



Medicare Telehealth Services for 2023 – CMS Proposes Substantial Changes

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On July 7, 2022, the Centers for Medicare and Medicaid Services (CMS) released its proposed [2023 Medicare Physician Fee Schedule \(PFS\)](#) rule. The rule, if enacted as proposed, will:

1. Create three new permanent telehealth codes for prolonged E/M services;
2. Discontinue reimbursement of telephone (audio-only) E/M services;
3. Discontinue the use of virtual direct supervision;
4. Postpone the effective date of the telemental health six-month rule until 151 days after the PHE ends;
5. Extend coverage of the temporary telehealth codes until 151 days after the PHE ends; and
6. Add 54 codes to the Category 3 telehealth list.

Reading between the lines, the nature of CMS' comments and the changes it proposed (and refused to propose) suggest that CMS rulemakers anticipate the Public Health Emergency (PHE), and associated PHE waivers, will expire no later than the first half of 2023.

Three New Telehealth Codes for Prolonged E/M Services

This year, CMS rejected all stakeholder requests to permanently add codes to the Medicare Telehealth Services List. Following its standard evaluation process for such requests, CMS considered whether they met appropriate categories. [Category 1](#) services must be “similar to professional consultations, office visits, and/or office psychiatry services that are currently on the Medicare Telehealth Services List.” Category 2 services require “evidence of clinical benefit if provided as telehealth” and all necessary elements of the service must be able to be performed remotely. CMS rejected this year’s requests because none of the proposed services (e.g., therapy, electronic analysis of implanted neurostimulator pulse generator/transmitter, adaptive behavior treatment and behavior identification assessment codes) met the requirements of Category 1 or 2 services. Interested stakeholders can collect and submit better evidence to persuade CMS to add these codes on a Category 1 or 2 basis next year (submissions are due by February 10, 2023).

Although it rejected stakeholder-submitted codes, CMS itself proposed three new codes to be added to the Medicare Telehealth Services list on a permanent 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, 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, 99350 for home or residence evaluation and management services).

CMS added these codes because they are similar to current CPT codes 99356 and CPT 99357 and HCPCS code G2212, all listed on a permanent basis.

Discontinue Reimbursement of Telephone (Audio-Only) E/M Services

Under PHE waivers, CMS allowed separate reimbursement of telephone (audio-only) E/M services (CPT codes 99441-99443), something that was embraced by a sizeable cohort of practitioners and patients, particularly in rural areas or patients without suitable broadband access for audio-video.

CMS rejected requests to permanently add these services to the Medicare Telehealth Services List. With the exception of certain telemental health services, CMS stated two-way interactive audio-video telecommunications technology will continue to be the Medicare requirement for telehealth services following the PHE. This is because Section 1834(m)(2)(A) of the Social Security Act requires telehealth services be analogous to in-person care by being capable of serving as a substitute for the face-to-face encounter. In CMS' own language, "We believe that the statute requires that telehealth services be so analogous to in-person care such that the telehealth service is essentially a substitute for a face-to-face encounter." As audio-only telephone is inherently non-face-to-face, CMS determined, that modality fails to meet the statutory standard.

Therefore, 151 days after the PHE expires, audio-only telephone E/M services will revert to their pre-PHE "bundled" status under Medicare (i.e., covered but not separately payable). Practitioners will no longer receive separate reimbursement for these services.

Discontinue the Use of Virtual Direct Supervision

Under Medicare Part B, certain types of services (e.g., many diagnostic tests, services incident to physicians' or practitioners' professional services) must be furnished under the direct supervision of a physician or practitioner. For Medicare purposes, direct supervision requires the supervising professional to be physically present in the same office suite as the supervisee, and immediately available to furnish assistance and direction throughout the performance of the procedure. The supervising professional need not be present in the same room during the service, but the "immediate availability" requirement means in-person, physical - not virtual - availability.

In connection with PHE waivers, CMS temporarily changed the direct supervision rules to allow the supervising professional to be remote and use real-time, interactive audio-video technology. That change did not require the professional's real-time presence at, or live observation of, the service via interactive audio-video technology throughout the performance of the procedure.

This change was temporary because CMS was concerned widespread direct supervision through virtual presence may not be safe for some clinical situations. In its proposed PFS rule, CMS rejected requests to make virtual direct supervision a permanent feature in Medicare. CMS is considering whether or not it should make virtual direct supervision a permanent feature of Medicare at some point in the future. Interested stakeholders with data are invited to submit comments and information to CMS on this topic.

If the proposed rule is finalized, virtual direct supervision will expire at the end of the calendar year in which the PHE ends. If the PHE ends in October 2022, the supervision waiver will end December 31, 2022. If the PHE ends in January 2023, the supervision waiver will end December 31, 2023.

Postpone the Effective Date of the Telemental Health Six-Month Rule Until 151 Days After PHE Ends

In 2020, Congress imposed new conditions on telemental health coverage under Medicare, creating an in-person exam requirement alongside coverage of telemental health services when the patient is located at home. Under the rule, Medicare will cover a telehealth service delivered while the patient is located at home if the following conditions are met:

1. The practitioner conducts an in-person exam of the patient within the six months before the initial telehealth service;
2. The telehealth service is furnished for purposes of diagnosis, evaluation, or treatment of a mental health disorder (other than for treatment of a diagnosed substance use disorder (SUD) or co-occurring mental health disorder); and
3. The practitioner conducts at least one in-person service every 12 months of each follow-up telehealth service.

For a full understanding of the rule, read the frequently asked questions and what it means for practitioners at [Medicare Telehealth Mental Health FAQs](#).

This rule was originally scheduled to take effect the day after the PHE expires. Following an amendment to the rule, it is now set to take effect 151 days after the PHE expires.

Extend Coverage of the Temporary Telehealth Codes Until 151 Days After the PHE Ends

Temporary telehealth codes are those services added to the Medicare Telehealth Services List during the PHE on a temporary basis, but which were not placed into Category 1, 2, or 3. Coverage of those temporary telehealth codes had been scheduled to end when the PHE expires.

In its proposed PFS rule, CMS states it will extend coverage of those temporary telehealth codes until 151 days after the PHE ends. CMS is doing so for consistency with the [Consolidated Appropriations Act, 2022](#) (CAA). CMS stated this extension may simplify the post-PHE transition by applying the same coverage end date to all the various waiver-related telehealth codes in a hope to reduce billing errors.

Note, the Category 3 codes are set to expire December 31, 2023, while the other temporary telehealth codes are set to expire 151 days after the PHE ends. This means, under the proposed rule, if the PHE ends after August 2023, the Category 3 codes would expire before the temporary telehealth codes. If finalized, health care providers would need to keep a careful eye on the calendar to ensure billing practices keep up with the various sunset dates.

Add 54 Codes to the Category 3 Telehealth List

CMS' [Category 3 list](#) contains services that likely have a clinical benefit when furnished via telehealth, but lack sufficient evidence to justify permanent coverage. CMS proposed adding 54 codes to that Category 3 list. The services fall into nine categories: (1) therapy; (2) electronic analysis of implanted neurostimulator pulse generator/transmitter; (3) adaptive behavior treatment and behavior identification assessment; (4) behavioral health; (5) ophthalmologic; (6) cognition; (7) ventilator management; (8) speech therapy; and (9) audiologic. The complete list can be found at [this link](#).

Keep in mind, these codes will expire December 31, 2023. Category 3 codes were originally slated to expire at the end of the year in which the PHE ends, but CMS extended coverage of those codes through December 31, 2023. In this year's proposed PFS rule, CMS declined any further extension, so all Category 3 codes will expire at the end of 2023. In the event the PHE extends well into 2023, CMS said it will consider a further extension of the Category 3 codes at that time.

What to Do Next?

Providers, facilities, technology companies, and virtual care entrepreneurs interested in changes to the telehealth codes for 2023 should consider providing comments to the proposed rule. CMS is soliciting comments on the proposed rule until 5:00 p.m. ET on September 6, 2022. Anyone may submit comments – anonymously or otherwise – via electronic submission at [this link](#). Alternatively, commenters may submit comments by mail to:

- *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.
- *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

If submitting via mail, please be sure to allow time for comments to be received before the closing date.

Want to Learn More?

- [*Remote Therapeutic Monitoring: What You Need to Know About CMS' Proposed Changes*](#)
- [*3 Considerations for Telemedicine Companies Shifting Reimbursement Models*](#)
- [*HIPAA & Telehealth: FAQs from HHS Guidance on Audio-Only Telehealth*](#)

For more information on telemedicine, telehealth, virtual care, remote patient monitoring, digital health, and other health innovations, including the team, publications, and representative experience, visit [Foley's Telemedicine & Digital Health Industry Team](#).