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How CMS Changes and Trump's Executive Order Impact Telehealth Coverage in 2020 and Beyond

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Alongside President Trump's call for more rural telehealth coverage, CMS' proposed 2021 Physician Fee Schedule could keep the momentum going for connected health. But is it enough?

August 06, 2020 - The Centers for Medicare & Medicaid Services has come out with its long-anticipated plans to expand telehealth coverage beyond the coronavirus pandemic.

An advance copy of **the proposed 2021 Physician Fee Schedule** contains several changes to current Medicare coverage, including highlighting new opportunities for remote patient monitoring and adding nine new billing codes for connected health services. Supporters say the changes offer providers a strong transition from the emergency measures now in effect to deal with COVID-19, while some have said the changes don't go far enough to keep the momentum going.

"Compared to last year, where CMS made only minor additions to telehealth services, the changes proposed for 2021 are bold and designed to more deliberately expand the use of telehealth technologies among Medicare beneficiaries," Nathaniel Lacktman, a partner with Foley & Lardner and chair of its Telemedicine & Digital Health Team, said **in a blog** co-authored by Thomas Ferrante, senior counsel, and Emily Wein, an attorney with the firm.

The announcement came on the same day that President Donald Trump **issued an Executive Order on Improving Rural and Telehealth Access**, though there is some question as to whether the two are related – and what the Executive Order can accomplish other than to sound the drumbeat for telehealth.

"The Executive Order signed by President Trump to expand telehealth services for Medicare populations and improve access to care in rural areas signals, loud and clear, the Administration's continued support for telehealth and virtual care," American Telemedicine Association CEO Ann Mond Johnson said. "We applaud the Administration, as well as telehealth champions in Congress for taking the necessary steps to ensure individuals receive

the care they need during this national health emergency and indicating support for extending telehealth post-pandemic."

"The Alliance for Connected Care is pleased to see the Administration prioritizing access to telehealth services," added Krista Drobac, that organization's executive director. "Our members are looking forward to utilizing new telehealth codes and continuing to leverage some existing telehealth tools after the pandemic."

Like many others, Drobac also pointed a finger at Congress, which has been deluged with bills, letters and other lobbying efforts aimed at getting them to expand telehealth coverage.

"The vast majority of barriers to telehealth are statutory," she pointed out. "We need Congress to take clear, permanent action to expand access to telehealth for seniors, and to allow them to use it in any location. Without these statutory barriers addressed permanently, CMS cannot take the thoughtful, measured steps needed to allow the medical community to plan for, and carefully implement long-term telehealth strategies to benefit seniors."

"There is more work that needs to be done, on both the Federal and state levels, to cement these gains and make permanent the waivers put in place in response to COVID-19," Johnson echoed. "The stresses on our healthcare system were well-documented prior to the pandemic – including crippling provider shortages, escalating costs, and an aging population – and will only be exacerbated as our nation begins to recover from this health crisis. We have an unprecedented opportunity to modernize our healthcare system and appropriately leverage the technologies already available to deliver quality care, improve clinical outcomes, and increase patient and provider satisfaction by integrating telehealth in our nation's healthcare delivery."

CMS 2021 PHYSICIAN FEE SCHEDULE

According to the Foley & Lardner analysis, the proposed rule changes for Medicare coverage can be boiled down into four categories:

New Telehealth Codes. CMS added nine new codes to the 2021 list, covering a variety of services. They consist of 99347 and 99348 (Home Visits), 99334 and 99335 (Domiciliary, Rest Home or Custodial Care Services), 99483 (Care Planning for Patients with Cognitive Impairment), 96121 (Neurobehavioral Status Exam), 90853 (Group Psychotherapy), 99XXX (Prolonged Services) and GPC1X (Visit Complexity Associated with Certain Office/Outpatient E/Ms).

One notable service omitted from this list is proposed CPT 96040, which would have allowed genetic counselors to bill for telehealth services.

In addition, **CMS has proposed creating a separate category for codes** added to the list to cover telehealth services during the COVID-19 emergency. Some 50 codes have been created

during the pandemic are included in this Category 3, along with 13 new codes, covering Domiciliary, rest Home or Custodial Care Services – Established Patients (99336, 99337 and 99349), Home Visits – Established Patients (99350), Emergency Department Visits (99281, 99282 and 99283), Nursing Facilities Discharge Day Management (99315 and 99316), Psychological and Neuropsychological Testing (96130, 96131, 96132 and 96133).

Direct Supervision via Telehealth and Incident-to-Billing. CMS is expanding the telehealth platform to allow supervising physicians – who previously had to be in the building and immediately able to assist in a clinical procedure – to supervise via real-time, interactive, audio-visual telemedicine.

"The new definition opens opportunities for telehealth and incident-to billing," the Foley team said. "CMS acknowledged there are no Medicare regulations that explicitly prohibit eligible distant site practitioners from billing for telehealth services provided incident-to their services. But because the current definition of direct supervision requires on-site presence of the billing clinician when the service is provided, it is difficult for a billing clinician to fulfill direct supervision of services provided via telehealth incident-to their professional services by auxiliary personnel. Under the new definition, CMS believes services provided incident to the professional services of an eligible distant site physician or practitioner could be reported when they meet direct supervision requirements at both the originating and distant site through the virtual presence of the billing physician or practitioner."

Because some clinical situations aren't suitable for telehealth supervision, CMS is limiting the time frame of this change to the 2021 year and asking for comments on whether additional "guardrails" are needed to make the change permanent.

Emergency Limitations for Nursing Facility and Hospital Inpatient Services. CMS is proposing to increase the frequency of nursing facility care services provided via telehealth from once every 30 days to once every three days. The agency is also asking for comments on a proposal that the frequency limitation be eliminated, and how best to balance virtual and in-person care in that case.

Communications Technology-Based Services (CTBS). CMS is proposing to expand the list of providers able to bill for telehealth services through HCPCS codes G2061-G2063 to include licensed clinical social workers, clinical psychologists, physical and occupational therapists and speech language pathologists who bill Medicare directly for their services. This would make permanent coverage now allowed under emergency waiver.

In addition, the agency proposes to create two additional codes – G20X0 and G20X2 – for billing by non-physician practitioners who can't independently bill for E/M services.

To help therapists bill for their service, the agency is proposing that HCPCS codes G20X0, G20X2, G2061, G2062 and G2063 be designated "sometimes therapy" services.

"When billed by a private practice PT, OT, or SLP, the codes would need to include the corresponding GO, GP, or GN therapy modifier to signify that the CTB are furnished as therapy services furnished under an OT, PT, or SLP plan of care," the Foley team advises.

PRESIDENT TRUMP'S EXECUTIVE ORDER

Trump's Executive Order, meanwhile, sets out timetables for certain goals. Within 30 days, he says:

- The Health and Human Services Department must develop an "innovative payment model to enable rural healthcare transformation;"
- The HHS Secretary and Secretary of Agriculture must "develop and implement a strategy to improve rural health by improving the physical and communications healthcare infrastructure available to all Americans;" and
- The HHS Secretary must report on existing and future policy initiatives to increase access to healthcare by removing regulatory burdens, "prevent disease and mortality" by developing incentives to improve rural outcomes, "reduce maternal mortality and morbidity" and improve mental health services in rural areas.

Trump gives the HHS Secretary 60 days, meanwhile, to review the emergency measures enacted during the pandemic to improve telehealth coverage and access and "propose a regulation to extend these measures, as appropriate, beyond the duration" of the public health emergency.

The order drew some praise from experts.

It's "a welcomed step towards assuring the continued growth and expansion of telehealth post-COVID," said Nadia de la Houssaye, a partner with the Jones Walker law firm. "The Order's focus on rural American and the need to help small rural hospitals integrate robust telehealth platforms, with improved technology and infrastructure, really hit home. Having grown up in rural Southwest Louisiana, I have witnessed the death of many rural hospitals, which led to the death of many rural communities."

"That said, the Order's focus on rural telehealth should not diminish the need to advance telehealth expansion to all Americans, regardless of geographic location," she added. "Additionally, although the Order is certainly a promising step forward in the long-term telehealth playing field, additional regulatory barriers at the federal and state level must be addressed to make permanent the waivers put in place in response to COVID and to solidify the long-term benefits and success of telehealth integration."

Carrie Nixon, of the Nixon Law Group, said the order calls for “a strategy to improve rural health by improving the communications infrastructure in rural America,” though she notes such a stretchy would have to be funded.

“While Trump’s Executive Order is a good show of support for rural Americans, it lacks any real teeth when it comes to expanding telehealth,” she said. “An Executive Order can instruct an agency on the type of action the President would like it to take, but it can’t change existing law.”

“The Order directs the Secretary of Health & Human Services to extend the flexibilities around telehealth implemented during the COVID beyond the declared Public Health Emergency, but the fact is that Congress has to take action to pass a law removing the barriers to reimbursement for Medicare telehealth visits,” Nixon concluded. “Without legislative action, the vast majority of Medicare patients won’t have access to telehealth when the PHE (public health emergency) is over.”