

Chair Monnes Anderson and members of the Committee,

SB 786 may be short, but is it sweet? Not in my opinion.

This bill should be amended to:

1. Redefine telemedicine and telehealth so they are consistent with the Office of the National Coordinator (ONC) for Health Information Technology
2. Require the Oregon Health Authority:
 - a. Create privacy, consent and identity management standards for telehealth products in the consumer marketplace;
 - b. Create a centralized source for questions and complaints related to telehealth;
 - c. Create competency requirements for licensed health professionals who want to obtain and maintain credentials to perform telehealth; and
 - d. Reevaluate laws regarding out-of-state prescriptions from licensed telehealth providers
3. Require Professional Regulatory Boards
 - a. Regulate competency requirements and continuing education as licensed telehealth professionals; and
 - b. Create and enforce penalties for out-of-state telehealth providers who unlawfully prescribe medicines for Oregonians

This bill defines “telehealth” as the *“delivery of clinical information and health services to a patient by a health care practitioner from a distance using electronic telecommunications technology.”*

There is scant difference between this definition and that of the statutory definition of “telemedicine”^[1] *“Telemedicine” means the provision of health services to patients by physicians and health care practitioners from a distance using electronic communications.*

Telehealth owes its inception to challenges in rural communities.^[2] The Health Resources and Services Administration describes telehealth as:

Telehealth is defined as the use of electronic information and telecommunication technologies to support and promote long-distance clinical health care, patient and professional health-related education, public

health and health administration. Technologies include video conferencing, the internet, store-and-forward imaging, streaming media, and terrestrial and wireless communications.

The Office of the National Coordinator (ONC) for Health Information Technology created a 16-page federal telehealth compendium in November 2016.[\[3\]](#) The compendium includes a wide range of telehealth activities across agencies including: research, policy development, implementation, adoption, care delivery, standards/interoperability, and privacy.

The broader definition of telehealth[\[4\]](#) also includes agencies like the Department of Homeland Security.

- **Telehealth:** Includes remote monitoring, telepharmacy, and non-clinical services, such as education programs, administration, and public health that can be provided remotely using communication technologies.



Increasingly, healthcare is delivered through School Based Health Centers. In coalition with the Telehealth Alliance of Oregon, Michael Tynan, representing school-based health health program, OHA and Public Health, advocated for telemedicine reimbursement in 2015.[\[5\]](#)

Currently, the House Health Care Committee is deliberating expansion of school-based mental health providers and funding a pilot program that uses trauma-informed approaches.[\[6\]](#) I have advocated the legislature convene a task force that includes parents and high school students to ensure confidentiality of sensitive student health records, given confusion over HIPAA and FERPA.[\[7\]](#) **This is especially important given the threats that undocumented students face.**

The ONC[\[8\]](#) discriminates between telemedicine and telehealth as such:

Although the terms “telemedicine” and “telehealth” are often used to describe similar types of technologies, the term “telemedicine” has historically been used to refer specifically to bilateral, interactive health communications with clinicians on both “ends” of the exchange (e.g., videoconferenced Grand Rounds, x-rays transmitted between radiologists or consultations where a remote practitioner presents a patient to a specialist). Whereas, the term “telehealth” incorporates not

only technologies that fall under “telemedicine,” but also direct, electronic patient-to-provider interactions and the use of medical devices (e.g., smartphone applications (“apps”), activity trackers, automated reminders, blood glucose monitors, etc.) to collect and transmit health information, often with the intent to monitor or manage chronic conditions.






In conclusion, the legislature needs to better define *both* “telehealth” *and* “telemedicine”


Entrepreneurs, no doubt, see a huge **untapped marketplace with telehealth**. SB 786 gives telehealth developers the nudge to go beyond telemedicine in rural markets where care, especially specialty care, is limited. **Telehealth in urban markets will serve many uninsured and under-insured patients.** Consequently, this market is not just in the domain of the Division of Financial Regulation.

Telehealth is touted to be disruptive technology, just like Uber.[\[9\]](#)

Disruptive Technology

New ways of doing things that disrupt or overturn the traditional business methods and practices

-  Uber vs. Taxi
-   Amazon vs. Retailer
-  Netflix vs. Blockbuster
-  Telemedicine vs. Clinic

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Ironically a new study[\[10\]](#) on direct-to-consumer telehealth just prompted this headline at Wired Magazine[\[11\]](#): *Telemedicine Could Be Great, if People Stopped Using It Like Uber*

Tapping the market comes with great risks.

The other provision of the bill says, “A health professional regulatory board *shall* allow a health care practitioner that the board regulates to use telehealth when, in the professional judgment of the health care practitioner, the use of telehealth is an appropriate manner in which to provide the health service that the health care practitioner is authorized to provide.”

Hospitals limit physician privileges if they are not competent to perform activities. Who would want an internist performing an appendectomy? This should hold true for telehealth.

Companies claim HIPAA compliance for clarity in their marketing materials, but there is no software certified as HIPAA compliant. As psychotherapists have stricter confidentiality laws, they have delved more into ethical and legal considerations of video conferencing for telehealth. As such, it’s recommended that **scope of practice** be limited to psychotherapists that are **competent in these technologies** and **remain current on changing legal requirements, and ethical and legal issues**. [\[12\]](#)

Physicians in independent practices need to know how to construct a Business Associate Agreement with telehealth vendors. They need to understand basic requirements necessary for HIPAA secure telehealth transmission. They need legal advice to construct informed consent for telehealth. They need to know how to authenticate an individual’s identity to prevent fraud—especially if third party payers are involved.

But more and more physicians are salaried by hospitals and large medical practices. How does a physician know whether their large medical practice has a safe telehealth platform? How does a physician do so employed by national companies, backed with venture capital and Silicon Valley innovation?

And very importantly, in the blitz of telehealth promulgation, how can patients who seek health care off the insurance grid discriminate HIPAA compliance?

Companies like Doctors on Demand,[\[13\]](#) HealthTap[\[14\]](#) (a politically obtuse name for a company handling sensitive health information) and PingMD[\[15\]](#) want to capitalize on the unregulated market across state lines.[\[16\]](#) Earlier this week, I called Doctors on Demand as a prospective patient. I was told that any care I received could come from out-of-state doctors licensed in Oregon. These doctors can prescribe a wide range of drugs.[\[17\]](#)

More direct-to-consumer telehealth providers will be practicing *and* prescribing medicines across state lines. **Oregon law currently states a “physician granted a license to practice medicine across state lines” ... “shall refrain from writing prescriptions for medication resulting only from a sale or consultation over the Internet.”** If this law remains on the books, there must be penalties. **Otherwise, the law should be updated to ensure patient safety should telehealth providers be allowed to prescribe medicines.**[\[18\]](#)

As health care providers are HIPAA covered entities,[\[19\]](#) they must comply with the HIPAA Privacy Rule. Choosing a safe telehealth platform is critical. Could clinicians be sued for negligence in data breach cases if plaintiffs can successfully argue that the provider choose an unsafe telehealth platform, clearly not meeting the 'standard of care'[\[20\]](#)?

The Oregon Health Authority needs to step in to fill this void, working hand in hand with professional licensing boards.

Two years ago, I wrote how the Oregon Board of Medical Examiners had issued a license a telemedicine license to a Doctors on Demand doctor without a brick-and-mortar Oregon hospital/clinic connection.[\[21\]](#) But I was also able to discern that one of the appointments I could have made then was with a physician who is not licensed in Oregon.[\[22\]](#) I also wrote, *Skype's privacy policy*[\[23\]](#), *on the other hand, doesn't even mention HIPAA.*

So two years ago, I came to this committee with concerns about SB 144A telemedicine bill.[\[24\]](#) As written in the Lund Report:

Local healthcare activist Dr. Kris Alman raised concerns that existing telemedicine technology would leave Oregon patients vulnerable to security breaches, but Bergstein said the federal HIPAA law was strict enough to make state laws that ensure cybersecurity of video-chat services unnecessary. “The penalties at the federal level force providers and insurers to make sure we are fully securing patient privacy and security,” he said.

I made a last ditch plea to elevate standards in an open letter to Rep. Greenlick.[\[25\]](#)

Zoom+Care continues to use Skype for its telehealth/telemedicine platform.[\[26\]](#)

5.6. Video Visit via Skype(™) Privacy and Security

ZOOM+Care makes video visits available to ZOOM+Care Patients using Skype(™). ZOOM+Care has entered into a Business Associate Agreement with Skype's provider, Microsoft, as required by HIPAA. Because Skype(™) is an independent company, ZOOM+Care cannot be responsible for the privacy, technical and security safeguards maintained by Skype(™) for its application. However, because Microsoft is a Business Associate in providing Skype(™) to ZOOM+Care, it is independently regulated by and required to comply with HIPAA.

Is Skype, which is owned by Microsoft, “HIPAA Compliant”? Reading through the lines, the answer is NO.[\[27\]](#)

HIPAA regulations require that covered entities and their business associates—in this case, Microsoft when it provides services, including cloud services, to covered entities—enter into contracts to ensure that those business associates will adequately protect PHI. These contracts, or BAAs, clarify and limit how the business associate can handle PHI, and set forth each party’s adherence to the security and privacy provisions set forth in HIPAA and the HITECH Act. Once a BAA is in place, Microsoft customers—covered entities—can use its services to process and store PHI.

Currently there is no official certification for HIPAA or HITECH Act compliance. However, those Microsoft services covered under the BAA have undergone audits conducted by accredited independent auditors for the Microsoft ISO/IEC 27001 certification.

Does having a BAA with Microsoft ensure my organization’s compliance with HIPAA and the HITECH Act?

No. By offering a BAA, Microsoft helps support your HIPAA compliance, but using Microsoft services does not on its own achieve it. Your organization is responsible for ensuring that you have an adequate compliance program and internal processes in place, and that your particular use of Microsoft services aligns with HIPAA and the HITECH Act.

Yesterday I spoke with an employee at the Health and Human Services Office of Civil Rights.[\[28\]](#) She forthrightly told me that Skype is not HIPAA compliant and that I should register a complaint.

There is confusion over the “conduit exemption.”[\[29\]](#)



Business Associates: Conduits

- The Final Rule provides important clarification about the status of “conduits” as business associates.
- A conduit, whether of paper or electronic PHI, only provides transmission services, including any temporary storage of PHI incidental to the transmission service.
- Service provider is a business associate if the data is maintained in the performance of its function
 - Even if the agreement with the covered entity does not contemplate any access or access only on a random or incidental basis.
 - The test is persistence of custody, not the degree (if any) of access.

Nonetheless, Secure Medical's June 2015 interpretation and advice to Telemedicine Video Doctor Visit app developers regarding HIPAA is concerning[30]:

Security Rule closely affects developers as it applies to E-PHI (protected health information in electronic form). The rule discusses acceptable ways to implement necessary security measures to protect E-PHI from unauthorized access, deletion, alteration, and transmission. It addresses video conferencing concerns in a straightforward way, stating that E-PHI excludes information that did not exist in electronic form before transmission such as video teleconferencing, paper-to-paper faxes and messages left on voicemail. HIPAA defines electronic media as transmission media used to exchange information that is already in electronic storage. It means that your telemedicine app only need to meet the requirements of the Security Rule only if it has capabilities to record the consultation between the doctor and a patient...

Given all this confusion, I also hope white hat computer experts be able to look at proprietary code for telehealth apps and software to make sure there is no malware.

The tele-evolution of telehealth has been rapid. When regulated ZoomCare flunks the "HIPAA compliant" test, we know that there is no sheriff in town. That needs to change.

Respectfully,

Kris Alman MD

[1] http://arcweb.sos.state.or.us/pages/rules/oars_400/oar_409/409_045.html

[2] US Dept. of Health & Human Services; HRSA; Federal Office of Rural Health Policy:
<https://www.hrsa.gov/ruralhealth/telehealth/>

[3] https://www.healthit.gov/sites/default/files/federal_telehealth_compendium_final_122316.pdf

[4] <http://media.straffordpub.com/products/drafting-telemedicine-agreements-legal-considerations-for-hospitals-and-physician-practice-groups-2014-05-07/presentation.pdf> Slide 8

[5] <https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/43353>

[6] <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2408>

[7] <https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/110049>

[8] <https://www.healthit.gov/playbook/patient-engagement/#section-4-3>

[9] <http://www.svmic.com/Home/media/29915/michael-telemedicine.pdf>

[10] <http://content.healthaffairs.org/content/36/3/485.abstract>

[11] https://www.wired.com/2017/03/telemedicine-great-people-stopped-using-like-uber/?utm_campaign=crowdfire&utm_content=crowdfire&utm_medium=social&utm_source=twitter#824657382122856448-tw

[12] http://www.zurinstitute.com/telehealth_IAVT.html

[13] <http://www.doctordemand.com/site-privacy-policy/>

[14] https://www.healthtap.com/terms/privacy_statement

[15] <https://www.pingmd.com/privacy/>

[16] <http://www.rd.com/health/conditions/telemedicine-apps/>

[17] especially those “useful for infections, allergies, skin conditions, travel or sports injuries.” Not certain drugs, such as: Gabapentin, muscle relaxants, narcotics, or pain medications that have been designated as U.S. Controlled substances as a Schedule I, II, III or IV drug.

[18] http://arcweb.sos.state.or.us/pages/rules/oars_800/oar_847/847_025.html

[19] <https://www.worldprivacyforum.org/2013/09/hipaaguide9-2/>; <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/HIPAAPrivacyandSecurityTextOnly.pdf>

[20] <http://www.govinfosecurity.com/court-allows-hipaa-negligence-claim-a-7535>

[21] <https://www.thelundreport.org/content/opinion-privacy-risks-climb-era-big-data>

[22] Dr. Kristen Dean is licensed in California

[23] <https://privacy.microsoft.com/en-us/privacystatement>

[24] <https://www.thelundreport.org/content/telemedicine-bill-passes-house-requires-payment-videochat-healthcare>

[25] <https://www.thelundreport.org/content/telemedicine-needs-privacy-protections>

[26] <https://www.zoomcare.com/info/policies>

[27] <https://www.microsoft.com/en-us/trustcenter/Compliance/HIPAA>

[28] Region IX office: 415-437-8314

[29] http://csrc.nist.gov/news_events/hipaa-2013/presentations/day2/kenney_holtzman_day2_1030_hipaa_hitech_rule_changes.pdf

[30] <https://www.securemedical.com/telemedicine-video-doctor-visits-and-hipaa-healthcare-rules/>