hospital may also bill an originating site facility fee for telehealth provided to a registered outpatient in a provider-based department of the hospital, which includes the patient's home during the PHE
- Hospital must make the patient location a provider-based department for hospital to be paid under OPPS
  - Submit request by email to CMS Regional Office. (Can batch-submit requests)
  - If choose not to submit request, can bill using PN-modifier and be paid under PFS

Waivers of Co-Insurance and Deductibles

- Routine cost-sharing waivers or reductions implicate AKS, CMPs and beneficiary inducement prohibitions
- OIG announced it will not subject physicians and other practitioners to administrative sanctions for waiving/reducing Medicare beneficiaries' cost-sharing amounts related to telehealth (and other remote care delivery modalities)
- Conditions:
  - A physician or other practitioner reduces or waives cost-sharing obligations that a beneficiary may owe for telehealth services furnished consistent with the then-applicable coverage and payment rules
  - The telehealth services are furnished during the PHE
- Per OIG: Provision of free telehealth, by itself, will not be deemed an inducement for future referrals

2022 Physician Fee Schedule – Extension of Medicare Telehealth Coverage

- 2022 PFS Extends Telehealth Services Added to Medicare List during the PHE through 12/31/23
- Ongoing Evaluation by CMS of the Telehealth List
- Addresses In-Person Service Requirement Newly Tied to Mental Health Telehealth Coverage
- For Diagnosis and E&M of Mental Health Services, Beneficiary Home Added as Eligible Originating Site, and Audio-Only Allowed for Patients at Home

Other Communication-Based Technology Services – Not Medicare "Telehealth"

- **E-visit:** Patient-initiated communication between established patient and provider **through online patient portal**. E/M services, not face-to-face. CPT codes 99421-99423, HCPCS codes G2061-G2063.
- **Virtual Check-in:** Brief (5-10 mins) check-in with practitioner authorized to furnish E/M services initiated by an established patient **via telephone or other telecommunications device**, to decide whether an office visit or other service is needed. Audio-only telephone ok. Cannot be the result of prior appointment within the last 7 days or lead to an appointment within 24 hours (included). HCPCS code G2012.
  - 2022 PFS Establishes Longer (11-20 mins) Virtual Check-in code and payment
- **Remote Evaluation of Pre-Recorded Patient Information:** Remote evaluation of **pre-recorded video and/or images** submitted by an established patient. Cannot be the result of prior appointment within the last 7 days or lead to appointment within 24 hours (included). HCPCS code G2010.
- **Interprofessional Telephone/Internet Consultation:** Communication **between providers**. CPT codes 99446-49, 99451 (billed by consulting physician who provides verbal and written report) and 99452 (billed by treating/requesting healthcare professional)

OCR HIPAA Enforcement Discretion

- **During PHE**, OCR will not impose penalties for HIPAA noncompliance related to good faith provision of telehealth using *non-public facing* audio or video communication.
- OCR will not impose penalties against covered health care providers for the lack of a BAA with video communication vendors or any other noncompliance with the HIPAA Rules.
- Telehealth can be provided for any reason; not limited to COVID-19 care.
- Providers should continue to implement reasonable safeguards to protect against unauthorized use or disclosure of PHI. (Private settings, lowered voices, etc.)

OCR HIPAA Enforcement Discretion

- Broader application than CMS billing rules. E.g., covers telehealth provided by store-and-forward technology and text messaging.
- Covered by Waiver: Zoom, Skype, FaceTime, Google Hangouts, Facebook Messenger.
- Not Covered: TikTok, Twitch, Facebook Live, etc.
- Providers encouraged to notify patients of security risks.
- Note: SAMHSA has in place similar waivers for Part 2: "to the extent necessary to meet a bona fide medical emergency in which the patient's prior informed consent cannot be obtained."

Prescribing Controlled Substances During PHE

- Federal Ryan Haight Act requires in-person visit before prescribing controlled substances using the internet
- The DEA lifted the in-person requirement during the PHE if the following are met:
  - The prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice
  - The telemedicine communication is conducted using an audio-visual, real-time, two-way interactive communication system.
  - The practitioner is acting in accordance with applicable Federal and State law.
- States may still require practitioners to register with an applicable agency and may subject practitioners to additional requirements to prescribe via telehealth

Prescribing Controlled Substances During PHE

- For example:
  - CT:
    - Waived requirement for practitioners licensed in other states to register with DCP before prescribing
    - Schedule II controlled substance prescriptions cannot be refilled. But, practitioners with a pre-existing patient relationship and have prescribed a Schedule II controlled substance in the past may reissue the prescription to that patient without an in-person visit
    - Schedule III and IV controlled substance prescriptions may be refilled up to 5 times in 6 months
  - CT has since passed legislation limiting telehealth prescriptions to certain non-opioid Schedule II or III controlled substances for treatment of psychiatric disability or substance use disorder

State Laws

- State laws governing licensure and similar requirements generally based on location of patient.
  - BUT, laws differ by state. Check your state's applicable laws.
- E.g., if patient located in MA, physician generally must be licensed in MA.
- However, there are uncertainties as to whether the physician must also be licensed in the state where they are located.
  - MA law defines the "practice of medicine" to include the provision of telehealth
  - If physician located in MA, and patient located out-of-state, physician providing telehealth is likely practicing medicine and must be licensed in MA and the patient's location

State Laws

- Many states waived or modified licensure requirements during PHE
- Though, state-by-state approach has created uncertainties
- CT: Passed a statute allowing telehealth by out-of-state providers until 6/30/23 under DPH order, as well as audio-only and expanded list of eligible telehealth providers
- MA: provided a process for emergency license to be obtained from BoRM. Reciprocity applied, but physician must obtain the license. NOTE: this process is no longer in effect as of 6/15/21.
- RI: Issued guidance stating it would not take action against *physicians* not licensed in RI providing telemedicine to RI patients during the state of emergency. Current approach uncertain so licensure may be advised.
- Also consider:
  - Insurance coverage for services in each state
  - State data protection laws
  - State informed consent requirements

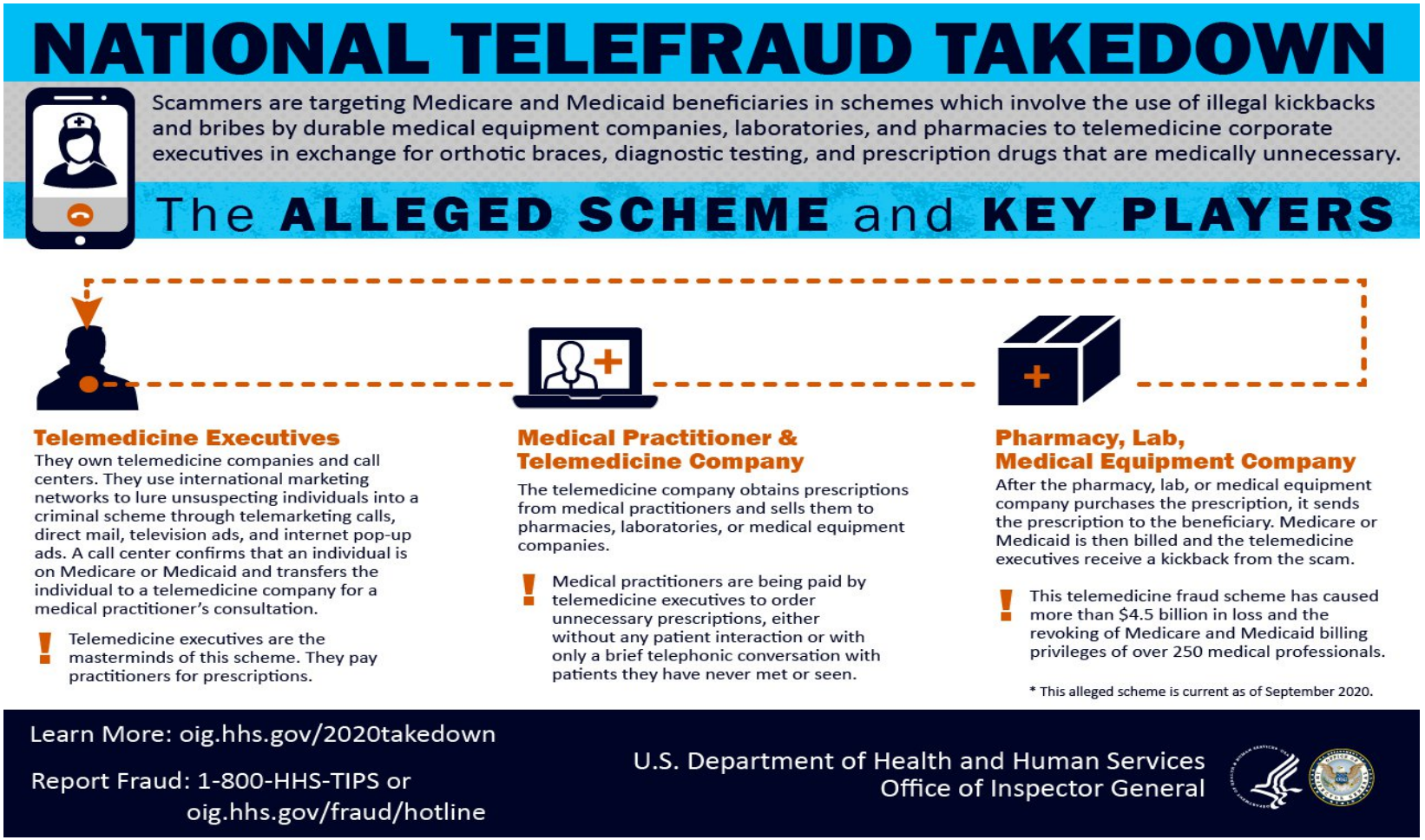
Telehealth Audits

- OIG: Conducting “significant oversight work assessing telehealth services” during PHE
- OIG: Audit of COVID-19 Telehealth Utilization Shows 84% of Beneficiaries Received Telehealth from Providers w/ Existing Relationship, Despite Waiver
- OIG Work Plan Features Multiple Ongoing Telehealth Audits

Telehealth and Enforcement Activities

- 2020 OIG Healthcare Fraud Takedown: “Since 2016, OIG has seen a significant increase in telefraud.”
- Schemes include use of telehealth and telemarketing and payments to practitioners to order labs, DME, and other testing for unknowing beneficiaries without any patient relationship.
- Telefraud distinct from telehealth fraud – but important for providers and compliance teams to be on the lookout (e.g., unsolicited faxes for DME).

OIG Telefraud Takedown



Telehealth Enforcement – Rotten Apples Spoiling the Barrel?

- May 2021: DOJ Announces First Criminal Charges for “Exploiting” Telehealth Expansion Policies by Billing for “Sham Telemedicine Encounters” that did not occur.
- Allegation that testing laboratories allowed telehealth providers access to beneficiaries to bill consultations in exchange for referrals for unnecessary cancer and genetic testing.
- September 2021: DOJ Announces Charges Targeting $1.1B in Telemedicine Fraud

Questions?

THANK YOU

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