

April 8, 2013

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Ms. Marilyn Tavenner
Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: CMS-3267-P; Amendment to Sec. 483.70 Physical environment, pertaining to the extension of the deadline to install sprinklers in nursing homes; FR Vol. 78, No. 26, Feb. 7, 2013. Submitted electronically.

Dear Secretary Sebelius and Acting Administrator Tavenner:

The undersigned organizations are dismayed that the Centers for Medicare & Medicaid Services chose the 10th anniversary of 31 fire deaths in Connecticut and Tennessee to propose waiving the deadline for facilities to install automatic sprinklers, as required by Sec. 483.70(a)(8). Medicare and Medicaid-certified nursing homes, whose occupants cannot evacuate themselves or be evacuated by others in time to prevent smoke inhalation and death, have operated legally for decades without this fundamental protection. Without the tragedies in Hartford and Nashville, the unconscionable delay by CMS and the National Fire Protection Association in requiring sprinklers in all nursing homes would have continued indefinitely.¹ Even so, CMS granted providers five years to come into compliance, and it now proposes to allow those who failed to comply to plead extenuating circumstances for failing to meet the deadline.

The proposal to give providers two to three more years to meet the requirement for nursing homes to have automatic sprinklers comes under the heading of *Regulatory Provisions to Promote Efficiency, Transparency, and Burden Reduction* – that is, to

¹ According to an article in the January/February 2013 NFPA Journal, 2013 is also the 50th anniversary of the second-worst nursing home fire in U.S. history, the Golden Age Nursing Home in Fitchville, Ohio, with 63 resident deaths. The fire occurred while state regulations that would have required the facility to have automatic sprinklers or a fire detection system were being held up by court actions brought by the state nursing home federation. The need for sprinklers in nursing homes, in addition to fire-resistive construction and staff preparation, had been recognized by the National Fire Protection Association since 1926, but the NFPA did not amend the Life Safety Code to require sprinklers in nursing homes until 2006. See “Long Time Coming” by Kathleen Robinson.

“reform Medicare regulations that CMS has identified as unnecessary, obsolete, or excessively burdensome on health care providers and suppliers” and to “increase the ability of health care professionals to devote resources to improving patient care, by eliminating or reducing requirements that impede quality patient care or that divert resources away from providing high quality patient care.” We fail to see how this proposal fulfills either purpose, particularly since CMS has repeatedly assured advocates for nursing home residents that the President’s burden reduction initiative would not affect the quality of resident care or safety.

In the case of fire safety, the burden has been imposed by decades of federal neglect and industry avoidance of common safety requirements for long-term care facilities.² Where state law dictates automatic sprinklers, facilities have not only complied but often complied within substantially shorter time frames than CMS has allowed. A survey by the American Health Care Association in 2006 found 100 percent of nursing homes in 13 states had sprinklers, as required by state law; two states had 100 percent sprinkler coverage even though they lacked state requirements. Almost 100 percent of Tennessee nursing homes were fully sprinklered within three years after the Nashville fire. Alabama, also acknowledging the tragedies in Tennessee and Connecticut, amended its licensing regulations in 2004 to require all nursing homes to be fully sprinklered; by 2007, all 74 of the state’ noncompliant facilities had installed sprinklers.

The Hartford and Nashville nursing home fires a decade ago underscored lessons learned from hundreds before them:

- Automatic fire suppression systems are the only means of ensuring against loss of life in a health care facility fire;
- Adequate staff with appropriate training and supervision to carry out an emergency preparedness plan are essential.
- Advanced (hard-wired) alarm systems can mitigate fire damage and loss of life.

The danger that a small fire will turn into a conflagration or result in numerous deaths from smoke inhalation is exacerbated by low staffing levels in most nursing homes, particularly on the night shift, and poor staff training. According to the NFPA, the NFPA Life Safety Code “imposes a great deal of responsibility on the staff of a health care facility to take appropriate action during a fire event. This responsibility extends to several areas, including knowing the duties and

² In contrast with the federal government’s requirements for nursing home residents’ safety, the Hotel and Motel Fire Safety Act of 1990 (Pub. L. No. 101-391, September 25, 1990 as amended by Pub. L. No. 105-85, November 18, 1997) requires federal employees to stay in fire-safe facilities when they require commercial lodging. According to the U.S. General Services Administration (<http://www.gsa.gov/portal/content/102177>), federal employees are encouraged to report hotels and motels of more than three stories that do not have *hard-wired smoke alarms and an automatic sprinkler system* in each guest room.

responsibilities of each staff member, when doors are to be closed, when patients have to be relocated to other areas within the building, and when patients may have to be evacuated to the exterior of the building. Previous fire investigations by NFPA have shown that an improper staff response—or in some cases, no response—can be disastrous.”³

In the February 2003 Hartford fire, investigators found that staff response had contributed to the loss of 16 lives: “Only 5 of the 12 available staff responded to the fire area, initially. At one point, 3 of the 5 staff were involved in a rescue attempt of just one person from Room 202.”⁴ Moreover, “staffers did not follow the written emergency plan and, in some cases, had never actually practiced the plan. Fundamental actions such as closing room doors did not occur, and the staff never relocated to the wing where the fire occurred.”⁵

In final regulations in 2006 requiring nursing homes without automatic sprinklers to have, at a minimum, battery-operated smoke detectors in resident rooms and common areas, CMS “encouraged” facilities to have system-based (hard-wired) smoke detectors that “are connected to a building’s general fire alarm system and are designed to activate that system, thus alerting the occupants of the entire building and notifying the fire department.” In spite of this acknowledgement of the preference for an “advanced system,” CMS regulations implemented only a minimum requirement for battery-operated smoke detectors in common areas and resident rooms.

Recommendations:

Assessment of Penalties

Nursing homes that fail to meet the August 13, 2013, deadline should be cited and sanctioned for failure to meet the regulatory requirements. These sanctions should include civil monetary penalties and/or closure or bans on admission of new residents until the sprinkler requirement is met. (See below.)

Public Notification of Plan to Request a Waiver

A facility’s request for a waiver should be transparent to its residents, their representatives, and the public and be approved by agencies responsible for public safety:

- Before applying for a waiver, a facility should notify the state survey agency; state long-term care ombudsman; state fire marshal; local fire marshal; consumer advocacy groups; facility residents, families and other resident representatives; and the public of its intent to request a waiver; the reasons for its request; enhanced procedures it will take to ensure the safety of

³ Solomon, Robert, and Duval, Robert, “The Right Response,” NFPA Journal, January/February 2010.

⁴ Fire Investigation Summary, Nursing Home: Hartford, CT, February 26, 2003, NFPA Fire Investigations Department.

⁵ See Solomon, “The Right Response,” above.

residents until compliance with the sprinkler requirement is achieved; its time frame for reaching compliance; and an opportunity for those receiving notification to attach comments and recommendations to the request.

- In addition to submitting comments and recommendations, the state survey agency, state ombudsman, and state fire marshal should be required to sign off on the request and the facility's plans for the interim safety of residents until sprinklers are installed.
- CMS should weigh all comments and recommendations in deciding whether to grant the waiver and the conditions it will apply if a waiver is granted.

Ban on New Admissions or Closure when Physical Plant Is Unsound

In instances where the provider's request for a waiver is based on its plan to substantially rehabilitate or replace the facility, CMS should take into consideration whether the physical plant as a whole is safe and whether closure or a ban on new admissions is appropriate.

Protecting Residents' Interests when New Construction Is Proposed

We appreciate CMS's optimism that nursing homes' residents "will benefit from the improved living environment" where providers plan extensive renovation or new building construction. However, we are concerned that CMS's accommodation of delays for capital improvements involving major investments, planning, and construction time will indirectly subsidize some providers to convert facilities to different, more lucrative levels of care, such as skilled nursing and rehabilitation. If that is the intent of facilities that have approached CMS about waivers, residents who experienced the risk of living in older and unsafe quarters would not benefit from CMS's policy if they were involuntarily discharged. As part of their waiver request, facilities should be required to certify as a condition of the waiver that they will not involuntarily discharge current residents or refuse admission to new residents based on source of payment.

Public Notification of Noncompliance with Life Safety Code

Facilities that are not in compliance with the automatic sprinkler requirement by August 13, 2013, should be required to post a notice in a prominent place in a format determined by the Secretary that the facility is noncompliant with requirements for automatic sprinklers. A special notification should be posted on Nursing Home Compare that the facility does not meet Life Safety Code requirements.

Interim Staffing Requirements and Monitoring to Ensure Fire Safety

Automatic sprinklers are the *only* measure that effectively ensures against death from fire-related causes in a nursing home. However, strict interim measures should be required to mitigate the risk of fire deaths:

- Hard-wired smoke alarms that automatically alert all sections of the facility and notify local fire departments and other emergency responders. These hard-wired smoke detectors should be placed in all resident rooms, public

areas, laundry rooms, kitchens, basements, attics, and utility closets where combustible materials may be stored.

- Enhanced staffing to ensure that the facility and all units within the facility are adequately staffed on all shifts.
- Strict state survey agency monitoring to ensure that all staff on all shifts, including temporary staff, are sufficiently trained in Life Safety Code requirements and oriented to the facility and facility emergency procedures.
- Enhanced state surveys, including Life Safety Code inspections, during the waiver period to ensure the facility complies with all interim safety requirements, including staffing levels.
- Immediate jeopardy citations and appropriate remedies for failure to be in compliance with interim Life Safety Code requirements.

No Waiver of Compliance, Penalties or Liability

Facilities operating under a waiver are not allowed to receive a waiver of liability for any fire-related injuries that occur because the facility did not comply with the August 13, 2013, deadline for the installation of automatic sprinklers.

Enhanced Penalties for Continued Noncompliance

Facilities that do not comply with the requirement by the extended deadline should be assessed with enhanced penalties, such as triple CMPs or denial of payment for new admissions, until sprinklers are fully installed.

We disagree with the statement in the proposed regulations that CMS implemented the automatic sprinkler requirement because “fire safety protections would clearly be improved by ensuring that all facilities be fully sprinklered within a reasonable period of time.” The reason for the requirement was that neither CMS nor the NFPA could any longer avoid acknowledging in regulations what the NFPA had long maintained in its public statements – that the *only* way to prevent multiple deaths when a fire occurs in a nursing home is to install automatic sprinklers.

Thank you for the opportunity to comment.

Sincerely,

Janet C. Wells, on behalf of:

California Advocates for Nursing Home Reform
Legal Aid Justice Center
Long Term Care Community Coalition
The National Consumer Voice for Quality Long-Term Care

