# PUBLICATION

## CMS Proposes Extending COVID-Era Telehealth and Supervision Flexibilities through CY 2025

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**The Centers for Medicare & Medicaid Services (CMS) proposed to extend a number of COVID-era regulatory flexibilities related to telehealth, remote services, and supervision in the CY 2025 Medicare Physician Fee Schedule (PFS) Proposed Rule. While these flexibilities were originally implemented to facilitate access to care during a pandemic, CMS's ongoing extensions are an acknowledgment that telehealth and remote services continue to play an important role in care delivery.**

**We summarize below a number of key proposals related to telehealth, virtual supervision, and remote services proposals in the CY 2025 Proposed PFS Rule. Comments on the Proposed Rule are due September 9, 2024.**

### 1. Telehealth Proposals

***Continuing to Permit Distant-Site Practitioners to Use Their Currently Enrolled Practice Location Instead of Their Home Address When Providing Telehealth Services From Their Homes***

After many concerns were raised about having to report the home address of telehealth practitioners, CMS proposed to continue to permit distant-site practitioners to use their currently enrolled practice location for billing and claims submission when providing services from their homes. We are evaluating how this applies to remote practitioners such as radiologists and the interplay with inter-jurisdictional reassignment guidance in those contexts.

***Expanding Coverage of Audio-Only Telehealth Services***

With successive extensions of telehealth flexibilities allowing audio-only telehealth services for mental health services and audio-only E/Ms, CMS has come to believe it would be appropriate to allow interactive audio-only telecommunications when any telehealth service is furnished to the patient in their home as long as certain criteria are satisfied: (1) the home must be a permissible originating site; (2) the distant-site practitioner has to be capable of using an interactive audio-visual system; and (3) the patient must not be capable of or not consent to the use of video technology. Modifier 93 has to be appended to the claim for services to verify these conditions have been met.

Another limitation on this expansion is that without further action by Congress, starting in January 2025, the patient's home only will be a permissible originating site for telehealth services furnished for the diagnosis or treatment of mental health or substance use disorders and for monthly ESRD-related clinical assessments.

***Continuing the Suspension of Frequency Limitations on Subsequent Inpatient and Critical Care Services Performed via Telehealth***

Before the PHE, the following frequency limitations were in place:

- Limit of one telehealth visit every three days for subsequent inpatient visits;
- Limit of one telehealth visit every 14 days for subsequent nursing facility visits; and
- Limit on critical care consultations to one telehealth visit per day.

CMS proposes to continue to delay through December 31, 2025, before reinstating limitations on the number of times certain services in high-acuity settings may be performed via telehealth. During this time, CMS will continue to evaluate whether the removal of these frequency limitations should be made permanent.

The extension of CMS's current suspension of frequency limitations applies to the following codes:

- Subsequent inpatient visit CPT codes 99231, 99232, 99233;
- Subsequent nursing facility visit CPT codes 99307, 99308, 99309, 99310; and
- Critical Care Consultation Services HCPCS codes G0508, G0509.

CMS still has some concerns about ensuring that patients in inpatient settings, nursing facilities, and receiving critical care services are regularly seen in person by physicians responsible for their care. At the same time, CMS acknowledged that during the period when frequency limitations have been suspended, claims data suggests that less than five percent of patients received one or more of these services as a telehealth service. This seems to have alleviated some of CMS's concerns that the frequency limitations are critical to maintaining patient safety.

***Adding Services to the Medicare Telehealth List***

Similar to past years, CMS exercised its authority to expand the list of services that are covered by Medicare when provided via telehealth (the Medicare Telehealth List). Services that were added on a provision or permanent basis are included below:

- Caregiver training services (on a provisional basis);
- Demonstration prior to initiation of Home International Normalized Ratio (INR) Monitoring (on a provisional basis); and
- PreP for HIV counseling services (on a permanent basis).

***Modifying Policies Related to Medicare Coverage for Opioid Use Disorder (OUD) Treatment Services Furnished by Opioid Treatment Programs (OTPs)***

In the CY 2025 Proposed Rule, CMS proposes the allowance of several telecommunication technology flexibilities for OUD treatment services furnished by OTPs, so long as the use of these technologies is permitted under the applicable SAMHSA and DEA requirements at the time the services are furnished, and all other applicable requirements are met. More specifically, CMS proposes the following related to these flexibilities:

- CMS is proposing to make permanent the current flexibility for furnishing periodic assessments via audio-only telecommunications beginning January 1, 2025, so long as all other applicable requirements are met. CMS believes that, given the prevalence of audio-only modalities of care for the treatment of OUD, permanently extending this flexibility could help prevent disruptions to care in OTP settings that may regularly provide periodic assessments via audio-only telehealth to Medicare beneficiaries; and
- CMS is proposing to allow the OTP intake add-on code to be furnished via two-way audio-video communications technology when billed for the initiation of treatment with methadone (using HCPCS

code G2076) if the OTP determines that an adequate evaluation of the patient can be accomplished via an audio-visual telehealth platform.

## 2. Virtual Supervision Proposals

***Continuing Virtual Immediate Availability for Direct Supervision***

CMS proposes to define direct supervision to permit the presence and "immediate availability" of the supervising practitioner through real-time audio and visual interactive telecommunications through December 31, 2025. For certain services, CMS proposes a permanent policy of allowing the supervising practitioner to satisfy direct supervision requirements by being "immediately available" through audio/video real-time communications technology. This permanent policy would apply to the following subset of incident-to-services described under § 410.26:

1. Services furnished incident to a physician or other practitioner's service when provided by auxiliary personnel employed by the billing practitioner and working under their direct supervision, and for which the underlying HCPCS code has been assigned a PC/TC indicator of '5'; and

2. Services described by CPT code 99211 (*Office or other outpatient visit for the evaluation and management of an established patient that may not require the presence of a physician or other qualified health care professional*).

CMS is willing to propose a permanent policy for these services because it views these as low-risk services that do not often demand in-person supervision, and are typically furnished entirely by the supervised personnel.

***Continuing Virtual Presence for Teaching Physician Billing and Requesting Information About Expanding the Primary Care Exception***

CMS is proposing to temporarily extend through December 31, 2025, the flexibility allowing teaching physicians to meet billing requirements to be present for key and critical portions of a service performed with a resident through virtual presence with the medical resident in certain contexts. Specifically, the virtual presence of the teaching physician only will result in a billable service in instances when the medical resident is providing medical services in a virtual setting (only in clinical instances when the service is furnished virtually such as a three-way telehealth visit with the physician/resident/patient in different locations).

CMS is soliciting feedback on the types of services that could be allowed under the so-called primary care exception, which permits teaching physicians to bill for certain lower and mid-level complexity physicians' services furnished by residents in certain training settings even when the physician is not present with the resent during the services as long as certain conditions are met.

Specifically, CMS is interested in whether the primary care exception should be expanded to include more services, specifically preventive services. CMS is also requesting information on the following:

- Whether the currently required six months of training in an approved program is sufficient for residents to furnish these types of services without the presence of a teaching physician?

- Whether the inclusion in the primary care exception of specific higher-level or preventive services would impede the teaching physician's ability to remain immediately available for up to four residents at any given time while directing and managing the care furnished by these residents?

***Expanding General Supervision of Therapists***

In CY 2024, CMS solicited comments as to whether to permit general supervision of occupational therapy assistants (OTAs) and physical therapist assistants (PTAs) by the occupational therapists in private practice (OTPPs) and physical therapists in private practice (PTPPs), respectively, when furnishing therapy services. Through these comments, CMS heard from interested parties that, given labor shortages, the direct supervision requirements in the private practice setting were problematic for OTPPs and PTPPs who must remain on-site and immediately available when Medicare patients are treated in order to bill for therapy services furnished by their supervised OTAs and PTAs.

In response to these comments, in the CY 2025 Proposed PFS, CMS is proposing to allow OTPPs and PTPPs in private practice to provide general supervision of OTAs and PTAs when the OTAs and PTAs are furnishing outpatient, occupational, and physical therapy services. CMS believes that this proposed change will give OTPPs and PTPPs more flexibility in meeting the needs of beneficiaries. Moreover, CMS hopes that this change will preserve patient access to medically necessary therapy services, including those experiencing challenges accessing these services in rural and underserved areas.

## Takeaways

In the CY 2025 Proposed PFS Rule, CMS proposes continuing various COVID-era regulatory flexibilities related to telehealth, remote services, and supervision. This provides some level of certainty regarding the regulatory landscape while we await legislative changes that would be necessary to permanently remove certain statutory constraints on telehealth services such as the originating site requirements that previously limited most Medicare coverage of telehealth services to clinical sites in rural areas. The Proposed Rule demonstrates CMS's continued emphasis on promoting access to patient care while continuing to evaluate practice patterns and utilization following the PHE to identify whether more permanent changes to these policies are appropriate.

If you have questions regarding how CMS's proposals or other regulatory requirements affect existing or planned telehealth arrangements or seek assistance with comments on the proposals, please contact Allison M. Cohen or any member of Baker Donelson's Telehealth Team.

*Noah Lipshie, a summer associate at Baker Donelson, contributed to this article.*