August 14, 2020

CMS Seeks Permanent Changes for Certain Telehealth Services Modified During Public Health Emergency

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Since the declaration of the public health emergency for the COVID-19 global pandemic ("PHE"), the Centers for Medicare & Medicaid Services ("CMS") has published two **Interim Final Rules**, as well as certain waivers, that extensively modify coverage of telehealth services in the Medicare program.[1] The **Physician Fee Schedule ("PFS") Proposed Rule** for CY 2021, issued August 3, 2020 (the "PFS Proposed Rule"), seeks to make certain of these changes permanent.[2] Also on August 3, 2020, President Trump issued an **Executive Order** requiring the Secretary of the Department of Health and Human Services, within 60 days, to review the temporary additional telehealth services offered to Medicare beneficiaries, and propose a regulation to extend these measures, as appropriate, beyond the duration of the PHE.[3] Thus, additional CMS rulemaking may take place in the upcoming months.

Comments on the PFS Proposed Rule are due October 5, 2020. The comment periods for the earlier Interim Final Rules have expired, but no revised final rules have been issued.

We have prepared a table in the format below describing changes implemented by the current rulemaking and related guidance **by affected provider and program,** and include cites to the pertinent Federal Register pages.

If you have questions, please contact any one of the authors or your usual Ropes & Gray advisor.

Affected Providers and Programs	**Description of CMS Telehealth Provision**	**Duration** (Temporary for the Public Health Emergency or Proposed to be Permanent)
Physicians and Non-Physician Practitioners and Medicare Requirements Generally	A. Prohibition on use of a telephone for telehealth services waived, but only if the **telephone has "audio and video equipment** permitting two-way, real-time interactive communication." (*e.g.*, Apple FaceTime, WhatsApp video chat, Zoom, Skype and Google Hangouts video).[4]	Temporary under April IFC
	B. **Waiver of geographic limitation** of telehealth services to rural areas.[5] C. **Waiver of "originating site" restrictions,**[6] (e.g., telehealth services may be furnished to beneficiaries in their home) as well as credentialing and privileging requirements.[7] Practitioners will receive payment at the in-person rate if patient is at home.[8]	Temporary under April IFC and HHS waiver

	D. HHS will not sanction providers that **reduce or waive cost-sharing for telehealth services** (normally, reducing or waiving cost-sharing would implicate federal fraud and abuse laws).[9] E. **Expands the types of health care professionals** who can furnish telehealth services to include all who are eligible to bill Medicare for their professional services.[10]	Temporary under HHS waiver
	F. Through the later of December 31, 2021 or when the PHE ends, **direct supervision requirements can be met** using real-time interactive audio and video technology, based on the practitioner's clinical judgment.[11] G. Clarifies services billable as **incident-to** may be provided via **telehealth,** though the physician staff still must be under the direct supervision of the billing professional (which may be provided virtually pursuant to the proposal above until at least December 31, 2021).[12]	**Proposed to be Permanent under PFS Proposed Rule**
	H. Numerous additional services may be furnished as telehealth services.[13]	Temporary under April and May IFC (but CMS requests comment in the PFS Proposed Rule regarding retaining)
	I. **Eight services similar to already permanently approved telehealth services may be furnished via telehealth**.[14] Another set of services temporarily permitted will remain on the Medicare telehealth services list through the calendar year in which the PHE ends.[15]	**Proposed to be Permanent**
	J. **Reimbursement for audio-only telephone E/M visits** for new and established patients, at payment rates that match rates under the PFS for office/outpatient visits with established patients.[16]	Temporary under April IFC, as revised by May IFC
	K. **"E-visits"** (a form of Communication Technology-Based Services ("CTBS") consisting of patient-initiated, non-face-to-face communications through an online portal) may be billed by licensed clinical social workers, clinical psychologists, PTs, OTs, and SLPs.[17] L. **The practitioners above can also provide virtual check-ins** (CTBS consisting of brief telephone calls) and **remote evaluation** (CTBS consisting of evaluations of pre-recorded video and/or images submitted by a patient and provider follow-up).[18] M. **Consent for CTBS** can be **documented by auxiliary staff** under general supervision, and timing or manner in which beneficiary	**Proposed to be Permanent under PFS Proposed Rule**

	consent is acquired should not interfere with the provision of CTBS.[19] N. Only **physicians and NPPs who are eligible to furnish E/M services may bill** remote patient monitoring ("RPM") services, as they are E/M services.[20] O. **Auxiliary personnel can furnish certain RPM services** under the general supervision of the billing physician/practitioner.[21] P. **Can obtain consent** at the time RPM services are provided.[22]	
	Q. Expands reimbursement of CTBS and RPM from those who are established patients to **new as well as established patients**.[23] R. **Waiver of frequency limitations** for subsequent hospital care services, nursing facility care services, and critical care consultations **delivered through telehealth**.[24]	Temporary under April IFC
	S. **Reduce frequency limitations** for nursing facility care services **delivered through telehealth from once every 30 days to once every three days**.[25]	**Proposed to be Permanent under PFS Proposed Rule**
	T. **NCD and LCD requirements for face-to-face encounters during qualification evaluations do not apply**, unless required by statute.[26]	Temporary under April IFC
Hospitals and AMCs	A. **Teaching physicians** can be **"present" through real-time, audio and video telecommunications** technology, including telehealth services, except in certain complex cases.[27]	Temporary under April IFC
	B. **Payment for teaching physician services** may be made when a teaching physician **reviews** (in addition to **directs or manages**) a resident's service via **audio/video real-time communications technology**.[28]	Temporary under May IFC
	C. Services billed under the "primary care exception" can include circumstances where the **resident** is furnishing services via telehealth.[29]	Temporary under April IFC, as revised by May IFC
	D. Hospital staff may furnish, **via telecommunications technology, certain outpatient therapy, counseling, and educational services**, incident to a physician's services, to patients at home registered as outpatients.[30] E. **Hospitals may bill the originating site fee to support telehealth services** furnished by providers who ordinarily practice in outpatient departments who are providing services to patients from home.[31]	Temporary under May IFC
	F. Direct supervision of **pulmonary, cardiac, and intensive cardiac rehabilitation services** may be provided remotely using audio/video	**Proposed to be Permanent under**

	real-time communications technology, subject to the clinical judgment of the supervising physician.[32]	**OPPS Proposed Rule**
ESRD Facilities	A. **Monthly clinical examination of access site can be provided via telehealth**; CMS exercising enforcement discretion if the statutorily-required initial three home dialysis visits and quarterly visits thereafter are provided via telehealth.[33]	Temporary under April IFC
	B. **Requirement that a patient must be seen in-person monthly by a provider waived,** if patient is stable. CMS recommends other options, e.g., phone calls, to ensure safety.[34] C. Waiver of the requirement for home visits to assess **adaptation of home dialysis machine**.[35]	Temporary under HHS waiver
SNFs	**Supervising physicians** may use telehealth to provide the visits required every 30 days during the first 90 days and every 60 days thereafter.[36]	Temporary under April IFC
IRFs	**Supervising physicians** may use telehealth to provide the three **weekly face-to-face visits**.[37]	Temporary under April IFC
HHAs	A. Services provided via a **telecommunications system cannot substitute for in-person visits or be considered for the purposes of eligibility or payment, as these are statutory prohibitions**.[38] B. However, **HHAs** may provide services via a telecommunications system, even if such may change the frequency (e.g., reduce) in-person visits. Use of a telecommunications system must be reflected in the **plan of care** and tied to patient-specific needs.[39]	**Proposed to be Permanent in HHA Proposed Rule**
Hospice	A. **Hospices** may provide services via a telecommunications system; use **must be included on the plan of care** and must be tied to patient-specific needs and measureable outcomes.[40] CMS gives the example of remote monitoring of a patient with COVID-19 using a telecommunications system to assess the patient's daily weight and oxygen saturation levels. **No additional payment for use of technology beyond the standard per diem**.[41] B. **Certification or re-certification** that patient is eligible for hospice services can be by telecommunications technology.[42]	Temporary under April IFC
ACOs and Value-Based Payment Participants	A. Expands definition of **primary care services in the Medicare Shared Savings Program ("MSSP") to include codes** for **e-visits**.[43] B. Expands definition of primary care services for purposes of the Consumer Assessment of Healthcare Providers and Systems ("CAHPS") for **Merit-Based Incentive Payment Program ("MIPS") assignment methodology** to include **CTBS and audio-only telephone E/M services**.[44]	**Proposed to be Permanent in PFS Proposed Rule**

	C. Add costs associated with telehealth services to MIPS cost measures.[45]	
	D. Expands definition of **primary care services in the MSSP to include telehealth codes** for virtual check-ins, remote evaluation and audio-only telephone E/M services.[46]	Temporary under May IFC
Federally Qualified Health Centers ("FQHCs") and Rural Health Clinics ("RHCs")	A. FQHCs and RHCs **may bill for "e-visits"** (also modeled on the physician/practitioner services discussed above), with updated payment rates.[47] B. CTBS are **billable for new** in addition to **established patients**; **consent** to receive CTBS can be received **at the time of the services**; consent can be **documented by auxiliary staff** under general supervision.[48]	Temporary under April IFC
Opioid Treatment Programs ("OTPs")	A. OTPs may provide **periodic assessments via telehealth**.[49]	**Proposed to be Permanent in PFS Proposed Rule**
	B. Counseling and therapy services do not have to be provided using video **if not available** to the beneficiary (i.e. audio-only telephone calls permissible).[50]	Temporary under April IFC

[1] CMS, COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers 1 (July 28, 2020), *available at* https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf ("CMS Blanket Waiver"); April 6, 2020 interim final rule with comment (the "April IFC"), 85 Fed. Reg. 19230 (April 6, 2020), *available at* https://www.federalregister.gov/documents/2020/04/06/2020-06990/medicare-and-medicaid-programs-policy-and-regulatory-revisions-in-response-to-the-covid-19-public; May 8, 2020 interim final rule with comment, 85 Fed. Reg. 27550 (May 8, 2020), *available at* https://www.federalregister.gov/documents/2020/05/08/2020-09608/medicare-and-medicaid-programs-basic-health-program-and-exchanges-additional-policy-and-regulatory (hereinafter "May IFC").

[2] CMS, 4120-01-P, Medicare Program: CY 2021 Revisions to Payment Policies under the Physician Fee Schedule and Other Changes to Part B Payment Policies; Medicare Shared Savings Program Requirements; etc., *available at* federalregister.gov/d/2020-17127 (hereinafter, the "PFS Proposed Rule").

[3] Executive Order 13941 of August 3, 2020: Improving Rural Health and Telehealth Access, 85 Fed. Reg. 47881 (Aug. 6, 2020).

[4] 85 Fed Reg. at 19243. Normally, use of these apps could be subject to HIPAA penalties as they may not comply with HIPAA privacy and security rules; however, OCR has announced that it is exercising enforcement discretion during COVID-19 with respect to any non-public facing remote communication product that is available to communicate with patients. U.S. Dep't of Health & Human Servs., Office of Civil Rights, Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency (Mar. 2020), *available at* https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html.

[5] 85 Fed Reg. at 19232; Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (P.L. 116-123); CMS, Medicare Telemedicine Health Care Provider Fact Sheet (Mar. 17, 2020), *available at* https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet.
[6] *Id.*
[7] CMS Blanket Waiver at 1.
[8] 85 Fed Reg. at 19233.
[9] 85 Fed Reg. at 19243; OIG, OIG Policy Statement Regarding Physicians and Other Practitioners That Reduce or Waive Amounts Owed by Federal Health Care Program Beneficiaries for Telehealth Services During the 2019 Novel Coronavirus (COVID-19) Outbreak, *available at* https://oig.hhs.gov/fraud/docs/alertsandbulletins/2020/policy-telehealth-2020.pdf.
[10] CMS acted under new waiver authority from the CARES Act. CMS, Trump Administration Issues Second Round of Sweeping Changes to Support U.S. Healthcare System During COVID-19 Pandemic (Apr. 30, 2020), *available at* https://www.cms.gov/newsroom/press-releases/trump-administration-issues-second-round-sweeping-changes-support-us-healthcare-system-during-covid; CMS Blanket Waiver at 17.
[11] PFS Proposed Rule at 123-27; 85 Fed Reg. at 19245-46.
[12] PFS Proposed Rule at 121-22.
[13] 85 Fed. Reg. at 19233-41 (adding approximately 85); May IFC; CMS, List of Telehealth Services, *available at* https://www.cms.gov/Medicare/Medicare-General-Information/Telehealth/Telehealth-Codes (last revised Apr. 30, 2020) (identifying a total of approximately 135 additional services payable under the Medicare Physician Fee Schedule during the PHE as telehealth services). Certain of these are proposed to be permanent in the PFS Proposed Rule.
[14] PFS Proposed Rule at 82-84; 106. These are Group Psychotherapy (CPT code 90853); Domiciliary, Rest Home, or Custodial Care services, Established Patients (CPT codes 99334-99335); Home Visits, Established Patient (CPT codes 99347- 99348); Cognitive Assessment and Care Planning Services (CPT code 99483); Visit Complexity Inherent to Certain Office/Outpatient E/Ms (HCPCS code GPC1X); Prolonged Services (CPT code 99XXX); and Psychological and Neuropsychological Testing (CPT code 96121).
[15] PFS Proposed Rule at 86-95; 106. These are Domiciliary, Rest Home, or Custodial Care services, Established Patients (CPT codes 99336-99337); Home Visits, Established Patient (CPT codes 99349-99350); Emergency Department Visits, Levels 1-3 (CPT codes 99281-99283); Nursing facilities discharge day management (CPT codes 99315-99316); and Psychological and Neuropsychological Testing (CPT codes 96130- 96133).
[16] 85 Fed. Reg. at 19264-67; 85 Fed. Reg. at 27589-90.
[17] PFS Proposed Rule at 113; *see also* 85 Fed. Reg. at 19243-45.
[18] PFS Proposed Rule at 113-15; *see also* 85 Fed. Reg. at 19243-45.
[19] PFS Proposed Rule at 115; *see also* 85 Fed. Reg. at 19243-45 (stating that it may be obtained at the same time that a service is furnished (i.e., but before billed)).
[20] PFS Proposed Rule at 133.
[21] PFS Proposed Rule at 137.
[22] PFS Proposed Rule at 137; *see also* 85 Fed Reg. at 19264.
[23] 85 Fed. Reg. at 19243-45 & 19264.
[24] 85 Fed Reg. at 19241.
[25] PFS Proposed Rule at 110-11.
[26] 85 Fed Reg. at 19266.
[27] 85 Fed Reg. at 19258-60.
[28] 85 Fed Reg. at 27586-89.
[29] 85 Fed Reg. at 19258-60; 85 Fed Reg. at 27586-89.
[30] 85 Fed. Reg. at 27562-66.
[31] 85 Fed Reg. at 27565.
[32] CMS, 4120-01-P, Medicare Program: Changes to Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Addition of New Categories for Hospital Outpatient Department Prior Authorization Process; etc., 85 Fed. Reg. 48772, 48936 (Aug. 12, 2020) (hereinafter, the "OPPS Proposed Rule").

[33] 85 Fed Reg. at 19242.
[34] CMS Blanket Waiver at 25.
[35] *Id*.
[36] 85 Fed Reg. at 19241.
[37] 85 Fed Reg. at 19252.
[38] CMS, Medicare and Medicaid Programs; CY 2021 Home Health Prospective Payment System Rate Update; Home Health Quality Reporting Requirements; and Home Infusion Therapy Services Requirements, 85 Fed. Reg. 39408, 39427-28 (June 30, 2020) (hereinafter, the "HHA Proposed Rule"); 85 Fed Reg. at 19248.
[39] 85 Fed. Reg. at 39408, 39427-28; 85 Fed Reg. at 19247-48.
[40] 85 Fed Reg. at 19250.
[41] *Id*.
[42] 85 Fed Reg. at 19251.
[43] PFS Proposed Rule at 475-76 & 85 Fed Reg. at 27583-86.
[44] PFS Proposed Rule at 652-56.
[45] PFS Proposed Rule at 660-61.
[46] 85 Fed Reg. at 27583-86.
[47] 85 Fed Reg. at 19254.
[48] 85 Fed Reg. at 19254.
[49] PFS Proposed Rule at 356-57; 85 Fed Reg. at 27558.
[50] 85 Fed Reg. at 19258.