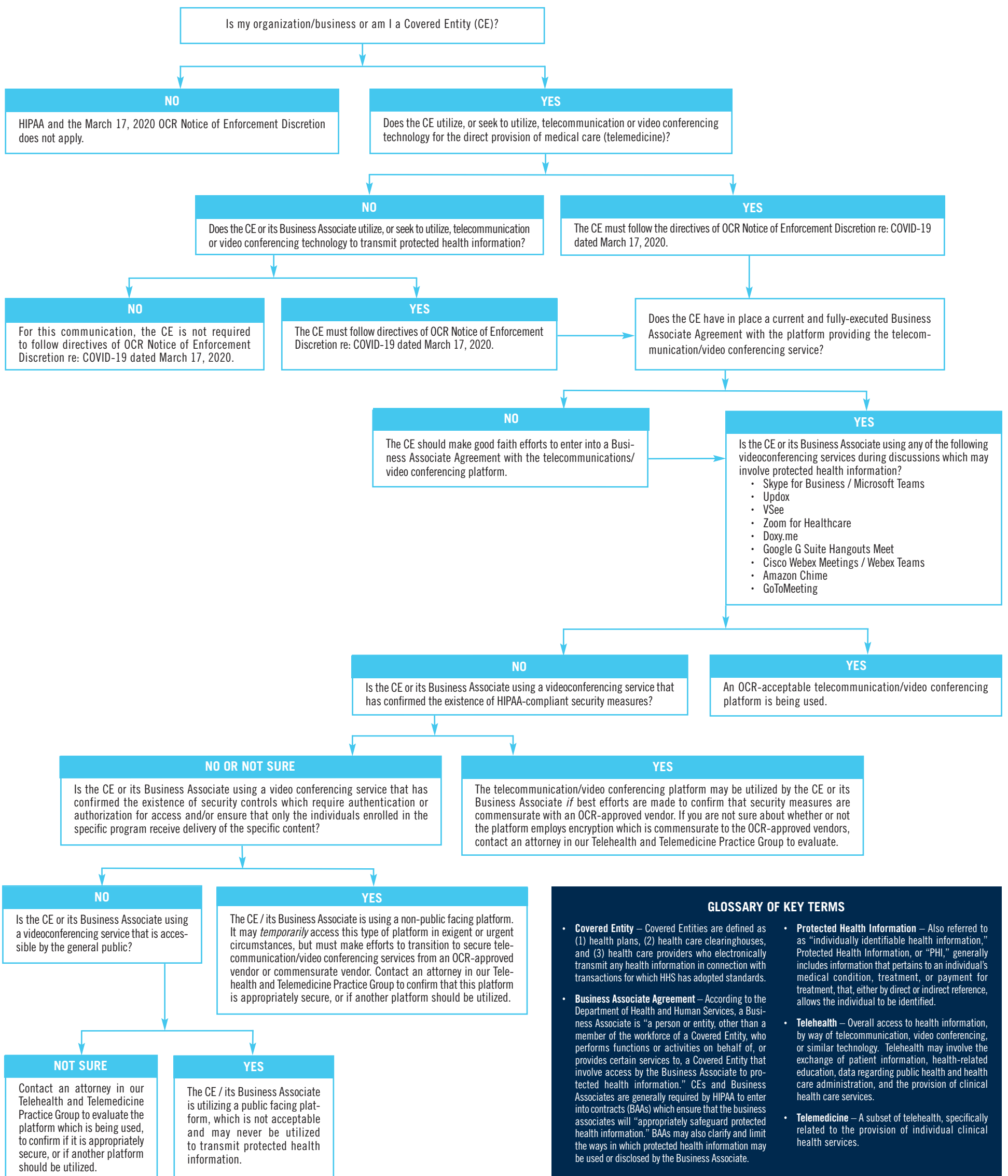


MAINTAINING PATIENT PRIVACY WITH TELEHEALTH AND TELEMEDICINE DURING THE COVID-19 CRISIS

On March 17, 2020, the HHS Office for Civil Rights issued a Notice of Enforcement Discretion, which addressed the privacy requirements expected of Covered Entities (“CE”), their Business Associates (“BA”) and Sub-Business Associates (“Sub-BA”) during the COVID-19 health crisis. The primary focus of the Notice was to address privacy requirements within the context of telehealth services, which have rapidly developed and expanded in the wake of social distancing guidelines and other quarantine-related measures. While these measures may discourage or prohibit Covered Entities from providing in-person patient care, new and existing technologies allow them to do so via telecommunication or video conferencing services, i.e., through telemedicine. The language in the Notice applies not just to the direct provision of patient care, but also to the manner in which CEs, BAs and Sub-BAs engage in telecommunication which may involve patient protected health information (“PHI”).

Under the OCR’s Notice, CEs should make good faith efforts to enter into a Business Associate Agreement (“BAA”) directly with a vendor providing telecommunication services to a CE, and its BAs / Sub BAs. Also, the OCR identifies specific telecommunication platforms which are recommended (Skype for Business / Microsoft Teams, Updox, Vsee, Zoom for Healthcare, Doxy.me, Google G Suite Hangouts Meet, Cisco Webex Meetings / Webex Teams, Amazon Chime & GoToMeeting). If an OCR-approved platform is not utilized, then the CE or its BA must utilize a videoconference platform that is non-public facing, meaning a platform which, as a default, allows only the intended parties to participate in the communication. A CE or BA is never permitted to use a public-facing platform, which is a platform where communications are open to the public. If the patient is involved in the communication, then the patient must be made aware of any privacy limitations with the videoconferencing platform, and must agree to communication via that platform.

In spite of these directives, the OCR attempts to account for possible “growing pains” that may result from new applications of telehealth and telemedicine services in the wake of the COVID-19 crisis. Accordingly, it will forego penalties against covered health care providers that lack a BAA with video communication vendors (or who otherwise fail to comply with “the HIPAA Rules”), if the provider’s activities pertain to “the good faith provision of telehealth services during the COVID-19 nationwide public health emergency.”



GLOSSARY OF KEY TERMS

- **Covered Entity** – Covered Entities are defined as (1) health plans, (2) health care clearinghouses, and (3) health care providers who electronically transmit any health information in connection with transactions for which HHS has adopted standards.
- **Business Associate Agreement** – According to the Department of Health and Human Services, a Business Associate is “a person or entity, other than a member of the workforce of a Covered Entity, who performs functions or activities on behalf of, or provides certain services to, a Covered Entity that involve access by the Business Associate to protected health information.” CEs and Business Associates are generally required by HIPAA to enter into contracts (BAAs) which ensure that the business associates will “appropriately safeguard protected health information.” BAAs may also clarify and limit the ways in which protected health information may be used or disclosed by the Business Associate.
- **Protected Health Information** – Also referred to as “individually identifiable health information,” Protected Health Information, or “PHI,” generally includes information that pertains to an individual’s medical condition, treatment, or payment for treatment, that, either by direct or indirect reference, allows the individual to be identified.
- **Telehealth** – Overall access to health information, by way of telecommunication, video conferencing, or similar technology. Telehealth may involve the exchange of patient information, health-related education, data regarding public health and health care administration, and the provision of clinical health care services.
- **Telemedicine** – A subset of telehealth, specifically related to the provision of individual clinical health services.