

We are not allowing any exceptions for roller latches because roller latches are one of our top three deficiencies for life safety. Roller latches that are not properly maintained may be a danger to the health and safety of patients and staff. We have found through our OSCAR data report that doors that include roller latches are consistently one of our most cited deficiencies. In fact, in skilled nursing facilities, roller latches in corridor doors are consistently the number one cited deficiency under our life safety requirements.

We also define all ambulatory facilities as surgery centers regardless of the number of patients they serve. Under § 416.44, ASCs are required to maintain a fully equipped operating room for the types of surgery the ASC conducts for the surgery to be performed in a manner that protects the lives and ensures the physical safety of all individuals in the area. It is imperative that these facilities provide the protection of the Ambulatory Health Care chapter (chapters 20 and 21) rather than the Business Occupancy chapter of the 2000 edition of the LSC that pertains to physician offices or clinics because surgery is being performed in these facilities.

*Comment:* Several commenters opposed the October 2001 proposed rule's carve-out of the roller latch exception provision in the LSC (chapter 19–3.6.3.2 (exception No. 2)). The commenters claimed there is no evidence supporting our carve-out of the roller latch exception.

*Response:* As described above, roller latches that are not properly maintained may be a danger to the health and safety of patients and staff and are consistently one of our most cited deficiencies.

One of the most tragic examples of roller latch failure occurred in the fall of 1989 where a fire claimed 12 lives in a nursing home. In all the rooms where the door was closed and remained closed through out the fire, the patients lived. In the rooms where the door was open or originally closed but bounced open, the patients died. During our investigation, we tested the doors on the floor above the fire origin. We discovered the majority of the doors tested failed to stay closed because of the roller latches. In fact, as a result of the failure of the roller latches in this facility, the 1991 edition of the NFPA LSC prohibited the use of roller latches in new buildings.

Therefore, in this final rule, we are prohibiting the use of roller latches in existing and new buildings except for ASCs under Chapter 20 and Chapter 21. We understand the burden that may be

caused to replace all existing roller latches and will phase-in this requirement over a 3-year period beginning March 11, 2003.

*Comment:* Many commenters supported the proposed rule's carve-out of the roller latch exception in the LSC (chapter 19–3.6.3.2).

*Response:* We appreciate the support. We believe, as discussed in our response to the previous comment, that prohibiting use of roller latches will allow patients and staff to experience the highest degree of fire safety possible.

*Comment:* Several commenters opposed the proposed exception to delete the smoke detector requirement for hospices and nursing facilities. Many believed smoke detectors are an inexpensive requirement for new facilities that provides an extra layer of protection.

*Response:* We agree with these comments and have changed the regulations text to no longer exempt new nursing homes or inpatient hospices from Chapter 18–3.4.5.3 of the LSC. Please note that this requirement does not apply to existing facilities, but only to new nursing homes or inpatient hospices.

#### C. Chapter 5—Performance Based Option

*Comment:* In the October 2001 proposed rule, we solicited comments on whether to adopt chapter 5, the performance based option of the LSC. Most of the comments we received specifically on chapter 5, the performance based option, stated that they had little experience with this option.

The performance based design option in chapter 5 of the LSC translates fire safety goals into performance objectives and performance criteria. Performance based design establishes broad goals and objectives with a team effort. The performance based design is applied to make the building safe as well as functional. The design is specific to the building. Computer fire models and other calculation methods are used in combination with the building design specifications, specified fire scenarios and assumptions to calculate the overall performance criteria and whether it meets the fire life safety goals and is in compliance with the intent of the code.

*Response:* We have decided to include chapter 5, the performance based option provision. We do not expect many providers to choose this option. However, we would like all providers to have the alternative to use the performance based option if the provider believes it would be beneficial for it to comply with the LSC.

Please note that the final rule will also continue to allow two other options besides the prescriptive requirements of the LSC. Health care facilities may choose the FSES, and a facility may apply for a waiver of specific provision of the LSC if it is unable to meet a specific requirement. We may grant a waiver for a specific LSC requirement if (1) we determine that the waiver would not adversely affect patient and staff health and safety; and (2) we determine that it would impose an unreasonable hardship on the facility to meet a specific LSC requirement. A provider may request a waiver from its State agency. The State agency will review the request and make a recommendation to our appropriate regional office. Our regional office will review the waiver request and the State agency's recommendation and make a final decision on the waiver request. We cannot grant a waiver if patient safety is compromised in any way.

#### D. State Codes

*Comment:* One commenter opposes the LSC because it would preempt State or local decision-making authority and create an unfunded mandate.

*Response:* If a State or local authority would rather use its State fire and safety code, this is an allowable option as long as the State fire and safety code is imposed by State law and adequately protects the life and safety of the patients. To request this option, the State must forward the request to its CMS regional office. The CMS regional office will forward the request to the CMS central office where a final determination will be made as to whether the State fire and safety code may be used in place of the NFPA LSC.

We also have retained our authority to waive provisions of the LSC, on a case-by-case basis. We may grant a waiver for a specific LSC requirement if we determine that the waiver would not adversely affect the patient or staff health and safety and it would impose an unreasonable hardship on the facility to meet a specific LSC requirement. If a health care facility would like a waiver for a specific provision in the LSC, the facility must forward the request to their State survey agency. The State agency will review the request, make a recommendation and forward the request to the appropriate CMS regional office. The CMS regional office will review the State agency's recommendation and make a final decision.

*Comment:* Several commenters requested that the October 2001 proposed rule be revised to allow health care facilities to choose other codes that