Frequently Asked Questions—CMS Proposed Rule Related to Therapeutic Diet Orders and Other Regulatory Changes (updated February 15, 2013)

1. What does this proposed rule do?
The Centers of Medicare and Medicaid Services (CMS) announced on February 4, 2013 a proposed rule change that would, among other things, “Save hospitals significant resources by permitting registered dietitians to order patient diets independently, which they are trained to do, without requiring the supervision or approval of a physician or other practitioner. This frees up time for physicians and other practitioners to care for patients.” In addition, the proposed rule would allow privileged RDs to order lab tests to monitor the effectiveness of dietary plans and orders. These exciting developments are designed to help health care providers to operate more efficiently by getting rid of regulations that are out of date or no longer needed. The proposed rule would apply only to RDs privileged by the hospital in which they work, and the change would not take effect until the rule is finalized by CMS later this year.

According to CMS, “Our intent in revising the provision was to provide the flexibility that hospitals need under federal law to maximize their medical staff opportunities for all practitioners, but within the regulatory boundaries of their State licensing and scope-of-practice laws. We believe that the greater flexibility for hospitals and medical staffs to enlist the services of non-physician practitioners to carry out the patient care duties for which they are trained and licensed will allow them to meet the needs of their patients most efficiently and effectively.”

Relevant portions of the proposed rule are on pages 9216, 9221-9224, 9233-9235, and 9244. A description of the rulemaking process, including detail on the difference between a proposed rule (such as this) and a final rule (that would actually permit the proposed change in practice to take effect and be permitted) is available on the Rules and Regulations section of the Academy website.

2. Who would be able to order therapeutic diets?
Under the proposed rule, qualified dietitians would be explicitly permitted to become privileged by the hospital staff to (a) order patient diets, (b) order lab tests to monitor the effectiveness of dietary plans and orders, and (c) make subsequent modifications to those diets based on the lab tests, if in accordance with state laws including scope of practice laws. CMS made this change because it “believe[s] that RDs are the professionals who are best qualified to assess a patient’s nutritional status and to design and implement a nutritional treatment plan in consultation with the patient’s interdisciplinary care team.”

3. Does the proposed rule do anything else in addition to making this change in diet ordering?
Yes. The proposed rule specifically clarifies that RDs may be included on the medical staff, as they “have equally important roles to play on a medical staff and on the quality of medical care provided to patients in the hospital.”

In addition, the proposed rule is seeking suggestions that would better allow RDs and other practitioners to furnish and bill for site telehealth services through rural health clinics (RHC) in a way that would not result in duplicate payment (once through the Medicare RHC cost report and again through the Medicare Part B physician fee schedule payment).
Members with experience working and billing with RHC should work with their DPG and affiliate leadership to submit DPG- or affiliate-endorsed recommendations to Pepin Andrew Tuma, Director of Regulatory Affairs.

CMS also seeks comment on suggestions for additional rules and regulations as additional candidates for reform from the entire body of Conditions of Participation, and members should work with their DPG and affiliate if there are Conditions of Participation (or associated interpretive guidelines) negatively impacting your practice you seek to have revised to submit DPG- or affiliate-endorsed recommendations to Pepin Andrew Tuma, Director of Regulatory Affairs.

4. Why did CMS issue it now?
This proposed rule responds directly to the President’s instructions in Executive Order 13563 urging federal agencies to reduce or revise outmoded or unnecessarily burdensome rules and regulations. Many of the proposed rule’s provisions streamline the standards health care providers must meet in order to participate in the Medicare and Medicaid programs without jeopardizing beneficiary safety. The Academy has been meeting and working with CMS to make this change for over two years and submitted formal comments to CMS in December 2011, providing the evidentiary and scientific basis upon which CMS relied in the proposed rule.

5. What is a “qualified dietitian”?
The Conditions of Participation for hospitals do not unambiguously define the term “qualified dietitian,” but the interpretive guidelines indicate that “Qualification is determined on the basis of education, experience, specialized training, State licensure or registration when applicable, and maintaining professional standards of practice.” CMS defines “qualified dietitian” variously in long term care facilities (“A qualified dietitian is one who is qualified based upon either registration by the Commission on Dietetic Registration of the American Dietetic Association, or on the basis of education, training, or experience in identification of dietary needs, planning, and implementation of dietary programs.”) and transplant centers (“A qualified dietitian is an individual who meets practice requirements in the State in which he or she practices and is a registered dietitian with the Commission on Dietetic Registration.”).

The Academy will work with CMS to develop a consistent definition across the continuum of care that ensures that only the qualified nutrition professional, eligible for registration with the Commission on Dietetic Registration and with expertise mirroring that of the RD gold standard specified in the Social Security Act (§ 1861(vv)(2)), will be able to order diets independently, thereby protecting patient health and realizing the cost savings associated with RD-ordered diets.

6. How is “therapeutic diet” defined?
There is not presently a definition of therapeutic diet in the Conditions of Participation regulating hospitals. CMS has previously adopted the Academy-approved “therapeutic diet” definition and interpretive guidance for the Resident Assessment Instrument Manual 3.0. The Academy will continue to work with CMS to encourage adoption of the definition for hospitals and across the continuum of care.

7. When would I be able to start ordering therapeutic diets for my patients?
Two things must occur before an RD would be legally permitted to order patient diets: (a)

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the proposed rule must become finalized, which is likely to happen later this year, and (b) the RD must become part of the medical staff or be granted privileges by the hospital to order therapeutic diets. In addition, given the abundance of state laws and regulations that mirrored the restrictive regulation that CMS is revising here, it is important to be aware of the progress state legislatures and regulatory authorities will make in ensuring consistency with this new proposed rule.

8. **What does it mean to have hospital privileges?**
   Privileging is the process by which a hospital’s medical staff individually evaluates each practitioner and determines that he or she has the qualifications and demonstrated competence to perform all of the specific tasks for which privileges are granted.

9. **Would this include the ordering of nutritional supplements, too?**
   Privileged RDs should be able to order nutritional supplements for patients in accordance with state laws and regulations if the proposed rule is finalized.

10. **How does this apply to RDs in long term care facilities? Would I be able to order therapeutic diets or provide nutritional supplements to my residents?**
    The proposed rule would apply only to RDs privileged by hospitals. The Academy will continue to work with CMS to urge a separate regulatory change that would apply to RDs practicing in long term care or other facilities.

11. **Our state does not license dietitians (or our state only certifies dietitians); does this proposed rule change apply to RDs in our state?**
    The Academy believes that RDs in states that do not currently license dietitians would be able to become privileged to order patient diets, although we will be seeking explicit language confirming this in the final rule. CMS clearly states that “[i]n order for patients to have access to the timely nutritional care that can be provided by RDs, a hospital must have the regulatory flexibility either to appoint RDs to the medical staff and grant them specific nutritional ordering privileges or to authorize the ordering privileges without appointment to the medical staff, all through the hospital’s appropriate medical staff rules, regulations, and bylaws.” (Emphasis added.) State surveyors in states without licensure previously would not permit RDs to become privileged predicated on their belief that without a dietetics licensure board, there was insufficient oversight for reporting improper dietetics practice. In this proposed rule, CMS appears to rebut that premise, stating that whether through appointment to the medical staff or the granting of order writing privileges by the hospital, “medical staff oversight of RDs and their ordering privileges would be ensured.”
    The Academy will keep members apprised of specific developments on this topic and will work individually with state affiliates concerned about this issue.

   All hospitals in every state that deals with and receives reimbursement from CMS must follow the regulations and interpretive guidelines in the CMS State Operations Manual - specifically § 482.28 - Conditions of Participation (CoPs): Food and Dietetic Services.

12. **What is the Academy’s strategy for commenting on the proposed rule?**
    The Academy will be commenting on behalf of our 74,000 members and will work closely with DPGs, affiliates, and members of the CMS Workgroup in drafting our formal comments supportive of the proposed rule. We will add any new, additional studies not previously provided to CMS on the benefits of allowing RDs to independently order patient diets and also seek clarification on several specific issues:
a. Confirming that a state’s decision not to regulate dietetic practice through licensure does not preclude its hospitals from granting privileges to RDs overseen by their medical staffs;
b. Adopting the Academy-approved definition of “therapeutic diet” for hospitals;
c. Ensuring the definition of “qualified dietitian” reflects the education, skills, and training of RDs in order to realize the benefits anticipated after implementation of the proposed rule;
d. The accuracy of CMS’s conservative cost-savings estimates and the assumptions underlying them;
e. The importance of a proposed rule change that would allow RDs working at long term care facilities to be able to order patient diets as well.
f. Recommendations for revisions to additional Conditions of Participation; Recommendations for revising process for reimbursement for practitioners at rural health clinics; and
g. Providing specific, documented instances of substantive harm to patients or costs to providers/hospitals (from delay, wrong orders, or other causes) resulting from existing rule’s prohibition on RDs ordering patient diets.

The Academy will be offering a draft set of comments for review approximately four weeks prior to the April 8, 2013 deadline. Members are encouraged to work through their DPGs and affiliates with any thoughts or suggestions for additional elements to include.

13. What can members do to encourage CMS to finalize this proposed rule and allow RDs to order therapeutic diets?

It is important to speak with a unified voice to CMS and the Academy appreciates CMS’ admonition that quality is usually more important that quantity when commenting on technical regulatory changes. We welcome members’ offers of additional evidence-based studies not referenced in the proposed rule or the Academy’s December 23, 2011 comments and members’ evidence-based insight into the specific issues on which the Academy anticipates comment, particularly the accuracy of CMS’s conservative cost-savings estimates and the assumptions underlying them. In addition, we welcome specific, documented instances of substantive harm to patients or costs to providers/hospitals (from delay, wrong orders, or other causes) resulting from existing rule’s prohibition on RDs ordering patient diets. Members should work with their DPGs and affiliates to provide input for the Academy’s comments and can submit new evidence based studies or specific, documented instances of harm to Pepin Tuma, Director of Regulatory Affairs.

The Academy is coordinating with members to solicit support for the proposed rule from physician and non-physician providers, hospitals, and congressional champions in the form of signing-on to a letter supporting the ability of RDs to order patient diets and will provide a template for brief comment for those affiliates and DPGs who wish to make one prior to the April 8, 2013 deadline.

In addition, as noted in Q&A 2 above (Does the proposed rule do anything else in addition to making this change in diet ordering?), members with suggestions for (a) revisions to additional Conditions of Participation or (b) reimbursement for practitioners at rural health clinics should work with their DPGs and affiliates to provide insight and comment.