

# The COVID-19 Public Health Emergency Ends on May 11, 2023: What Telehealth Prescribers Need to Know

AUTHOR: PHIL BERRA, DENNIS HARMS

## Federal Telehealth Prescription Compliance (Schedule II-V)

Providers working for telehealth companies can currently prescribe schedule II-V medications via telehealth by adhering to the federal guidelines below and calling prescriptions into the patient's pharmacy. This avenue remains open at least until May 11, 2023<sup>[1]</sup>, due to the COVID-19 Public Health Emergency ("PHE") and the public emergency exception contained within the Ryan Haight Pharmacy Consumer Protection Act of 2008 ("RHA").<sup>[2]</sup>

The RHA's emergency provision suspends the in-person patient examination requirements for all schedule II-V controlled substances in the United States provided the following conditions are met:

1. The prescription is issued for a legitimate medical purpose by a practitioner acting in the usual course of his/her professional practice.
2. Telemedicine communication is conducted using an audiovisual, real-time, two-way interactive communication system.
3. The practitioner is acting in accordance with applicable federal and state laws.<sup>[3]</sup>

When the PHE ends on May 11, 2023, telehealth prescribers must ensure RHA compliance as follows:

1. Patients who have been seen in person at least once by the practitioner prescribing the controlled medication may continue receiving telehealth prescriptions.

2. Patients never seen in person by the prescribing practitioner may receive one 30-day prescription per medication after the PHE ends but will need to be evaluated in person at least once after the 30-day supply ends prior to renewal.[4] Providers should begin scheduling in-person appointments before the end of the PHE on May 11, 2023, to ensure a smooth transition after the PHE ends.
3. Patients who were seen in person prior to or during the PHE, but have their medications prescribed by another practitioner (the covering practitioner), must be seen in person by the prescribing practitioner within two years of the last in-person visit.

#### Future DEA Guidance to Watch

The RHA contains a provision allowing providers obtain a special registration for the practice of telemedicine from the U.S. Attorney General.[5] However, the DEA has not issued guidelines regarding special registration requirements or an application process to date. This may change with the COVID PHE sunset on May 11, 2023, and mounting provider pressure to release guidance.[6] Providers will want to watch for any future guidance issued by the DEA in this area to promptly apply for special registration.

#### Takeaway

Telehealth providers prescribing schedule II-V controlled substances should begin scheduling in-person patient visits in advance of the May 11, 2023, PHE expiration. While the proposed DEA telehealth rules allow for a slight buffer period (one 30-day supply per medication prescribed to a patient) after the expiration, planning in-person visits now will save providers from a patient backlog after the PHE ends.

[1] H.R. 382, A bill to terminate the public health emergency declared with respect to COVID-19, STATEMENT OF ADMINISTRATION POLICY, EXECUTIVE OFFICE OF THE PRESIDENT OFFICE OF MANAGEMENT AND BUDGET (Jan. 30, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf>.

[2] The RHA was intended to stop controlled substances sales through online pharmacies by requiring an in-person examination of any person seeking a prescription for such substances. See 21 U.S.C. § 802, (available at <https://www.congress.gov/110/plaws/publ425/PLAW-110publ425.pdf>).

[3] 21 CFR 1306.04(a); see also U.S. Drug Enforcement Admin., Dep't. Justice; *How to Prescribe Controlled Substances to Patients During the COVID-19 Public Health Emergency* (Mar. 31, 2020), [https://www.deadiversion.usdoj.gov/GDP/\(DEA-DC-023\)\(DEA075\)Decision\\_Tree\\_\(Final\)\\_33120\\_2007.pdf](https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-023)(DEA075)Decision_Tree_(Final)_33120_2007.pdf).

[4] U.S. Drug Enforcement Admin., Dep't. Justice; *DEA Announces Proposed Rules for Permanent Telemedicine Flexibilities* (Feb. 24, 2023), <https://www.dea.gov/press-releases/2023/02/24/dea-announces-proposed-rules-permanent-telemedicine-flexibilities>.

[5] 21 U.S.C. § 831(h).

[6] See American Hospital Association, *Letter to DEA Regarding Request for Release of Special Registration for Telemedicine Regulation* (Dec. 1, 2022), <https://www.aha.org/lettercomment/2022-12-01-aha-letter-dea-regarding-request-release-special-registration-telemedicine-regulation>.