

PUBLICATION

Key Telehealth Proposals in Calendar Year 2023 Medicare Physician Fee Schedule Proposed Rule

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August 2022

On July 29, 2022, the Calendar Year (CY) 2023 Medicare Physician Fee Schedule (PFS) proposed rule was published in the Federal Register. The proposed rule includes several noteworthy proposals related to telehealth and other remote services. Some highlights include proposals to have Medicare cover additional telehealth services, extend its coverage of certain temporarily covered telehealth services, and to advise on modifiers that will be required for telehealth claims after the COVID-19 public health emergency (PHE).

The deadline for comments on the Proposed Rule is 5:00 p.m. on September 6, 2022.

Here is a summary of key provisions of the Proposed Rule in more detail.

Additions to Medicare Telehealth Services List

Before the COVID-19 PHE, Medicare only covered certain services furnished via telehealth, including (1) professional consultations, (2) office medical visits, (3) office psychiatry services, and (4) any additional service specified by the HHS Secretary when furnished via an interactive telecommunications system. These services are all included on a list that is amended and published annually in the PFS (the [Medicare Telehealth List](#)). On an annual basis, CMS considers proposals to add services to the Medicare Telehealth List on a Category 1 basis. This means that the proposed services are similar to the professional consultations, office visits, and office psychiatry services that are already covered in the list.

In addition, CMS may add services to the Medicare Telehealth List on a Category 2 basis if there is evidence of clinical benefit when the services are provided through telehealth. Finally, in the CY 2021 PFS final rule, CMS established a new Category 3 to add services to the List on a temporary basis through the end of the year in which the COVID-19 PHE expires. Category 3 services must have a likely clinical benefit when furnished via telehealth, although there is not yet sufficient evidence to consider these services for permanent addition on a Category 1 or Category 2 basis.

In its CY 2022 PFS final rule, CMS provided that Category 3 services would be retained until December 31, 2023, to ease the transition from the expanded list of services added to the Medicare Telehealth List during the COVID-19 PHE. During this time period, CMS will evaluate whether the services should be permanently added to the Medicare Telehealth List after the COVID-19 PHE has terminated.

Proposed Category 1 Additions

The Proposed Rule would add three telehealth codes for prolonged E/M services to the Medicare Telehealth Services List on a Category 1 basis.

- GXXX1 (prolonged hospital inpatient or observation care evaluation and management service(s) beyond the total time for the primary service when the primary service has been selected using time on the date of the primary service; each additional 15 minutes by the physician or qualified healthcare

professional, with or without direct patient contact – list separately in addition to CPT codes 99223, 99233, and 99236 for hospital inpatient or observation care evaluation and management services).

- GXXX2 (prolonged nursing facility evaluation and management service(s) beyond the total time for the primary service when the primary service has been selected using time on the date of the primary service; each additional 15 minutes by the physician or qualified healthcare professional, with or without direct patient contact – list separately in addition to CPT codes 99306 or 99310 for nursing facility evaluation and management services).
- GXXX3 (prolonged home or residence evaluation and management service(s) beyond the total time for the primary service when the primary service has been selected using time on the date of the primary service; each additional 15 minutes by the physician or qualified healthcare professional, with or without direct patient contact – list separately in addition to CPT codes 99345 or 99350 for home or residence evaluation and management services).

These codes would replace existing codes for prolonged services that are on the Category 1 list, including inpatient prolonged services (CPT codes 99356 and 99357).

Proposed Category 3 Additions

CMS proposes adding 54 Category 3 services. The services fall into nine categories:

1. adaptive behavior treatment and behavior identification assessment;
2. audiologic;
3. behavioral health;
4. cognition;
5. electronic analysis of implanted neurostimulator pulse generator/transmitter;
6. ophthalmologic;
7. speech therapy;
8. therapy; and
9. ventilator management.

A list of proposed Category 3 services is in Table 8 of the [Proposed Rule](#).

Extended Coverage of Temporary Telehealth Services

During the COVID-19 PHE, CMS added telehealth services to the Medicare Telehealth List on a temporary basis, other than Category 3. A list of the temporary telehealth services is in Table 10 of the [Proposed Rule](#). Currently, Medicare's coverage of the services is set to end when the COVID-19 PHE expires. In the Proposed Rule, CMS would extend this coverage: Medicare would cover the services until 151 days after the end of the COVID-19 PHE. CMS writes that this extension is consistent with the telehealth provisions in the Consolidated Appropriations Act, 2022 (CAA). Additional information about the CAA telehealth provisions can be found [here](#).

Limit on Coverage of Audio-Only Telehealth Services

CMS declined to keep telephone E/M services on the Medicare Telehealth Services list after the 151-day post-PHE extension period. CMS acknowledges that in certain circumstances, audio-only technology may be used to furnish mental health services to patients in their homes after the PHE ends. Outside of this context, two-way audio visual communications technology will continue to be the appropriate standard for Medicare telehealth services.

Use of Telehealth Service Modifiers After PHE

CMS has directed practitioners during the COVID-19 PHE to add the modifier "95" to claims to indicate a telehealth service instead of using place of service (POS) 02 for all telehealth claims. This temporary policy has allowed claims for telehealth services to be paid based on the POS where the service generally would be furnished during the PHE. CMS now proposes that practitioners continue to use the modifier 95 for 151 days after the end of the PHE. After this 151-day period, CMS would no longer require the modifier 95. Practitioners would instead be required to use the following POS indicators for telehealth services:

- POS "02" – This code would be redefined, if finalized, as Telehealth Provided Other than in Patient's Home (descriptor: the location where health services and health-related services are provided or received through telecommunication technology. Patient is not located in their home when receiving health services or health-related services through telecommunication technology); and
- POS "10" – Telehealth Provided in Patients Home (descriptor: the location where health services and health-related services are provided or received through telecommunication technology. Patient is in their home (which is a location other than a hospital or other facility where the patient receives care in a private residence) when receiving health services or health-related services through telecommunication technology).

Unless there are further legislative changes, most telehealth services will be billed with POS 02 and will not be covered by Medicare if delivered to beneficiaries in their homes. Telehealth services billed with POS 02 after the PHE ends will once again be paid at the MPFS facility rate. The exceptions include claims for Medicare telehealth mental health services, clinical assessments for patients with ESRD who are receiving home dialysis, and Medicare telehealth mental health services that are co-occurring with substance use treatment that are furnished with the patient in their home. For these exceptions, POS 10 should be used by the billing practitioner.

CMS further proposes that a practitioner add the modifier 93 to claims involving services furnished by audio-only technology. This proposed change would go into effect on January 1, 2023.

Delay in Imposition of Periodic In-Person Visit Requirements Applicable to Coverage of At-Home Mental Health Telehealth Services

The 2022 CY PFS final CMS rule implements CAA 2021 provisions allowing Medicare coverage of certain mental health services delivered to a patient at their home via telehealth. This expanded coverage of telehealth services for treatment and diagnosis of mental health disorders is only permitted if an in-person, non-telehealth service has been provided by the physician or practitioner furnishing mental health telehealth services within six months before the initial telehealth service and at least once every six months thereafter. This rule is scheduled to take effect the day after the COVID-19 PHE.

Pursuant to the CAA, 2022, CMS proposes to delay the periodic in-person visit requirements associated with this coverage until 151 days after the COVID-19 PHE. Until that date, telehealth services furnished to diagnose and treat mental health disorders may be furnished to Medicare beneficiaries in their homes without prior or intermittent in-person visits under COVID-19–related flexibilities that temporarily lift originating site requirements.

Comments on Virtual Direct Supervision

CMS declines to extend the temporary policy to allow practitioners to meet the immediate availability requirement for direct supervision through virtual presence via real-time, audio/visual technology beyond the PHE. CMS seeks comments on whether to allow this in the future and/or whether this policy should be continued for only a subset of services.

Takeaways

The Proposed Rule would make several notable changes to Medicare's coverage of telehealth services. It would add services to the Medicare Telehealth List, extend Medicare's coverage of certain temporary telehealth services by 151 days, and change how practitioners report telehealth services for processing claims after the COVID-19 PHE. It also delays the expansion of Medicare's coverage of mental health telehealth services and requests feedback on whether virtual direct supervision should continue on a permanent basis.

Interested stakeholders have until 5:00 p.m. ET on September 6, 2022, to provide comments on the Proposed Rule. Stakeholders can submit comments at [this link](#) or by mail:

- *Regular Mail:* Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-1770-P, P.O. Box 8016, Baltimore, MD 21244-8016; and
- *Express Overnight Mail:* Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-1770-P, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

Stakeholders submitting comments by mail should allow time for their comments to be received before the deadline.

For more information, please contact [Allison Cohen](#), [Alex Lewis](#), or any member of Baker Donelson's [Telehealth Group](#).