

## **DEA Announces Permanent Flexibilities for the Prescribing of Controlled Substances via Telemedicine**

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On February 24, 2024, the Drug Enforcement Administration (“DEA”) released a long-anticipated proposed rule that aims to permanently extend controlled substance prescribing flexibilities beyond the COVID-19 Public Health Emergency (“PHE”). If approved, the proposed rule will add flexibility to the Ryan Haight Online Consumer Protection Act of 2008, which restricts prescribing controlled substances via telemedicine to practitioners that conduct an in-person medical evaluation of the patient.

The proposed rule was developed with the U.S. Department of Health and Human Services (“HHS”) and in close coordination with the U.S. Department of Veterans Affairs and proposes to allow controlled substance prescribing for a narrow set of telemedicine consultations. Specifically, the proposed rule allows practitioners to prescribe non-narcotic Schedule III-V controlled substances via telemedicine without a prior in-person medical evaluation. Drugs prescribed via telemedicine are limited to a 30-day supply, after which the practitioner must conduct an in-person medical evaluation of the patient to continue prescribing to the patient. The proposed rule also revises the DEA regulatory definition of the “practice of telemedicine” to align with the Center for Medicare and Medicaid Services (“CMS”) regulations, which require that telemedicine take place using an interactive telecommunication system. As a result of this regulatory clarification, the DEA’s updated definition allows the prescribing of controlled substances via telemedicine using audio-only equipment in certain limited circumstances, such as for mental health services.

Notably, the proposed rule creates an alternative pathway for practitioners that are unable to conduct an in-person evaluation following the initial 30-day controlled substance supply via, what the DEA is terming, a “qualifying telemedicine referral.” A prescribing practitioner that receives a qualifying telemedicine referral may prescribe any controlled substance, including Schedule II controlled substances, if the referral is from a DEA-registered practitioner who has conducted a medical evaluation of the patient. A prescribing practitioner may receive a qualifying telemedicine referral from, for example, a patient’s primary care practitioner who has conducted a medical evaluation of the patient. Likewise, a medical group practice member may issue a written telemedicine referral to another member of the same group practice following the evaluation, diagnosis and treatment of a patient.

To safeguard against diversion, the proposed rule requires prescribing practitioners to review

relevant prescription drug monitoring program data or, if unavailable, limit controlled substance prescriptions to a 7-day supply until such data can be reviewed. Similarly, apart from prescribing predicated on a qualifying telemedicine referral, prescribing schedule II-controlled substances and all narcotic controlled substances are excluded from the proposed rule. However, while not a provision of this proposed rule, the DEA released a separate proposed rule titled 'The Expansion of Induction of Buprenorphine via Telemedicine Encounter.' This rule makes an exception to the non-narcotic prescribing requirement and proposes to allow prescribing of certain narcotic-controlled substances, such as buprenorphine via telemedicine for the treatment of opioid use disorder.

The DEA's proposed rule ensures that patients do not experience lapses in care and also provides continuity of care under current telehealth flexibilities recently extended through December 31, 2024, as a result of key provisions of the Consolidated Appropriations Act of 2023. The DEA and HHS have provided a 30-day notice and comment period.

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