

Center for Medicaid and State Operations/Survey & Certification Group

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TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Compliance With State Fire and Safety Code in Lieu of Life Safety Code

Memorandum Summary

- The Centers for Medicare & Medicaid Services (CMS) has adopted the 2000 edition of the National Fire Protection Association's (NFPA) Life Safety Code (LSC) as part of the Medicare health and safety standards for certified providers and suppliers.
- It is permissible to use a State fire and safety code (State Code) in lieu of the NFPA 2000 LSC, *if* CMS finds that the State Code is imposed by State law and that it adequately protects residents or patients. There are also financial implications for State Survey Agencies (SAs).

The Social Security Act (SSA) provides, under certain circumstances, for use of a State Code in lieu of the NFPA LSC provisions adopted by CMS for nursing homes, skilled nursing facilities, and small rural hospitals. Additionally, by regulation, CMS has adopted the 2000 edition of the NFPA LSC for the following types of certified providers and suppliers: nursing homes (NHs), skilled nursing facilities (SNFs), hospitals, critical access hospitals (CAHs), intermediate care facilities for the mentally retarded (ICFs/MR), ambulatory surgical centers (ASCs), hospices providing inpatient care, and end-stage renal dialysis (ESRD) facilities. In these regulations CMS also provides for use of a State Code in lieu of the adopted LSC under certain conditions. (Attachment) In all instances, a State must apply to CMS for approval to use the State Code and must provide CMS sufficient documentation for CMS to determine whether the State Code is imposed by State law and adequately protects residents or patients.

The purpose of this memorandum is to clarify the process to be followed when a State seeks approval to use its State fire and safety code in lieu of the edition of the NFPA LSC currently adopted by CMS regulations. We also point out fiscal implications for SAs, should CMS approve such a request.

Requirements for Using a State Fire and Safety Code in Lieu of the LSC

Currently no State is approved to use its State Code for Federal certification purposes. Any State that wishes to apply its State Code in lieu of the CMS-adopted LSC requirements must submit an application, signed by the Governor, to CMS that documents the following:

1. The State Code must apply to all of the above-listed provider/supplier types for which there are Medicare-certified providers or suppliers in the State. If the State Code exempts from its purview a class of health care providers or suppliers for which CMS has adopted a specific edition of the NFPA LSC, and there are such Medicare-certified providers or suppliers in the State, then the State Code may not be approved for use in lieu of the LSC. On the other hand, for example, if a State does not have any CAHs, it would not be expected to have its State Code apply to CAHs. The application must provide details of the State Code provisions that apply to each provider/supplier type.
2. The State must be seeking approval to use its State Code in lieu of the LSC for all of the above-listed provider/supplier types for which there are Medicare-certified providers or suppliers in the State. CMS will not consider applications in which the State proposes to use the State Code in lieu of the LSC for selected provider/supplier types only. For example, CMS will not approve a State application to use the State Code in lieu of the LSC only for its NHs, SNFs, and hospitals, but not for its ASCs, ESRDs, CAHs, etc.
3. The State Code must be imposed by State law. Therefore, a copy of the pertinent sections of the State statute and/or regulation imposing the State Code must be submitted with the application.
4. The application must include evidence as well as an assurance by the State that the State Code applies consistently in all locations within the State. CMS cannot approve a State Code in States where local jurisdictions are exempt from application of such State Code in lieu of a locally-adopted code, or no code.
5. The State Code must adequately protect patients/ residents in both new and existing facilities. The State must demonstrate not only how the State Code adequately protects patients or residents when health care facilities are first constructed, but also how it accomplishes this on an ongoing basis for existing health care facilities. Accordingly, the State's application must include at least the following:
 - a. Evidence that the State Code assures that buildings used by providers or suppliers offer a level of protection that is equal to or higher than the level of protection offered by buildings subject to CMS requirements, including the LSC as adopted by CMS and other applicable CMS standards. The application must specifically identify the features of the State Code that provide such assurance.
 - b. Evidence that the State Code has operational features (for example, provider/supplier maintenance or training requirements) that assure ongoing compliance with the State Code by providers or suppliers and furnish at least the same level of assurance as do the operational features found in the applicable LSC provisions and CMS requirements for each provider/supplier type.

- c. Evidence that the State verifies both initial and ongoing compliance. The application must describe the verification process in detail, including who assesses/determines initial and ongoing compliance of health care facilities with the State Code; what methodology is used, frequency of compliance determinations, and qualifications and training requirements of staff performing those functions. If the State does not use an ongoing survey/inspection process, it is unlikely that CMS would approve its application.
- d. Evidence that the State takes enforcement actions when it determines that a health care facility is out of compliance with the State Code, including description of the enforcement mechanisms in place. Inclusion of examples of cases where noncompliance was enforced is encouraged. The State must have the authority and a mechanism to address noncompliance with the State Code in a manner that adequately protects residents/patients.
- e. Evidence of whether and how the State Code provides for permanent or temporary waivers of some or all of the State Code requirements; the standards and processes for review, approval, and monitoring/enforcement of such waivers. This would include describing who is authorized to approve waivers and criteria for approval/denial. (CMS will no longer be the waiver-granting authority or the reviewer of the FSES.)

The submission should include a detailed crosswalk between the State Code and the CMS-adopted LSC provisions and other applicable Medicare fire safety requirements to facilitate CMS review.

The application package must be submitted to the appropriate CMS Regional Office, Survey and Certification Branch. Applications will be forwarded to CMS Central Office for review and approval or denial. CMS will publish a notice of its final decision in the *Federal Register*. No State may use its State Code in lieu of the CMS-adopted LSC until and unless it has received formal CMS approval and notice has been published in the *Federal Register*.

CMS' approval of a State's request to use its State Code in lieu of the CMS-adopted LSC is not open-ended; it is valid only so long as the State Code continues to adequately protect residents or patients. So, for example, it is expected that a State that has been granted approval by CMS to use its State Code will notify CMS (in writing) within a reasonable time (e.g., 60 days) of adoption of any changes to the State Code that affect a class of health care providers or suppliers subject to the State Code in lieu of the CMS-adopted LSC. This will enable CMS to perform its duty under the law and regulations to determine whether residents/patients are being adequately protected under the revised version of the State Code. In order to facilitate CMS' review, the State should provide a copy of the new code, explaining the changes in detail and providing a crosswalk between the new provisions and the pertinent provisions of the CMS-adopted LSC and/or additional fire safety requirements adopted in regulation by CMS. CMS will review the new information and determine whether the State Code may continue to be used in lieu of the CMS-adopted LSC.

Likewise, if at any time CMS adopts a different version of the NFPA LSC, or adopts specific fire safety provisions not found in the CMS-adopted LSC, any State using its State Code in lieu of the CMS-adopted LSC must submit a new application to CMS, providing a crosswalk to the newly-adopted CMS requirements and demonstrating how the State Code continues to

adequately protect patients/residents. Such re-application must be submitted within a reasonable amount of time (e.g., 60 days) after CMS' adoption of the new requirements.

CMS may at any time, based upon evidence that a State Code does not adequately protect residents/patients, rescind a prior approval of use of the State Code in lieu of the CMS-adopted LSC. Notice of such action will be published in the *Federal Register*. The CMS-adopted LSC provisions will take effect within the State within 60 days following publication of the notice of rescission/withdrawal of the prior approval of use of the State Code. Providers and suppliers determined to be out of compliance with the LSC would be subjected to CMS' normal enforcement processes, including consideration of applications for temporary or permanent waivers.

Impact on Deemed Providers

In a State where an approved State Code is used in lieu of the CMS-adopted LSC, providers or suppliers who have been deemed to meet Medicare's health and safety standards on the basis of accreditation by a CMS-recognized accreditation organization are expected to comply with CMS' LSC requirements rather than those of the State Code. The accreditation organizations' standards are required to meet or exceed the Medicare standards, including the LSC.

Funding Implications

If CMS approves a State's request to use the State Code in lieu of the LSC, there are implications for CMS' funding of SAs under the Section 1864 agreement between CMS and the State. Specifically, when a State Code is used in lieu of the CMS-adopted LSC, there is no federal LSC requirement in force, and thus CMS will not provide funding for conducting LSC surveys in those States, nor will CMS evaluate SA performance in enforcement of the State Code. This is the case even when the SA is utilized by the State to survey for compliance with the State Code. The only exception would be for validation surveys of providers/suppliers that have been deemed to meet Medicare requirements on the basis of their accreditation. For validation surveys conducted on either a representative sample basis or in response to a substantial allegation of noncompliance, and for full surveys following upon a validation substantial allegation survey that results in condition-level deficiency findings, SAs would continue to be expected to conduct LSC surveys in accredited deemed facilities in accordance with CMS requirements and would be funded accordingly.

Effective Date: Immediately. Please ensure that all appropriate staff are fully informed within 30 days of the date of this memorandum.

If you have additional questions or concerns, please contact James Merrill at 410-786-6998 or via e-mail at james.merrill@cms.hhs.gov

/s/

Thomas E. Hamilton

cc: Survey and Certification Regional Office Management

Attachment: Statutory and Regulatory authorities

Social Security Act Provisions
Use of State Code in Lieu of NFPA Life Safety Code

Medicare Provisions

Section 1819 (42 USC1395i-3)

Requirements for, and assuring quality of care in, skilled nursing facilities

* * *

(d) Requirements relating to administration and other matters

(1) Administration

* * *

(B) Life Safety Code

A skilled nursing facility must meet such provisions of such edition (as specified by the Secretary in regulation) of the Life Safety Code of the National Fire Protection Association as are applicable to nursing homes; except that—

* * *

(ii) the provisions of such Code shall not apply in any State if the Secretary finds that in such State there is in effect a fire and safety code, imposed by State law, which adequately protects residents of and personnel in skilled nursing facilities.

Section 1861(42 USC Sec. 1395x). Definitions

(e) Hospital

* * *

The term “hospital” also includes a facility of fifty beds or less which is located in an area determined by the Secretary to meet the definition relating to a rural area described in subparagraph (A) of paragraph (5) of this subsection and which meets the other requirements of this subsection, except that--

* * *

(C) with respect to the fire and safety requirements promulgated under paragraph (9), the Secretary ...

* * *

(ii) may accept a facility's compliance with all applicable State codes relating to fire and safety in lieu of compliance with the fire and safety requirements promulgated under paragraph (9), if he determines that such State has in effect fire and safety codes, imposed by State law, which adequately protect patients.

Medicaid Provisions (Nursing Homes)

Section 1919(d)(2)(B) (42 USC1396r). Requirements for nursing facilities

(a) “Nursing facility” defined

(d) Requirements relating to administration and other matters

* * *

(2) Licensing and Life Safety Code

(B) Life Safety Code

A nursing facility must meet such provisions of such edition (as specified by the Secretary in regulation) of the Life Safety Code of the National Fire Protection Association as are applicable to nursing homes; except that—

* * *

(ii) the provisions of such Code shall not apply in any State if the Secretary finds that in such State there is in effect a fire and safety code, imposed by State law, which adequately protects residents of and personnel in nursing facilities.

Regulatory Authority

There are no other statutory provisions specific to Life Safety Code for other facility types. However, by regulation CMS has adopted regulations repeating the statutory provisions for nursing homes and SNFs, and promulgating the same approach for hospitals, CAHs, ASCs, ICFs/MR, and hospices that provide inpatient care directly. There is no LSC standard for RHCs or FQHCs.

SNFs/NFs: § 483.70:

(a) *Life safety from fire.* (1) Except as otherwise provided in this section—

* * *

(i) The facility must meet the applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association...

* * *

(3) The provisions of the Life safety Code do not apply in a State where CMS finds, in accordance with applicable provisions of sections 1819(d)(2)(B)(ii) and 1919(d)(2)(B)(ii) of the Act, that a fire and safety code imposed by State law adequately protects patients, residents and personnel in long term care facilities.

Hospitals: § 482.41(b):

(b) *Standard: Life safety from fire.* (1) Except as otherwise provided in this section—

* * *

(i) The hospital must meet the applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association...

* * *

(3) The provisions of the Life Safety Code do not apply in a State where CMS finds that a fire and safety code imposed by State law adequately protects patients in hospitals.

Critical Access Hospitals: § 485.623(d):

(d) *Standard: Life safety from fire.* (1) Except as otherwise provided in this section—

* * *

(i) The CAH must meet the applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association...

* * *

(2) If CMS finds that the State has a fire and safety code imposed by State law that adequately protects patients, CMS may allow the State survey agency to apply the State's fire and safety code instead of the LSC.

ICFs/MR: § 483.470(j):

(j) *Standard: Fire protection* —(1) *General.* Except as otherwise provided in this section—

* * *

(i) The facility must meet the applicable provisions of either the Health Care Occupancies Chapters or the Residential Board and Care Occupancies Chapter of the 2000 edition of the Life Safety Code of the National Fire Protection Association...

* * *

(4) If CMS finds that the State has a fire and safety code imposed by State law that adequately protects a facility's clients, CMS may allow the State survey agency to apply the State's fire and safety code instead of the LSC.

ASCs: § 416.44(b):

(b) *Standard: Safety from fire.* (1) Except as otherwise provided in this section, the ASC must meet the provisions applicable to Ambulatory Health Care Centers of the 2000 edition of the Life Safety Code of the National Fire Protection Association, regardless of the number of patients served...

* * *

(3) The provisions of the Life Safety Code do not apply in a State if CMS finds that a fire and safety code imposed by State law adequately protects patients in an ASC.

Hospices: § 418.100:

A hospice that provides inpatient care directly must comply with all of the following standards.

* * *

(d) *Standard: Fire protection.* (1) Except as otherwise provided in this section—

* * *

(i) The hospice must meet the provisions applicable to nursing homes of the 2000 edition of the Life Safety Code of the National Fire Protection Association...

* * *

(3) The provisions of the adopted edition of the Life Safety Code do not apply in a State if CMS finds that a fire and safety code imposed by State law adequately protects patients in hospices.

ESRD: § 494.60:

(e) *Standard: Fire safety.* (1) Except as provided in paragraph (e)(2) of this section, by February 9, 2009 the dialysis facility must comply with applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association (which is incorporated by reference at §403.744(a)(1)(i) of this chapter).

* * *

(3) If CMS finds that a fire and safety code imposed by the facility's State law adequately protects a dialysis facility's patients, CMS may allow the State survey agency to apply the State's fire and safety code instead of the Life Safety Code.