CMS Proposes Major Changes to Split/Shared Billing Requirements – Opportunity for Comment

Insights 08.13.21

PROFESSIONAL

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On July 23, 2021, the Centers for Medicare & Medicaid Services ("CMS") published the calendar year 2022 Physician Fee Schedule proposed rule, which includes a proposal to make significant changes to how and when providers may bill Medicare for evaluation and management ("E/M") services that are "split (or shared)" by a physician and a nonphysician practitioner ("NPP") in the same group. If adopted, this proposal would fill a void that was left when CMS recently withdrew its previous longstanding guidance on split (or shared) billing from the Medicare Claims Processing Manual ("MCPM"). CMS's proposal for split (or shared) billing includes:

- requiring a physician to perform "more than half" of the total time spent on the visit to qualify for the higher reimbursement rate,
- expanding the types of and settings for split (or shared) services to include critical care services and skilled nursing facilities (SNFs),
- clarifying that split (or shared) billing applies both to new and to subsequent patient visits and for prolonged services,
- specifying as documentation requirements that the medical record identify the practitioners involved and be signed and dated by the billing practitioner,
- adding a claims modifier to indicate a split (or shared) service, so that CMS may more closely monitor these types of claims, and
- codifying these revised policies in a new regulation at 42 C.F.R. § 415.140.

If finalized, these proposed changes would be effective starting January 1, 2022. They could significantly alter what may be billed to Medicare as a split (or shared) service and how those claims should be submitted, so potentially impacted providers should consider submitting comments. For example, some split (or shared) services that would have qualified for billing at the higher physician rate under CMS's previous guidance may not meet the "more-than-half" time requirement and, instead, be billable only by the NPP. Further, while CMS's proposal states that tracking time should not be burdensome, that will presumably vary from provider to provider, and might well depend on EHR functionality. CMS has also specifically called for comments on whether and how to define whether practitioners are in the "same group," which has been an area of some confusion, and what activities should count for purposes of tallying each practitioner's time spent on split (or shared) visits.

Importantly, when CMS recently withdrew its previous split (or shared) billing guidance, the agency noted that, until a new regulation governing split (or shared)

claims is in place, "the agency will limit review to the applicable statutory and regulatory requirements for purposes of assessing payment compliance."

Comments on CMS's proposed split (or shared) regulation are due by September 13, 2021.

Hooper, Lundy & Bookman is available to assist with submission of comments. We also welcome any questions you may have on CMS's proposal or about handling split (or shared) claims during the time period from when CMS withdrew its guidance until a new rule goes into effect.

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Background on split (or shared) billing and CMS's prior guidance

If a physician provides an E/M service in the hospital setting, the physician may bill and Medicare's payment will be based on 100% of the Physician Fee Schedule ("PFS"); if a NPP (typically a nurse practitioner or physician assistant) provides the E/M service, then payment is 85% of the PFS rate. In 2004, CMS first provided guidance, in Chapter 30 of the MCPM, for billing E/M services that were split (or shared) by a physician and an NPP. The MCPM guidance permitted physicians to bill at the higher 100% rate if certain criteria were satisfied.

In May 2021, CMS withdrew all of the split (or shared) guidance. *See* CMS Transmittal 10742 (May 3, 2021). CMS explained that it was withdrawing the guidance in response to a petition under the "Good Guidance Practices Rule," 42 C.F.R. §1.3(a)(2), which prohibits HHS from using "any guidance for purposes of requiring a person or entity outside [of HHS] to take any action, or refrain from taking any action, beyond what is required by the terms of an applicable statute or regulation." CMS's notice of this withdrawal said that the agency would be addressing the topic of split (or shared) billing through notice-and-comment rulemaking. Meanwhile, until a new rule is in place, claims involving split (or shared) services "will remain subject to the requirements of Medicare law and duly promulgated regulations . . ," and CMS will "limit review to the applicable statutory and regulatory requirements for purposes of assessing payment compliance." *See* CMS Notice.

CMS's proposed regulation governing split/shared billing

As previously noted, in July 2021, shortly after withdrawing its split (or shared) guidance from the MCPM, CMS published a proposed regulation covering split (or shared) billing for Medicare. 86 Fed. Reg. 39,104, 39,203-211 (July 23, 2021). The proposal, if adopted, would alter the criteria for split (or shared billing) in several important ways.

1. A new definition for what qualifies as performing the "substantive portion" of the visit to bill at the higher physician rate

To bill at the higher physician rate, the physician must perform a "substantive portion" of the E/M visit. Previously, CMS's now-withdrawn guidance in the MCPM defined the "substantive portion" as at least one of the three face-to-face portions of the patient encounter (history, examination, or medical decision making).

The proposed regulation changes the definition of "substantive performance" from one that is task based to one that is time based: The physician must perform "more than half" of the total time spent collectively by the physician and the NPP on the visit. If the physician does anything less, payment is made at the 85% NPP rate. The proposed regulation includes some technical rules on how to count time when the physician and NPP are simultaneously treating the patient (the time is counted once) and an extensive list of tasks that would count towards the time total. CMS has specifically requested comment on the list of tasks.

This proposed change—basing physician "substantive performance" on time—has significant implications for providers. For example, it is possible that overall reimbursement for E/M visits will drop if portions of split (or shared) services that used to qualify for billing at the higher physician rate no longer qualify because they do not meet the time test. In addition, this proposed change will require precise tracking of physician and NPP time spent on a visit, including when it is spent simultaneously. CMS downplays the potential burden of tracking time by noting "that practitioners are likely to increasingly time their visits for purposes of visit level selection independent of our split (or shared) visit policies." However, this change

should be expected to necessitate time tracking in virtually every E/M case, given that there is "a more team-based approach to care, and greater integration in the practice of physicians and NPPs, particularly when care is furnished by practitioners in the same group in the facility setting." *See* 86 Fed. Reg. at 39,206. Furthermore, unless time tracking is completely, and accurately automated by EHR application functionality or other means, then this requirement risks introducing the potential for error.

2. Expanded services and care settings for split (or shared) services

CMS's prior guidance did not permit providers to bill for split (or shared) visits involving critical care services or in SNFs. CMS's proposed regulation expressly permits split (or shared) billing in these contexts. The proposal also would permit billing add-on codes for prolonged E/M visits. But CMS has also proposed certain limits, including that no other E/M visit may be billed for a patient on the same date as a critical care service by the same practitioner or by members of the same practice specialty and group.

3. Request for comment on the definition of "same group"

CMS has proposed to continue to permit billing for split (or shared) services only where the practitioners are in "the same group." Like CMS's prior guidance, the proposed regulation does not define what is the "same group." However, CMS considered several options and seeks comments on whether the "group" should be defined based on the clinical specialty; the definition of "physician organization" under the self-referral laws; the same tax identification number; or some other measure. This definition is directly relevant because CMS's proposal states that it will not pay for partial E/M visits; thus, practitioners that perform part but not a complete E/M service may only bill if they are in the same group.

4. Documentation requirements

CMS's prior guidance did not specify the documentation necessary for split (or shared) claims. The proposed regulation would require that "Documentation in the medical record" "identify the physician and [NPP] who performed the visit" and that the practitioner "who performed the substantive portion of the visit (and therefore bills for the visit) must sign and date the medical record."

5. Claim modifier to identify split (shared) visits

CMS's proposed rule explains that it currently cannot tell if a visit was performed on a split (or shared) basis, except through medical records review. Therefore, "for program integrity and quality considerations," CMS is proposing to create a modifier to identify split (or shared) visits. This proposal signals that CMS's intends to apply heightened scrutiny to split (or shared) claims under its new policy.

If adopted, CMS's split/shared regulation will apply to services performed on or after its effective date, which is expected to be January 1, 2022.

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For further information, please contact Sven Collins in Denver, Charles Oppenheim in Los Angeles, Bob Roth in Washington D.C., David Schumacher in Boston, or your regular Hooper, Lundy & Bookman contact.

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