

Report on Medicare Compliance Volume 29, Number 29. August 17, 2020 In Proposed Physician Rule, Telehealth Expands and Contracts, Limited by Statute, PHE

By Nina Youngstrom

Telephone-only evaluation and management (E/M) services as a type of telehealth will disappear next year or whenever the COVID-19 public health emergency (PHE) ends, according to the 2021 proposed Medicare Physician Fee Schedule (MPFS) regulation,^[1] which is scheduled to be published in the Aug. 17 *Federal Register*. And CMS plans to add and remove telehealth services in different ways, across three categories, partly by making some PHE telehealth services permanent. The glitch, however, is Medicare coverage again will be limited to originating sites—essentially rural areas—and audiovisual technology after the PHE. CMS's hands are tied, because a permanent telehealth expansion to all corners of the country and to telephone calls requires a change in the Social Security Act, which only Congress can make, attorneys said. For the same reason, a patient's home won't be a telehealth originating site when the regulation takes effect Jan. 1 if the PHE expires by then. In fact, a number of Medicare payment proposals are contingent on which comes first: the end of the PHE or 2021—a testament to the turbulence of the times.

“We are starting to see a little bit of the unwinding plan and what can remain permanent versus what is likely to get reeled back and returned to pre-COVID rules,” said Richelle Marting, an attorney in Overland Park, Kansas. CMS also is asking for an unusual amount of feedback as it figures out how to proceed, said attorney David Glaser, with Fredrikson & Byron in Minneapolis. “They are soliciting comment more actively than they ever have before, so there is an opportunity for people to chime in.”

The proposed MPFS has changes all over the map. Two are on the supervision front, and both were seen as positive. One is a telehealth addition that, if finalized, would allow physicians to provide direct supervision virtually, using real-time, interactive audiovisual technology, said attorney Thomas Ferrante, with Foley & Lardner in Tampa, Florida. That's a game changer for billing incident to the physician's services, he said. Physicians wouldn't have to be physically present to provide direct supervision for incident-to billing or other services. Virtual supervision would be allowed, if finalized, until Dec. 31, 2021, or the end of the PHE, whichever is later, Ferrante said.

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