

# The Landscape is Changing for Telemedicine and Controlled Substances: Proposed Rulemaking for Post-Pandemic Treatment

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## Practices

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## Article

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On February 24, 2023, the Drug Enforcement Administration (DEA) proposed rules addressing the prescribing of controlled substances via telemedicine upon the scheduled end of the COVID-19 Public Health Emergency (PHE) on May 11, 2023. Last week, the DEA published the Telemedicine Controlled Substances Proposed Rule (the “Proposed Rule”)<sup>[1]</sup> for comment, the statutory basis for which is the Ryan Haight Online Pharmacy Consumer Protection Act of 2008<sup>[2]</sup> (the “Ryan Haight Act”). Generally, the Ryan Haight Act requires providers perform an in-person medical evaluation of a patient prior to prescribing a controlled substance unless an exception applies. Relevant here is the exception for treatment that occurs during a PHE, allowing for the prescribing of a controlled substance without the prerequisite of an in-person medical examination of the patient. The flexibilities in controlled substance prescribing that were invoked in January 2020 in response to the COVID-19 PHE are set to end on May 11, 2023, leaving many providers and stakeholders previously waiting to see how the DEA would proceed.

### Key Takeaways from the Proposed Rule include the following:

- Consistent with the Ryan Haight Act, controlled substances “only may be prescribed for legitimate medical purposes by practitioners acting in the usual course of professional practice.”
- Up to a 30-day supply of Schedule III, IV and V controlled substances or buprenorphine as medication for opioid use disorder may continue to be prescribed without an in-person evaluation, but an in-person evaluation would be required for any subsequent renewals.
- Telehealth providers (including both physicians and mid-level practitioners engaging in the practice of telemedicine) would no

longer be able to prescribe Schedule II controlled substances or narcotics without an in-person evaluation, which is currently permissible during the COVID-19 PHE.

- A limited exception to the resumed requirement of an in-person evaluation is proposed for provider-patient relationships formed *during* the COVID-19 PHE, allowing telehealth providers to continue prescribing Schedule II, III and V controlled substances, but only through November 7, 2023 (allowing an extra 180 days for prescribing controlled substances). After that date, an in-person evaluation would be required to continue prescribing.
- The required in-person evaluation may be conducted by any of the following:
  - The prescribing telehealth provider;
  - Another DEA-registered provider who participates in a real-time audio-visual telehealth consultation with the patient and the prescribing provider; or
  - Another DEA-registered provider who has performed an in-person evaluation of the patient and refers the patient to the prescribing provider (deemed in the Proposed Rule a “Qualifying Telemedicine Referral”).

According to the DEA Media Release,<sup>[1]</sup> the Proposed Rule is intended to continue the expanded access to needed medications that has existed during the PHE while also ensuring safeguards are in place to prevent online over-prescribing of controlled medications, consistent with the Ryan Haight Act. The above takeaways are a high level overview of just a few of the key changes included in the highly nuanced Proposed Rule, the full text of which can be accessed [here](#). A visual summary published by the DEA of the Proposed Rule, as well as the Telemedicine Buprenorphine Proposed Rule, can be found [here](#).

The Proposed Rule is open for comment until March 31, 2023. Comments can be submitted [here](#).

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[1] Along with the Telemedicine Controlled Substance Proposed Rule, the Telemedicine Buprenorphine Proposed Rule was also published on the same date, which addresses the prescribing of buprenorphine via telemedicine for the treatment of opioid use disorder.

[2] 21 USC § 829(e)(1).

[1] <https://www.dea.gov/press-releases/2023/02/24/dea-announces-proposed-rules-permanent-telemedicine-flexibilities>