

December 19, 2006

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attn: CMS-3191-P  
P.O. Box 8012  
Baltimore, MD 21244-8012

**Re: Comments on Proposed Rule CMS-3191-P**  
*Including comments on Background, GAO Report, Current Fire Safety Status,  
CMS Action, Installation, and Maintenance*

The International Code Council<sup>®</sup> (ICC<sup>®</sup>) supports the clear enhancement in public safety proposed through this rulemaking by the Department of Health and Human Services (HHS), and offers its observations on issues to be addressed in adopting a final rule.

The ICC is an association of building safety and fire prevention professionals whose membership of 40,000 includes broad representation from local, state and federal public and private sector interests. The ICC mission is to provide the highest quality codes, standards, products, and services for all concerned with the safety and performance of the built environment. This mission and the activities of the ICC directly relate to providing a safe physical environment through the adoption, implementation and use of codes and standards developed by our membership, and through the robust supporting infrastructure ICC provides to aide the effective use of our codes and standards. These codes and standards, and the infrastructure ICC provides, are key means by which the design and building industries work together with building safety and fire prevention authorities in protecting America's built-environment.

The codes developed under the auspices of the ICC, with the participation of all interested and affected parties, serve as a baseline for the design, construction, operation and maintenance of the majority of both public and private sector buildings in the U.S. They are readily recognized and understood by building owners, product manufacturers, designers, contractors, insurance interests, policy decision-makers, code officials and all others involved in building design, construction, approval, and operation. Through their adoption and implementation by federal, state and local government, new and existing buildings are increasingly safer and more responsive to both natural and man-made disasters and other building safety and performance related issues.

For convenience, our comments below are identified with the section titles requested in the Federal Register Notice.

## **Background and GAO Report:**

Amendments made in 1967 to the 1965 statute cited in the rulemaking<sup>1</sup> instructed HHS to apply the Life Safety Code (LSC) in the establishment of uniform minimums in fire-safety and building egress. In 1967, the LSC was employed in the statute to ensure a minimum nationwide level of safety in these basic concerns, but the LSC was not offered as, or recognized to be, a comprehensive building code. In terms of modern regulatory action based on this statute, it is important to recognize that between 1967 and 1994, construction in this country became increasingly guided by comprehensive building codes developed by one of the three U.S. model code development organizations<sup>2</sup>. Since 1994, through the code development partnership and eventual consolidation of those three organizations, commercial construction in the U.S. has grown to be now predominantly guided by a single nationally recognized model building code, creating near national unanimity in model building code use that did not exist in 1967. The ICC believes that the findings used by HHS in demonstrating the development in U.S. policymaking on sprinklering requirements should accurately recognize the leadership in this public safety issue through the comprehensive building codes used in governance of the built-environment by state and local jurisdictions. More specifically, HHS must recognize that State and local jurisdictions were requiring sprinkler systems in long term care facilities decades before the federal government adopted the same requirement.

The Background section includes the statement “*Since adopting and enforcing the 1967 and subsequent editions of the LSC, there has been a significant decline in the number of multiple death fires, indicating that the LSC has been effective in improving fire safety in health care facilities.*”<sup>3</sup> As we explain, this statement is unduly presumptive in ascribing cause and effect, and is also prejudicial to the analysis of input HHS has invited regarding the impact on the authority and concerns of state and local jurisdictions. Multiple-death fires have declined over this period, but this result is more attributable to code adoption and enforcement actions at the state and local level. This achievement is also more attributable to application of a comprehensive building and fire code than to application of the LSC. In the central issue of this rulemaking, the efficacy of automatic fire sprinklers, it was recognized in the Government Accounting Office’s 2004 report on Nursing Home Fire Safety, that an automatic sprinkler system is “regarded as the single most effective fire protection feature.”<sup>4</sup> The proposed rule cites data from that GAO report that there is an “82 percent reduction in the chance of death occurring in a sprinklered building when compared to the chance of death occurring in an unsprinklered building.”<sup>5</sup> The rulemaking omits, however, that this conclusion is drawn from data from 1994 through 1998, a period starting nearly a decade before HHS adopted a sprinkler

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<sup>1</sup> Public Law 97, 89<sup>th</sup> Cong., 1st sess. (30 July 1965)

<sup>2</sup> Building Officials and Code Administrators International, Inc. (BOCA), International Conference of Building Officials (ICBO), and Southern Building Code Congress International, Inc. (SBCCI)

<sup>3</sup> *Federal Register* 71, no. 208 (27 October 2006): 62958

<sup>4</sup> Government Accountability Office, *Nursing Home Fire Safety: Recent Fires Highlight Weaknesses in Federal Standards and Oversight* (16 July 2004), 13.

<sup>5</sup> *Federal Register* 71, no. 208 (27 October 2006): 62959

requirement<sup>6</sup>, and a period when LSC requirements could have only begun to have an effect in mandating sprinkler installations in long term care facilities<sup>7</sup>. This rulemaking should recognize and attribute the predominant source of model building codes used by this country's federal, state and local jurisdictions. Acting on this recognition would also assist HHS in exacting the maximum effectiveness and expediency in combined federal and state administration of Medicare & Medicaid systems.

It is important to recognize that the LSC, authored by the National Fire Protection Association (NFPA), as well as the comprehensive building safety and fire prevention codes developed by our organization, are each offered as model legislation for state, local and federal adoption. As model legislation, the model codes have no effect until adopted by an authority with a defined jurisdiction over building safety and fire prevention. Adopting agencies are those having authority over broad classes of occupancy, such as state and local governments, as well as those, like HHS, whose responsibilities are focused on a limited scope of occupancy and use. Both the ICC and the NFPA are non-governmental organizations which develop model codes and standards that are consistent with the purpose and requirements of the National Technology Transfer and Advancement Act<sup>8</sup>, and, as such, are suitable for federal government adoption.

In terms of HHS' intent to regulate to achieve maximum efficient administration of provisions for building safety, the same 1967 law authorizes HHS to accept a state request to avoid federal/state regulatory overlap and inefficiency through recognition of a state administered fire and safety code as encompassing the same purposes of the federal law. On this point, in HHS' regulatory action in 2003 to adopt the 2000 edition of the Life Safety Code<sup>9</sup>, the agency responded to numerous comments regarding recognition of state adopted codes. In its replies, HHS repeatedly recognized its authority, and in each instance remarked that HHS would responsibly evaluate and respond to requests for this recognition. At present the ICC has a request for recognition by HHS of the adequacy of the I-Codes, the State of Michigan has an application that has been pending HHS review since 2004, and the State of Alaska, in November of 2006, initiated a similar renewal of its request for recognition. For its own part, ICC has met repeatedly with HHS-CMS regarding its request, and is familiar with the multi-year efforts of the State of Michigan regarding timely consideration of its request, but has not been advised of a process or timetable for the review and response to these applications.

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<sup>6</sup> HHS first adopted this requirement in 2003. *Federal Register* 68, no. 7 (10 January 2003): 1374

<sup>7</sup> "In 1991, the NFPA code began requiring full sprinkler coverage for newly constructed nursing homes or for any portion of a home that underwent a substantial renovation." Government Accountability Office, *Nursing Home Fire Safety: Recent Fires Highlight Weaknesses in Federal Standards and Oversight* (16 July 2004), 13. Given a general lag of approximately 18 months for adoption of newly released model codes, the 1991 edition of the LSC, where adopted, could have only begun to have an impact on newly constructed facilities in the time period at question. The 1985 edition of the LSC did include an installation requirement, but was limited in application to new construction of facilities over 75 feet tall. *Federal Register* 66, no. 208, (26 October 2001): 54183

<sup>8</sup> Public Law 113, 104<sup>th</sup> Cong., 2<sup>nd</sup> sess. (7 March 1996)

<sup>9</sup> *Federal Register* 68, no. 7 (10 January 2003): 1374

At the end of the *Background* section of the proposed rule, HHS requests comment on the "...necessity, advantages, and disadvantages of deferring to State and local jurisdictions."<sup>10</sup> The ICC is encouraged that HHS is specifically requesting comments on the issue of federalism, but is concerned about the presumptively conclusive nature of the statement at the end of Section IV that "Federal regulation is the most efficient and expedient manner for achieving the goal of uniform nationwide minimum fire safety standards; therefore, we chose to pursue Federal regulation rather than depending on State and local governments."

ICC recognizes that code requirements are only a part of the overall systems of life safety in a community, and resources and components of life safety system can vary from one jurisdiction to another. These resources include fire response capabilities (staffing, response times, training, etc.), water supply, and other emergency and non-emergency programs. For any federal agency to assume that all jurisdictions have the same overall capability, and, therefore, need the same level of built-in protection, seems unresponsive to those communities that have chosen to provide services in a different manner than a federal agency envisions.

### **Current Fire Safety Status:**

We agree with this section's assessment that "...the low number of fire-related fatalities each year is attributable to the increasing use of automatic sprinklers systems in long term care facilities as a fire protection method."<sup>11</sup> The discussion here, however, offers a sweeping and potentially misleading attribution of this development to the addition of a sprinklering requirement in the 1991 edition of the LSC. If HHS wishes to offer a record for establishment of sprinklering policy it should do so definitively and accurately, and the observations regarding state and local application of the LSC offer conclusions not supported by the data presented or referenced in this rulemaking. HHS itself did not adopt this sprinklering requirement until 2003. As early as 1975 state adopted building codes not only included this provision for new construction, but some were beginning to require existing facilities to be retrofitted with sprinklers. Here it is also important to recognize, in the context of federal rulemaking, that HHS rules did not incorporate a sprinklering requirement for new construction until 2003, thus lagging state policy developments in this area by several decades.

The rulemaking does not present a complete or accurate picture of the policies historically mandating the installation of fire sprinkler systems. Instead, the rulemaking offers simplistic and perhaps misleading assumptions regarding state and local adoptions of the LSC. One example is the assertion that "...a building constructed in 1991 likely met the requirements of the 1991 edition of the LSC."<sup>12</sup> This conclusion is built on the also unsubstantiated observation that "State and local jurisdictions often adopt new

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<sup>10</sup> *Federal Register* 71, no. 208 (27 October 2006): 62960

<sup>11</sup> *Federal Register* 71, no. 208 (27 October 2006): 62959

<sup>12</sup> *Federal Register* 71, no. 208 (27 October 2006): 62959

editions of the LSC when they are published.”<sup>13</sup> To suggest conclusions based on state and local adoptions HHS should offer specific data regarding those adoptions rather than anecdotes. HHS should also accurately represent that any edition of the LSC, like any model code, will not be widely applied in the year of its initial publication given the considerable process that any jurisdiction must undertake in a regulatory or legislative adoption. Additionally, when enacted, most new code edition adoptions have a future effective date so as not to unduly effect projects already permitted, and seldom are made to impact construction already underway.

Although inaccurate in portraying the impact of state and locally adopted building codes, the rulemaking is correct in observing that modern building and fire safety requirements have dramatically reduced incidents of fire fatalities at long-term care facilities. In its consideration of this rulemaking HHS should recognize that these achievements are historically founded on the building safety and fire protection features of comprehensive state and local building and fire codes. In utilizing data presented in this rulemaking, and data from the GAO’s 2004 report on nursing home fires, ICC estimates that 90% of today’s fully sprinklered long term care facilities were newly constructed under state and locally adopted codes before federal rules first reflected a requirement for the installation of automatic fire sprinkler systems in newly constructed or substantially renovated facilities.

**CMS Action:**

The proposed rule would create for the first time a federally imposed requirement for all nursing homes to be fully sprinklered in order to receive compensation for treating Medicare and Medicaid beneficiaries. HHS estimates that of 18,005 facilities across the country, 14,317 (76%) are fully sprinklered, 2,687 (15%) are partially sprinklered and 782 (4%) are not presently sprinklered, and the condition of 5% is unknown. HHS observes that not all states and localities have adopted requirements for all older facilities to be retrofitted, and that the ‘variability’ in this requirement across the country creates a lack of uniformity in protection, thus necessitating this federal action. The ICC recognizes that states and localities do face differing levels of need and ability in addressing the renovation of older facilities with sprinklers, and we encourage considerable attention on comments to be received regarding the “necessity, advantages, and disadvantages of deferring to State and local jurisdictions.”<sup>14</sup>

In overall requirements, as ICC has observed to HHS in this and other comments, the ICC model codes incorporate comprehensive requirements for public safety and property protection that exceed the requirement of the referenced statutes, provide comprehensive governance for the construction and use of the built-environment, and have historically equaled and exceeded the requirements of HHS regulations affecting long term care facilities.

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<sup>13</sup> *Federal Register* 71, no. 208 (27 October 2006): 62959

<sup>14</sup> *Federal Register* 71, no. 208 (27 October 2006): 62960

We agree and support the actions of code adopting authorities – such as HHS - to legally enhance the model code with provisions that purposefully and affordably move beyond minimum requirements of the code. This is the very manner in which, historically, the member jurisdictions of model code development organizations have progressively infused voluntary model code development and adoption processes with superior provisions for public safety and building science. It is in this manner that requirements for full sprinklering of long term care facilities, and most other commercial occupancies, was first incorporated in the model building codes as early as 1975. In 2003, HHS regulations first adopted the already long-standing and widespread state and local requirements for full sprinklering of new facilities. Although HHS regulation may not have been a predominant factor in first advancing requirements for sprinklering new and substantially renovated occupancies, this proposed rule does take the lead, in the greatest reach of HHS’ regulatory authority, in provoking the long term health care industry to renovate or retire America’s non-sprinklered and partially sprinklered facilities.

As a stand alone action, this rulemaking does propose a measure designed to enhance fire safety in long term care facilities. The ICC agrees that for expedience and maximum potential for adoption, this provision should be treated separately from a rulemaking to expansively consider adoption of the 2006 edition of the Life Safety Code. The ICC agrees that a full evaluation of the 2006 LSC is an extensive undertaking, and will involve consideration of numerous and potentially problematic issues far beyond the scope and intent of this rulemaking. ICC observes that “long term health care facilities” are not defined as such in the LSC; we also encourage HHS to fully describe the occupancy classifications of the presently adopted 2000 edition of the LSC with those it will characterize as “long term health care facilities”. This clarification is important in specifically identifying the occupancies addressed in this rulemaking.

**Installation:**

The ICC notes that, consistent with the continued general application of the 2000 edition of the Life Safety Code, HHS proposes to retain that document’s reference to the 1999 edition of NFPA 13. It should be observed that, to a considerable degree, state and locally adopted model codes reference an edition of this standard issued later than the edition proposed to be applied in this rulemaking.

**Maintenance:**

The ICC notes that, consistent with the continued general application of the 2000 edition of the Life Safety Code, HHS proposes to retain that document’s reference to the 1998 edition of NFPA 25. It should be observed that, to a considerable degree, state and locally adopted model codes reference an edition of this standard issued later than the edition proposed to be applied in this rulemaking.

### **Regulatory Impact Statement:**

We believe that the proposed rule is incomplete in its research and presentation of analysis on Federalism as required by President Clinton's Executive Order 13132.<sup>15</sup> The Order states, in part, that "Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means." In its representation on this point, HHS, in a perfunctory statement, simply offers that "This proposed regulation would not have any Federalism implications."<sup>16</sup> This conclusion is belied by the statement in the rulemaking such as "There has been discussion within the larger long term care community about the advantages and disadvantages of Federal, State and local regulation in this area."<sup>17</sup> In this proposed rulemaking, especially in light of statements prejudicial to the role and interests of State and local authority, we believe that HHS should complete its consultation with State and local officials, to review carefully the commentary received on this point, and perfect its analysis in constructing a final rule.

In presenting calculations on the impact of this proposed rule HHS discounts the economic impacts of a federal rule based on a presumption regarding future state adoptions of the 2006 edition of the LSC. The rulemaking asserts that 12 states with present adoptions of the 2003 edition of the LSC will "continue to adopt the most recent version of the LSC."<sup>18</sup>, thus, this federal rule will have no economic impact in those states. We are troubled by the defensibility of analysis in a federal rulemaking that draws conclusions based on presumptions of future independent action by State and local authorities.

The calculation presented under the heading "Decreasing Loss of Life" may also require reevaluation. In this calculation a loss of life percentage (10.8 deaths per 1,000 fires) is derived from historical fire events occurring in unsprinklered facilities<sup>19</sup>. In calculating the expected benefit of this proposed rule, however, this historical percentage for fire-event deaths in unsprinklered facilities is multiplied against a prediction of future annual fire events in a combination of facilities that are unsprinklered, partially-sprinklered, and for which the status is unknown.<sup>20</sup> It should be made clear if the historical data is comparably derived from events at both unsprinklered and partially sprinklered facilities. Even if that is so, the GAO report itself questioned estimates based on counting facilities

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<sup>15</sup> President. Executive Order. "Federalism." *Federal Register* 64, no.153 (10 August 1999): 43255

<sup>16</sup> *Federal Register* 71, no. 208 (27 October 2006): 62965

<sup>17</sup> *Federal Register* 71, no. 208 (27 October 2006): 62960

<sup>18</sup> *Federal Register* 71, no. 208 (27 October 2006): 62967

<sup>19</sup> "In unsprinklered facilities, there are 10.8 deaths per 1,000 fires. In sprinklered facilities, there are 1.9 deaths per 1,000 fires." *Federal Register* 71, no. 208 (27 October 2006): 62965

<sup>20</sup> *Federal Register* 71, no. 208 (27 October 2006): 62965

characterized as “partially sprinklered”, given that the term “covers homes that have very few sprinklers as well as homes that are almost completely sprinklered.”<sup>21</sup>

**Conclusion:**

The ICC reiterates its support for code adopting authorities, such as HHS, to actively investigate and promote the enhancement of the model codes they adopt with affordable provisions that serve to best protect their constituencies. The ICC is encouraged that within the last four years HHS has moved to adopt requirements for sprinklering in new facilities, and is now acting to advance the application of this requirement in all older facilities that are impacted by its governance. The purpose of this proposed rule is consistent with HHS’ duties, and the expenses are arguably then afforded by Medicaid program in reimbursements for Medicaid provided services. The benefits of this enhanced requirement will accrue directly to the safety and well-being of those that reside in, work in and visit these facilities, and will, as well, provide peace of mind for all with loved ones housed in long term care facilities. On the ambition of this proposed rulemaking, and in all measures, the ICC encourages HHS to fully employ and enforce its statutory authority to efficiently and effectively administer the Medicaid & Medicare programs. Consistent with our above stated comments, the ICC encourages the perfection of this rulemaking, and the subsequent adoption of this requirement to its existing rules.

Once again, ICC thanks you for the opportunity to provide input on this important document. Should additional information be needed, or should HHS-CMS want to involve ICC further through our relationship with state and local officials and the building community, please do not hesitate to contact us.

Respectfully submitted by the International Code Council  
Rick Weiland  
Chief Executive Officer

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<sup>21</sup> Government Accountability Office, *Nursing Home Fire Safety: Recent Fires Highlight Weaknesses in Federal Standards and Oversight* (16 July 2004), 16