GT GreenbergTraurig

Alert | Health Care & FDA Practice

April 2019

CMS Issues Final Rule for Telehealth

Citing the use of telehealth as a care delivery option for Medicare Advantage (MA or Part C) enrollees with the potential to "improve access to and timeliness of needed care, increase convenience for patients, increase communication between providers and patients, enhance care coordination, improve quality and reduce costs related to in-person care," the Centers for Medicare & Medicaid Services (CMS) issued a final rule on April 5, 2019, implementing several provisions from the Bipartisan Budget Act of 2018 (Public Law 115-123), including updating the MA program by allowing MA plans to include "additional telehealth benefits" as part of the Medicare basic benefits. As a result, starting in plan year 2020, MA plans will be able to include such "additional telehealth benefits" (i.e., telehealth benefits beyond what original Medicare allows) in their bids for the basic Medicare benefits.

Traditionally, MA plans have been constrained in how they deliver telehealth services outside of the original Medicare telehealth benefit, limiting payment to specified services at eligible originating and distant sites within certain designated geographic locations. Because the government's capitation payment historically has only included hospital and physician/outpatient services covered under original Medicare, most telehealth benefits offered by MA Plans have been offered as MA supplemental benefits, which are funded through the use of rebate dollars or supplemental premiums paid by enrollees. The new rule allows MA plans more flexibility to design their telehealth programs within the Medicare benefit package. While MA plans will still be able to offer MA supplemental benefits for those services that do not meet the requirements for coverage under original Medicare or the requirements for MA "additional telehealth benefits" (described below), the new rule will allow MA plans to provide increased access to

patient-centered care by giving enrollees more control to determine when, where, and how they access benefits.

"Additional telehealth benefits" are defined as services i) available under Medicare Part B, but not payable under the original Medicare telehealth benefit and ii) identified by the MA plan as clinically appropriate to furnish through electronic exchange when the physician or practitioner providing the services is not in the same location as the enrollee. *See* 42 CFR 422.135(a); 42 CFR 410.78. CMS broadly defines "electronic exchange" as electronic information and telecommunications technology and permits MA plans to furnish such "additional telehealth benefits" provided the plan meets the following requirements:

1. the plan provides in-person access to the specified Part B services(s) at the election of the enrollee;

2. the plan advises each enrollee that he/she may receive the specified Part B services through an in-person visit or through electronic exchange;

3. the plan complies with the Medicare provider selection and credentialing requirements and, when providing additional telehealth benefits, ensures through its contract with the provider that the provider meets and complies with applicable state licensing requirements and other applicable laws for the state in which the enrollee is located and receiving the services; and

4. the plan makes information about coverage of additional telehealth benefits available to CMS upon request, including but not limited to statistics on use or cost, manner or method of electronic exchange, evaluation or effectiveness, and demonstration of regulatory compliance.

See 42 CFR 422.135(c).

Additionally, an MA plan furnishing "additional telehealth benefits" may only do so using contracted providers. CMS requires that the MA plan review and certify the qualifications and compliance of such providers to ensure that telehealth services are furnished in accordance with clinically appropriate standards of care and that all licensure and credentialing requirements are met. Coverage of benefits furnished by a non-contracted provider through electronic exchange may only be covered as a supplemental benefit. *See* 42 CFR 422.135(d).

If an MA plan fails to comply with the requirements of 42 CFR 422.135, the MA plan may not treat the benefits provided through electronic exchange as "additional telehealth benefits." (The plan may treat them as supplemental benefits, but subject to CMS approval.)

Further, because CMS deems the delivery of a Part B service via electronic exchange as inherently different (e.g., in modality and required infrastructure) from in-person delivery, MA plans offering "additional telehealth benefits" may maintain different cost-sharing for the specified Part B services furnished through an in-person visit versus furnished through electronic exchange. *See* 42 CFR 422.135(f).

Under this final rule, CMS envisions that MA enrollees will have additional opportunities to receive health care services from places like their homes, rather than being required to go to a health care facility. And MA plans will now have broader flexibility than is currently available in how they pay for telehealth benefits to meet the needs of their enrollees.

GT GreenbergTraurig

Author

This GT Alert was prepared by **Elizabeth Corliss Sacco**. Questions about this information can be directed to:

- Elizabeth Corliss Sacco | +1 518.689.1433 | saccoe@gtlaw.com
- Or your Greenberg Traurig attorney

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.¬ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.¤ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.