March 25, 2016

Phillip Husband
General Counsel
Department of Health, Office of the General Counsel
899 North Capitol Street NE, 5th Floor
Washington, D.C. 20002

RE: Notice of Proposed Rulemaking Sections 4618, Telemedicine and 4699, Definitions

Dear Mr. Husband:

The American Telemedicine Association (ATA) appreciates the opportunity to comment on the D.C. Department of Health’s (“Department”) Proposed Rulemaking on medical practice using telemedicine. We strongly support the Department’s intention to ensure the Board of Medicine’s role to “protect and enhance the health, safety, and well-being of District of Columbia residents by promoting evidence-based best practices in health regulation, high standards of quality care and implementing policies that prevent adverse events.”

While we commend the Department for taking a step to explicitly embrace telemedicine, ATA recommends changes to address some details we find onerous and arbitrary. We strongly support mechanisms that assure patient safety and promote that all health services delivered either in-person or via telemedicine are of the highest quality. While there are some important clinical differences that should be recognized, allowed, and appropriately regulated, the provision of telemedicine should not be regulated differently or held to a different standard than in-person care.

We highlight below important areas where the proposal would impose different and higher standards – and thus objectionable standards – for telemedicine, and note several areas where changes would strengthen the overall intent.

**4618.2 – Face-to-Face**

We recommend that the Department replace ambiguous “face-to-face” with more precise “in-person”. Some telemedicine modalities, such as video conferencing, use cameras, screens, microphones, and speakers which facilitate a face-to-face clinical encounter.

**4618.3 and 4618.6 – Evaluations**

Proposed section 4618.2 requires that a physician adhere to the same standard of care regardless of the delivery method. To maintain consistency, we recommend that the Department delete section 4618.6 and amend section 4618.3 as follows:

A physician shall perform a patient evaluation via telemedicine that meets the standard of care requirements set forth in 17 DCMR § 4618.6 before providing recommendations, or making
treatment decisions, or prescribing medication for a new patient. This provision does not apply to physicians, except when performing interpretive services including, but not limited to, pathology, radiology, dermatology, and ophthalmology.

4618.5(a) – Patient Informed Consent
ATA believes that a patient must be appropriately informed, and the health care provider must disclose to a patient all of the potential benefits, risks, and alternatives involved for any medical encounter performed in-person or via telemedicine. However, a patient should not have to give additional expressed consent for telemedicine when consent is implicitly required and obtained for all health care services rendered. It is important to underscore that telemedicine is a delivery method and not a separate service, therefore we recommend the Department delete the requirement for obtaining and documenting an additional patient consent.

4618.8 – Establishing a Physician-Patient Relationship
All medical encounters, whether conducted in-person or remotely, should be based on the provider’s medical competence and professional decision making using sufficient, appropriate clinical and non-clinical information to provide the medical service. When a physician uses telemedicine they are simply augmenting the sound clinical training and education that they have received to perform a clinical encounter. Performing patient and environmental assessments, obtaining medically necessary clinical histories, and providing culturally and linguistically competent patient education, and are all components of the standard medical practice with or without telemedicine.

However, the Department’s proposal gives undue weight to the delivery tools enabling a physician-patient relationship rather than the clinical components which make up standard medical practice. We recommend that the Department delete the requirements for the sole use of “real-time auditory communications or real time visual and auditory communications” to establish a physician-patient relationship, and allow a physician to rely on their medical judgment and any appropriate tools that are medically necessary to uphold the standard of care. This includes accommodating services that can be rendered with various delivery tools and asynchronous transmissions such as dermatology and diabetic retinopathy. The Department should amend section 4618.8 as follows:

If a physician-patient relationship does not include a prior in-person, face-to-face interaction with a patient, the physician shall use telemedicine real-time auditory communications or real-time visual and auditory communications to establish a valid patient-practitioner relationship and to allow a free exchange of protected health information between the patient and the physician performing the patient evaluation.

4618.11 – E-mail Communication
ATA recommends that the Department delete sections 4618.11-.12 because electronic mail (e-mail) is generally not considered telemedicine. The proposed sections outlining standards for electronic mail communication place an undue burden on telemedicine providers specifically. Moreover, the Department has existing standards for accurate record keeping in section 4616.14. Requiring a physician to store and file all patient-related e-mails in a medical record is impractical and unprecedented, as most electronic medical record systems are not equipped for this function.

4699 – Definitions
The Department proposed amendments to Section 4699 to explain the terms used in Section 4618. However, “consultative service” and “group practice” are not used in proposed section 4618. We recommend that the Department delete these definitions.
In § 3-1201.02 (7)(A)(ii) of the Health Occupations Revision Act of 1985, interpretive services are already defined and included in the practice of medicine: “The interpretation of tests, including primary diagnosis of pathology specimens, images, or photographs”. We recommend that the Department delete the terms “face-to-face”, “interpretive services”, physician-patient relationship”, and “real-time” for previously stated reasons.

**Future Rulemaking**
Pursuant to regulations in section 1300.8, a licensed pharmacist in the District is prohibited from dispensing a prescription if issued without a valid patient-practitioner relationship. Internet-based consultations are not considered adequate to establish a valid patient-practitioner relationship. Although not discussed in the Department’s notice of proposed rulemaking, we urge the Department to promulgate any future rules necessary to authorize telemedicine as adequate to establish a valid patient-practitioner relationship for the purposes of dispensing a prescription.

In conclusion, we see a need for prudent action by the Department to review and amend their proposed rules in order to address the needs of patients to access high quality medical services from licensed physicians via telemedicine.

In light of the recent U.S. Supreme Court's decision on *N.C. State Bd. of Dental Examiners v. FTC*, state licensing boards that impose different requirements for telemedicine as opposed to in-person services are newly exposed to risk of federal lawsuit for anticompetitive actions. We urge the Department to refrain from developing regulatory differences without an evidence base.

Sincerely,

Jonathan D. Linkous  
Chief Executive Officer