CONSOLIDATED APPROPRIATIONS ACT OF 2023 EXTENDS TELEHEALTH WAIVERS

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U.S. Health Care and FDA Alert

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On 29 December 2022, President Biden signed into law the Consolidated Appropriations Act of 2023 (the Act),[1] allocating US$1.7 trillion in government spending. The Act contains hundreds of pages of legislation on a myriad of topics, including extensions of telehealth flexibilities beyond the COVID-19 public health emergency (PHE). Similar to the Consolidated Appropriations Act of 2022,[2] which extended certain telehealth flexibilities for a period of 151 days after the end of the PHE, the Act extends many telehealth flexibilities beyond the end of the PHE, (which the Biden Administration has indicated will be 11 May, 2023[3]), but does so for over a year and a half, through 31 December 2024.

Specifically, those flexibilities are as follows:

- Expanding the definition of originating and geographic sites to include anywhere the patient is located, including the patient's home.
- Expanding the types of practitioners eligible to furnish telehealth services to include audiologists, occupational therapists, physical therapists, and speech-language pathologists.
- Extending the ability for federally qualified health centers (FQHCs) and rural health clinics (RHCs) to furnish telehealth services.
- Delaying the in-person requirements under Medicare for mental health services through telehealth, including at FQHCs and RHCs.
- Extending reimbursement for audio-only telehealth services.
- Allowing the use of telehealth to satisfy the face-to-face encounter requirement for recertification for hospice care.
- Providing for a study on telehealth and Medicare program integrity.
- Extending the safe harbor exceptions under health savings account-eligible, high-deductible health plans for telehealth services

Notably, the Act does not extend the waiver of the in-person meeting requirement before a practitioner can legally prescribe controlled substances via telehealth under the Ryan Haight Act of 2008.[4] While the American Telemedicine Association has expressed disappointment over this exclusion,[5] this decision was likely influenced by recent investigations related to allegations of overprescribing certain controlled substances via telehealth technology.[6]

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While the Act does not make dramatic changes to the telehealth landscape, choosing instead to primarily preserve the status quo, it does signal that Congress still believes that there is more to learn about telehealth and how it will fit into the overall landscape of U.S. health care. We should anticipate that the Centers for Medicare & Medicaid Services and the U.S. Department of Health and Human Services will continue to monitor the use of telehealth, but we should be optimistic about the advancements and innovations in health care delivery models that may have an opportunity to flourish in an environment of extended regulatory flexibility.

FOOTNOTES

[1] Consolidated Appropriations Act, 2023, H.R.2617, 117th Cong. (2022), https://www.govinfo.gov/app/details/BILLS-117hr2617enr/.

[2] Consolidated Appropriations Act, 2022, Pub. L. No. 117-103 (2022), https://www.govinfo.gov/app/details/PLAW-117publ103.

[3] Statement of Administration Policy, January 30, 2023, https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf

[4] Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. No. 110-425 (2008), https://www.govinfo.gov/app/details/PLAW-110publ425.

[5] Press Release, Am. Telemedicine Ass'n, CONGRESS UNVEILS TWO YEAR EXTENSION OF TELEHEALTH FLEXIBILITIES – AS URGED BY THE ATA AND ATA ACTION – AS PART OF OMNIBUS BILL (Dec. 20, 2022), https://www.americantelemed.org/press-releases/congress-unveils-two-year-extension-of-telehealth-flexibilities-as-urged-by-the-ata-and-ata-action-as-part-of-omnibus-bill/.

[6] Heather Landi, *Cerebral under federal investigation for possible violations of controlled substances law*, FIERCE HEALTHCARE (May 7, 2022, 4:09PM), https://www.fiercehealthcare.com/health-tech/cerebral-under-federal-investigation-possible-violation-controlled-substances-law.

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