CARES Act Provides Vital Resources for Telehealth to Combat COVID-19

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act ("the CARES Act") into law.[1] In addition to providing direct payments to Americans, buttressing unemployment benefits, and facilitating aid to struggling corporations and small businesses, the legislation makes numerous enhancements to telehealth – a critical resource to combat the COVID-19 pandemic.

I. Funding for Telehealth Deployment

Central to the CARES Act is promoting the rapid expansion of affordable, comprehensive telehealth services throughout the country. Telehealth extends medical coverage to rural and underserved areas and frees up physical health resources for the critically ill. It also has the ability to stem the spread of COVID-19 itself. As Senator Chuck Grassley remarked, the CARES Act will "boost the use of telehealth services so Americans can receive care in the safety of their own home, reducing the exposure risk for everyone including providers and the most vulnerable."[2]

The CARES Act provides $325 million in direct funding for federal agencies consisting of:

- An emergency appropriation of $200 million to the Federal Communications Commission ("FCC") "to prevent, prepare for, and respond to coronavirus, domestically or internationally," including the provision of communications service and equipment to health care providers necessary to provide telehealth. The CARES Act authorizes the FCC to administer this appropriation via the Universal Service Fund, if the FCC believes it to be in the public interest.[3]

- An emergency appropriation of $100 million to the United States Department of Agriculture's ("USDA") Broadband ReConnect Program, which "furnishes loans and grants to provide funds for the costs of construction, improvement, or acquisition of facilities and equipment needed to provide broadband service in eligible rural areas."[4] Projects must serve communities in which 90% of households lack broadband service of at least 10 Mbps downstream and 1 Mbps upstream. Previous applicants are given priority consideration, though no grant recipient may duplicate the broadband expansion efforts of a previous Rural Utilities Service ("RUS") broadband loan recipient.[5]

- An emergency appropriation of $25 million to the USDA RUS Learning, Telemedicine, and Broadband Program,[6] which "helps rural communities acquire the technology, equipment, and training necessary

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[1] Pub. L. 116-136 (2020).

[2] "The CARES Act: Major Coronavirus Relief for American Workers, Families, and Small Businesses" (Mar. 19, 2020), https://www.republicanleader.senate.gov/newsroom/research/the-cares-act-major-coronavirus-relief-for-american-workers-families-and-small-businesses.

[3] CARES Act Div. B, Tit. V.

[4] United States Department of Agriculture, ReConnect Loan and Grant Program, https://www.usda.gov/reconnect.

[5] CARES Act Div. B, Tit. I, § 11004.

[6] CARES Act Div. B, Tit. I.

to virtually connect with educators and medical professionals for remote services."[7]

The CARES Act also provides an emergency appropriation of $1.032 billion to the Indian Health Service, which supports, among other things, "electronic health record modernization, telehealth and other information technology upgrades" for American Indians and Alaskan Natives.[8] Likewise, a portion of the more than $27 billion allocated to the Department of Health and Human Services' ("HHS") Public Health and Social Services Emergency Fund is intended for "telehealth access and infrastructure;" $180 million is explicitly reserved until September 30, 2022 "to carry out telehealth and rural health activities."[9]

Finally, the CARES Act empowers the Secretary of Veterans Affairs to "enter into short-term agreements or contracts with telecommunications companies to provide temporary, complimentary or subsidized, fixed and mobile broadband services for the purposes of providing expanded mental health services to isolated veterans through telehealth or VA Video Connect during a public health emergency."[10] The Secretary is authorized to expand eligibility for veterans who do not currently qualify to obtain health services through telehealth, prioritizing those who reside in unserved, underserved, and rural areas, or are classed as low-income or present mental health concerns.[11] Telehealth may also be used to renew coverage for members of the Veteran Directed Care Program.[12] The Secretary also is directed to "ensure that telehealth capabilities are available during a public health emergency for case managers of, and homeless veterans participating in, the Department of Housing and Urban Development–Department of Veterans Affairs Supportive Housing program."[13]

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[7] United States Department of Agriculture, *2019 Distance Learning and Telemedicine Grants* (2019), https://www.rd.usda.gov/files/De_MD_DLT%20Flyer%202019%20PDF.pdf.

[8] CARES Act Div. B, Tit. VII.

[9] CARES Act Div. B, Tit. VII.

[10] CARES Act Div. B, Tit. X, § 20004(a); *see* United States Department of Veterans Affairs, VA Video Connect, https://mobile.va.gov/app/va-video-connect ("VA Video Connect connects Veterans with their health care team from anywhere, using encryption to ensure a secure and private session. It makes VA health care more convenient and reduces travel times for Veterans, especially those in very rural areas with limited access to VA health care facilities, and it allows quick and easy health care access from any mobile or web-based device.").

[11] CARES Act Div. B, Tit. X, § 20004(b).

[12] CARES Act Div. B, Tit. X, § 20006(a); *see* United States Department of Veterans Affairs, Veteran Directed Care Program (Formerly VD-HCBS), https://acl.gov/programs/veteran-directed-home-and-community-based-services/veteran-directed-home-community-based ("The vision is to have a long-term service and supports (LTSS) system that is person-centered and consumer-directed, and that helps people at risk of institutionalization to continue to live at home and engage in community life.").

[13] CARES Act Div. B, Tit. X, § 20011; *see* United States Department of Veterans Affairs, U.S. Department of Housing and Urban Development-VA Supportive Housing (HUD-VASH) Program, https://www.va.gov/homeless/hud-vash.asp ("HUD-VASH is a collaborative program between HUD and VA that combines HUD housing vouchers with VA supportive services to help Veterans and their families who are homeless find and sustain permanent housing.")

II. Grants for Telehealth

The CARES Act provides $29 million annually, from fiscal year 2021 through fiscal year 2025, for two kinds of existing Health Resources and Service Administration grants to nonprofit entities.[14] Telehealth Resource Center grants establish facilities that "provide technical assistance to healthcare organizations, healthcare networks, and healthcare providers in the implementation of cost-effective telehealth programs to serve rural and medically underserved areas and populations."[15] Telehealth Network grants offset salaries, equipment purchases, and operating costs associated with the development and delivery of telehealth services over a network comprised of two or more eligible entities.[16] These entities are:

1) community or migrant health centers or other federally qualified health centers;
2) health care providers, including pharmacists, in private practice;
3) entities operating clinics, including rural health clinics;
4) local health departments;
5) nonprofit hospitals, including community access hospitals;
6) other publicly funded health or social service agencies;
7) long-term care providers;
8) providers of health care services in the home;
9) providers of outpatient mental health services and entities operating outpatient mental health facilities;
10) local or regional emergency health care providers;
11) institutions of higher education;
12) entities operating dental clinics;[17] and,
13) as added by the CARES Act, providers of outpatient substance use disorder services and entities operating substance use disorder facilities.

Notably, the CARES Act eliminates the requirement that grant recipients be nonprofit entities,[18] but expands funding to rural areas. The CARES Act also reduces the amount of grant funds that may be expended to lease or purchase equipment, from 40% of total funds to 20%.[19] It applies an "evidence-based" standard to Telehealth Network grants[20] but also extends the preference for Telehealth Network grants to entities that create regional, rather than simply local, telehealth networks.[21] The HHS Secretary is required to provide a report to Congress on the effectiveness of these changes by 2024, with a supplemental report due every five years thereafter.

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[14] CARES Act Div. A, Tit. III, § 3212.

[15] Rural Health Information Hub, Telehealth Resource Center Grant Program - Regional and National (2017), https://www.ruralhealthinfo.org/funding/2106; *see* 42 U.S.C. § 254c–14(k)(2).

[16] 42 U.S.C. § 254c–14(k)(1).

[17] 42 U.S.C. § 254c–14(f)(1)(B)(iii).

[18] *See* 42 U.S.C. § 254c–14(f)(1)(A), (2).

[19] 42 U.S.C. § 254c–14(l)(2).

[20] 42 U.S.C. § 254c–14(d)(1).

[21] 42 U.S.C. § 254c–14(i)(1)(B).

III. Other Support for Telehealth

The CARES Act also amends:

- Section 223 of the Internal Revenue Code,[22] which permits individuals with high-deductible insurance plans to pay for medical expenses through tax-free health savings accounts.[23] The CARES Act ensures that such plans will continued to be classified as high-deductible, even if they lack a deductible for telehealth and remote medical services.[24] Plans also retain this classification if the policyholder has additional coverage for telehealth (following similar exemptions for vision, dental, and long-term care coverage).[25]

- Section 1135 of the Social Security Act,[26] which affords the HHS Secretary authority to waive requirements for Medicare, Medicaid, and the Children's Health Insurance Program during an emergency.[27] Division B, Section 102 of the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020[28] permitted the Secretary to waive, within the context of covered services, the definition of qualifying "originating sites" for telehealth[29] and the prohibition on the use of telephones in telehealth.[30] This waiver, however, was unavailable in cases when the health care provider or practice engaged in telehealth did not provide service to the beneficiary during the preceding three years. The CARES Act removes this limitation.

- Section 1834(m) of the Social Security Act,[31] to provide HHS payment for telehealth services furnished by a rural health clinic or federally qualified health center,[32] at rates comparable to national averages.[33] Costs associated with the provision of telehealth services are excluded from the prospective payment systems for such clinics or centers.

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[22] 26 U.S.C. § 223; *see* Healthcare.gov, High Deductible Health Plan (HDHP), https://www.healthcare.gov/glossary/high-deductible-health-plan/.

[23] CARES Act Div. A, Tit. III, § 3701.

[24] *See* 26 U.S.C. § 223(2). This applies only to plans that begin on or before December 31, 2021.

[25] *See* 26 U.S.C. § 223(c)(1)(B).

[26] 42 U.S.C. §1320b-5.

[27] CARES Act Div. A, Tit. III, § 3703.

[28] Pub. L. 116-123 (2020).

[29] *See* 42 U.S.C. § 1395m(m)(4)(C).

[30] *See* 42 CFR § 410.78(a)(3).

[31] 42 U.S.C. § 1395m.

[32] A "health center" is defined as "an entity that serves a population that is medically underserved, or a special medically underserved population comprised of migratory and seasonal agricultural workers, the homeless, and residents of public housing." 42 U.S.C. § 254b(a)(1). A "federally-qualified health center" is, in general, a health center directly or indirectly receiving or deemed qualified to receive a federal grant to provide services to medically underserved populations. 42 U.S.C. § 1395x(aa)(4).

[33] CARES Act Div. A, Tit. III, § 3704.

- Section 1814(a)(7)(D)(i) of the Social Security Act,[34] to facilitate recertification of a beneficiary's eligibility for continued hospice care through telehealth, rather than a face-to-face encounter with a hospice physician or nurse practitioner.[35] Separately, the CARES Act directs the HHS Secretary to "consider ways to encourage the use of telecommunications systems, including for remote patient monitoring,"[36] with respect to home health services, such as part-time nursing care, social services, and physical or occupational therapy.[37]

IV. The Road Ahead

Telehealth is an indispensable part of modern medicine – a $2.6 billion industry that witnessed a 25% market increase from 2015 to 2020.[38] The CARES Act provides robust provisions for expanding it, by empowering federal agencies and allocating resources for on-the-ground initiatives. But questions remain: as COVID-19 cases multiply daily, how quickly can telehealth services be activated to combat it? Does the CARES Act provide a sufficiently comprehensive framework for efficient and economical deployment? The Act provides important resources for long-term deployment of telehealth facilities, but many of those resources are unlikely to be able to be deployed quickly enough to deal with the immediate COVID-19 crisis.

The funding provided by the CARES Act is considerable, but money is not a panacea to telehealth buildout. Federal agencies already have invested considerable sums in this endeavor. The USDA, for example, allocated $42.5 million in 133 telehealth and distance learning projects across 37 states and two territories in November 2019, through its Distance Learning and Telemedicine grant program.[39] The FCC has allocated more than $604 million in 2020 to its Rural Health Care ("RHC") initiative, which provides rural health care providers with discounted telecommunications service rates (the Telecommunications Program), and support for eligible services, equipment, and infrastructure related to high-speed broadband connectivity (the Healthcare Connect Fund Program, or "HCFP").[40]

Despite such investments, roadblocks remain. In its November 2019 report to the FCC, the Intergovernmental Advisory Committee identified a series of barriers that cannot easily be cured through a grant or loan: cross-state licensing, incomplete health information exchanges, nebulous patient privacy laws, variable state Medicare and Medicaid policies, and a dearth of digital literacy amongst lawmakers.[41] At present, only 29 states, the District of Columbia, and the territory of Guam subscribe to the Interstate Medical Licensure Compact, which

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[34] 42 U.S.C. § 1395f(a)(7)(D)(i).

[35] CARES Act Div. A, Tit. III, § 3706.

[36] CARES Act Div. A, Tit. III, § 3707.

[37] *See* 42 U.S.C. § 1395x(m).

[38] IBISWorld, Telehealth Services in the US Market Size 2005–2025, https://www.ibisworld.com/industry-statistics/market-size/telehealth-services-united-states/.

[39] Carl Weinschenk, "USDA Invests $42.5M in Rural Distance Learning, Telemedicine," Telecompetitor (Nov. 20, 2019).

[40] CC Docket No. 02-6, WC Docket No. 02-60, *Wireline Competition Bureau Announces E-Rate and RHC Programs' Inflation-Based Caps for Funding Year 2020* (Mar. 12, 2020); *see* 47 CFR § 54.602(a), (b).

[41] *See* Intergovernmental Advisory Committee, *State, Local Tribal, and Territorial Regulatory and Other Barriers and Incentives to Telemedicine*, Advisory Recommendation No. 2019-2 (Nov. 7, 2019), https://docs.fcc.gov/public/attachments/DOC-360696A5.pdf.

permits eligible physicians to practice medicine across state lines.[42] Twenty-three states impose restrictions on a permissible "originating site" for a telehealth session, and only 22 state insurance programs provide reimbursement for remote patient monitoring.[43] These inconsistencies and limitations inhibit the development of a seamless, comprehensive, nationwide telehealth network. While Vice President Pence announced on March 18, 2020, that HHS was issuing a regulation "that will allow all doctors and medical professionals to practice across state lines to meet the needs of hospitals that may arise in adjoining areas," this rule has yet been promulgated.[44] And while on March 17, 2020, HHS's Office of Civil Rights announced a Notification of Enforcement Discretion on health care providers' compliance with the Health Insurance Portability and Accountability Act with respect to telehealth,[45] the law officially remains in place.[46]

Bureaucratic uncertainty could prove another stumbling block. Support under the HCFP may only be distributed to public or non-profit medical facilities, health centers, or post-secondary educational institutions that operate in rural areas.[47] Non-rural public or non-profit health care providers may receive funding through a consortium, but a majority of the consortium's membership must be rural health care provider sites.[48] In August 2019, the FCC announced a three-year, $100 million Connected Care Pilot Program, which will "provide an 85% discount on connectivity for broadband-enabled telehealth services that connect patients directly to their doctors and are used to treat a wide range of health conditions."[49] The FCC proposed applying the eligibility requirements from the HCFP to this groundbreaking telehealth initiative,[50] but has taken no action on this or any other aspect of

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[42] Interstate Medical Licensure Compact, The IMLC, https://imlcc.org/.

[43] Center for Connected Health Policy, State Telehealth Laws and Reimbursement Policies Report (2020).

[44] Rev, Donald Trump and Coronavirus Task Force News Briefing March 18: Invokes Defense Production Act, Calls COVID-19 "Chinese Virus" (Mar. 18, 2020), https://www.rev.com/blog/transcripts/donald-trump-and-coronavirus-task-force-news-briefing-march-18-invokes-defense-production-act-calls-covid-19-chinese-virus. In a March 24, 2020 letter, HHS Secretary Azar did urge state governors to "[a]llow health professionals licensed or certified to practice their professions in your state, either in person or through telemedicine." Letter from Alex M. Azar II to Governor (Mar. 24, 2020), https://www.midwife.org/acnm/files/cclibraryfiles/filename/000000007822/HHS%20Letter%20to%20Governors%20Scope%20COVID.pdf.

[45] United States Department of Health and Human Services, "OCR Announces Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency" (Mar. 17, 2020), https://www.hhs.gov/about/news/2020/03/17/ocr-announces-notification-of-enforcement-discretion-for-telehealth-remote-communications-during-the-covid-19.html; *see* United States Department of Health and Human Services, Office of Civil Rights, FAQs on Telehealth and HIPAA during the COVID-19 nationwide public health emergency, https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf ("OCR would consider all facts and circumstances when determining whether a health care provider's use of telehealth services is provided in good faith and thereby covered by the Notice.").

[46] *See* United States Department of Health and Human Services, Office of Civil Rights, "HIPAA Privacy and Novel Coronavirus" (Feb. 3, 2020), https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf.

[47] *See* 47 U.S.C. § 254(h)(7)(B); 47 CFR § 54.607.

[48] *See* 47 CFR § 54.607(a)-(b).

[49] Federal Communications Commission, "FCC Seeks Comment on Proposed $100 Million Connected Care Pilot Program" (July 10, 2019), https://docs.fcc.gov/public/attachments/DOC-358399A1.pdf; *see* WC Docket No. 18-213, *Promoting Telehealth for Low-Income Consumers,* Notice of Proposed Rulemaking, FCC 19-64, ¶ 15 (rel. July 11, 2019) ("*Connected Care NPRM*").

[50] *Connected Care NPRM* ¶ 37.

the Connected Care Pilot program since comments were received from the public in September 2019.[51] To the extent that the FCC chooses to devote a portion of its $200 million emergency appropriation to the Connected Care Pilot program, or something like it, urban and for-profit providers will be left wondering if they qualify for funding.

Finally, the extent of coordination between federal agencies remains an open question. While the CARES Act provides for some protection against duplicative projects within a particular funding program, it does not address this across the federal government. Should, for example, HHS devote grants and loans to triage suspect COVID-19 patients, while the FCC focuses its efforts on remote care for existing conditions? Might the Food and Drug Administration serve in an advisory capacity, with respect to the integration of newly approved advances in artificial intelligence, automation, and robotics?

Despite these outstanding issues, the CARES Act nonetheless constitutes a vital tool in the fight against an insidious virus. As Chairman Pai remarked, "At a time when many of our nation's hospitals are facing unprecedented challenges because of the coronavirus pandemic, telemedicine has never been more important to our nation's healthcare system and the many patients it needs to serve." [52]

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Chérie R. Kiser at 202.862.8950 or ckiser@cahill.com; or Matthew L. Conaty at 202.862.8945 or mconaty@cahill.com; or email publications@cahill.com.

[51] Numerous parties have urged the Commission to adopt a more expansive definition of eligibility. *See, e.g.,* WC Docket No. 18-213, Comments of American Academy of Family Physicians (Aug. 28, 2019) ("We caution that inequitable expansion of access to telehealth services may further broaden disparities in care and health outcomes among vulnerable populations. The AAFP believes as telemedicine services are expanded and utilized to achieve desired aims, it is imperative that outcomes are closely monitored to ensure disparities in care are not widened among vulnerable populations, attributed to inequitable expansion of access to telemedicine and telehealth services.").

[52] Federal Communications Commission, "Chairman Pai Welcomes Senate Passage Of The CARES Act and $200 Million Boost For FCC Telehealth Efforts" (Mar. 26, 2020), https://docs.fcc.gov/public/attachments/DOC-363318A1.pdf.

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