

Dated: May 1, 2013.

**S.M. Mahoney,**

*Captain, U.S. Coast Guard, Captain of the Port San Diego.*

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 17

RIN 2900-AO62

#### Community Residential Care

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Interim final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) amends its regulations concerning approval of non-VA community residential care facilities to allow VA to waive such facilities' compliance with standards that do not jeopardize the health or safety of residents. Waiver would be authorized in those limited circumstances where the deficiency cannot be corrected to meet a standard provided for in VA regulation. Authorizing this waiver will prevent veterans from needlessly choosing to move out of established and appropriate living situations due to minor deficiencies in standards that cannot be corrected, and into more restrictive and/or costly care. In addition, we make a technical edit to correct a reference to the section addressing requests for a hearing.

**DATES:** *Effective Date:* This interim final rule is effective on May 29, 2013.

*Comment Date:* Comments must be received on or before July 29, 2013.

**ADDRESSES:** Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov); by mail or hand-delivery to Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AO62, Community Residential Care." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov).

#### FOR FURTHER INFORMATION CONTACT:

Nancy Quest, Director, Home and Community Based Services (10P4G), Veterans Health Administration, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461-6064. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** The Community Residential Care (CRC) program is an important component in VA's continuum of care. It operates under the authority of 38 U.S.C. 1730, which, at subsection (a), provides that VA may refer a veteran for placement in a CRC facility if VA is furnishing outpatient medical services or hospital, domiciliary, or nursing home care to the veteran or has furnished the veteran with such care in the preceding 12 months, and placement in a CRC facility is appropriate. Under 38 U.S.C. 1730(b), VA cannot refer a veteran to a CRC facility unless VA approves the facility.

CRC facilities provide room, board, limited personal care, and supervision to veterans who do not require hospital or nursing home care but are unable to live independently because of medical or mental health conditions, and who have insufficient family resources to provide care. The veteran pays for the cost of this living arrangement. VA's contribution is limited to approving CRCs for inclusion on VA's list of approved CRC facilities. As part of the approval process, VA inspects the facility utilizing the criteria listed in 38 CFR 17.63 and conducts post-inspection monitoring. VA provides clinical services, including medical care provided by VA health care professionals, to veterans residing in CRC facilities. A CRC facility may be referred to by different names in various states and settings, such as: Medical Foster Homes, Assisted Living, Personal Care Homes, Family Care Homes, and psychiatric CRC Homes. The CRC program currently approves 826 CRC facilities serving more than 6,100 veterans, accounting for more than 398,000 bed days of care per calendar quarter.

VA's regulations governing the CRC program appear at 38 CFR 17.61 through 17.72. Decisions regarding approval of CRC facilities are made by an approving official at a local VA medical center level. The term "approving official" is defined at § 17.62(e) as a Director of a VA Medical Center or Outpatient Clinic which has jurisdiction to approve the CRC facility, or other medical center officials listed in that section who may be designated by the Director. As provided in § 17.65(a), the approving official may approve a CRC facility, based on the report of a VA inspection

and any findings of necessary interim monitoring of the facility, if the facility meets the standards listed in § 17.63. The standards found in § 17.63 cover a wide variety of issues related to health and safety as well as quality of life, environment, and administrative requirements. For example, § 17.63 provides standards for fire safety, heating and air conditioning, interior building plans, laundry service, size and furnishing requirements for the residents' bedrooms, nutrition, activities, residents' rights, and staffing and administrative requirements. The current regulation requires CRCs to meet all of these standards before an approving official may grant approval of a CRC facility.

Under § 17.65(b), if there is an identified deficiency that does not jeopardize the health or safety of the residents, the CRC facility may obtain provisional approval if the deficiency can be corrected and VA and the facility agree on a plan to correct the deficiency. If the deficiency is not corrected per the agreement, the provisional approval is terminated, as provided in §§ 17.66 through 17.71. Upon revocation of VA approval for a CRC facility, VA is required to cease referring veterans to the CRC facility, notify any veteran residing in the facility that VA has disapproved the facility, and request permission to assist in the veteran's removal if the veteran chooses to leave.

There currently is no provision whereby VA may waive a standard delineated in § 17.63. However, VA has determined that there may be instances in which a CRC facility may have a minor deficiency that cannot be corrected but which does not jeopardize the health or safety of resident veterans. We find that it is appropriate to provide a mechanism to waive the standard applicable to that minor deficiency and authorize approval of the CRC facility under § 17.65(a) or (b). An example of an instance in which a waiver would be appropriate would involve a CRC facility that would qualify for full approval but for the fact that a single-resident room measures slightly less than 100 square feet (as required under § 17.63(e)(2)), and the deficiency cannot be corrected without compromising the structural integrity of the facility. Waiver would be appropriate in this instance in order to ensure that a veteran is not discouraged from using an appropriate CRC facility located near his or her home, or to otherwise avoid more restrictive and/or costly care.

This interim final rule amends § 17.65 by adding a new paragraph (d) providing that VA may waive a standard found in § 17.63 for the approval of a

particular CRC facility if the deficiency does not jeopardize the health or safety of the residents, and the deficiency cannot be corrected as provided for in § 17.65(b). VA may grant a waiver of a standard applicable to the facility if the VA safety expert certifies that the deficiency does not endanger the life or safety of the residents; the deficiency cannot be corrected; and it is in the best interests of the veteran and VA's CRC program. The first two criteria in a waiver determination are objective; however, it is important for VA to retain some discretion in rare cases where waiving a particular standard would not be in the best interests of a particular veteran in the facility or the overall interests of VA's CRC program. We believe that this last criterion would be used to deny a waiver only in rare circumstances. For example, if a newly purchased CRC facility has a window defect that cannot be corrected due to the effect of the correction on the rest of the structure, but the facility should have been aware of the deficiency when it purchased the structure, it might be against the interests of the CRC program to authorize a waiver. Or, if a facility cannot meet a standard related to the quality of life for its residents but waiving that standard will have a negative impact on a veteran, VA might not authorize the waiver. Again, we believe that waivers will be appropriate in the majority of cases when the deficiency does not endanger the life or safety of residents and do not envision using this last criterion to deny waivers in many cases. Additionally, we note that, if needed to make a waiver eligibility determination, the VA safety expert may request supporting documentation from the CRC facility.

Under paragraph (d)(2), the subject standard is deemed to have been met once the waiver is granted. During the period the waiver is valid and in place, VA will document the existence of the waiver as well as the date it was issued on the facility's annual survey. Under paragraph (d)(3), the waiver remains valid so long as the CRC facility remains in the program continuously without a break. However, VA may, on the recommendation of an approving official, rescind a waiver issued under this section if a VA inspector determines that there has been a change in circumstances and that the deficiency can now be corrected, or a VA safety expert finds that the deficiency jeopardizes the health and safety of residents.

Finally, we make a technical edit to § 17.66. This section details notice requirements if the hearing official determines that a CRC facility is not

compliant with VA standards. Current paragraph (c) of § 17.66 cross-references § 17.51n for community residential care facilities to request oral or paper hearings before VA approval is revoked. On May 13, 1996, 61 FR 21965, VA redesignated § 17.51n as § 17.67. We are removing the reference to § 17.51n and adding, in its place, § 17.67.

#### **Effect of Rulemaking**

Title 38, Code of Federal Regulations, as revised by this interim final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures on this subject are authorized. All VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

#### **Administrative Procedure Act**

In accordance with 5 U.S.C. 553(b)(B), the Secretary of Veterans Affairs has concluded that ordinary notice and comment procedures would be impracticable and contrary to the public interest, and is accordingly issuing this rule as an interim final rule. This interim final rule is necessary to address an immediate need to provide a mechanism that will allow VA to grant a waiver to a CRC facility that cannot obtain full approval because of a minor deviation from regulatory standards that cannot be corrected and does not endanger the lives or safety of the veteran residents. Although approval would be rescinded because of a minor and uncorrectable deviation from standards unrelated to health or safety, veterans may be dissuaded from maintaining their residence in such facility. Providing a waiver in that circumstance will preclude the need to terminate a CRC facility's approval based on an uncorrectable minor deviation from non-safety related standards. This eliminates the potential that resident veterans will needlessly choose to leave an otherwise healthy, safe, and suitable living arrangement. Current regulations do not provide for any waiver of standards. An example of where a waiver may be appropriate is a CRC facility with a resident bedroom that is slightly smaller than the required 100 square feet of floor area for a single-resident room. Resident bedroom size is a quality of life rather than a health or safety standard. It is in the public interest for a veteran not to be removed from a stable living situation based solely on a minor deviation from

standards that does not threaten life or safety.

To prevent veterans from needlessly choosing to leave affected CRC facilities because the facilities are no longer on the approved list, and in order to ensure timely implementation of the program established by this rule, and for the reasons stated above, the Secretary also finds, in accordance with 5 U.S.C. 553(d)(3), good cause for this interim final rule to be effective on the date of publication.

#### **Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

#### **Paperwork Reduction Act**

This interim final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521). Documentation that a VA safety expert may request from a community residential care facility to support a waiver determination, as provided under 38 CFR 17.65(d)(1), would not qualify as “information” under the PRA because collection of this information would be conducted on an individual case-by-case basis and would require individualized information pertaining to the specific deficiency identified by the VA safety expert. We believe that this collection is therefore exempt from the PRA requirements, as provided under 5 CFR 1320.3(h)(6) (excluding from PRA requirements a “request for facts or opinions addressed to a single person”).

#### **Regulatory Flexibility Act**

The Secretary hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This interim final rule will have little, if any, economic impact on a few small entities. VA may waive a standard under this rulemaking provided a VA safety expert certifies that the deficiency does not endanger the life or safety of the residents, the deficiency cannot be corrected, and granting the waiver is in the best interests of the veteran in the

facility and VA's CRC program. In order to reach the above determinations, the VA safety expert may request supporting documentation from the CRC facility. VA believes supplying this information will constitute an inconsequential amount of the operational cost for those CRC facilities. VA believes that, at most, only a few CRC facilities would qualify for a waiver. On this basis, the Secretary certifies that the adoption of this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action" requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant

regulatory action under Executive Order 12866.

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; and 64.022, Veterans Home Based Primary Care.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Interim Chief of Staff, approved this document on May 8, 2013, for publication.

#### List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Government programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Dated: May 22, 2013.

**William F. Russo,**

*Deputy Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.*

For the reasons stated in the preamble, VA amends 38 CFR part 17 as set forth below:

#### PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 38 U.S.C. 501, and as noted in specific sections.

■ 2. Section 17.65 is amended by adding paragraph (d) to read as follows:

#### § 17.65 Approvals and provisional approvals of community residential care facilities.

\* \* \* \* \*

(d)(1) VA may waive one or more of the standards in 38 CFR 17.63 for the approval of a particular community

residential care facility, provided that a VA safety expert certifies that the deficiency does not endanger the life or safety of the residents; the deficiency cannot be corrected as provided in paragraph (b) of this section for provisional approval of the community residential care facility; and granting the waiver is in the best interests of the veteran in the facility and VA's community residential care program. In order to reach the above determinations, the VA safety expert may request supporting documentation from the community residential care facility.

(2) In those instances where a waiver is granted, the subject standard is deemed to have been met for purposes of approval of the community residential care facility under paragraphs (a) or (b) of this section. The waiver and date of issuance will be noted on each annual survey of the facility as long as the waiver remains valid and in place.

(3) A waiver issued under this section remains valid so long as the community residential care facility operates continuously under this program without a break. VA may, on the recommendation of an approving official, rescind a waiver issued under this section if a VA inspector determines that there has been a change in circumstances and that the deficiency can now be corrected, or a VA safety expert finds that the deficiency jeopardizes the health and safety of residents.

\* \* \* \* \*

■ 3. Section 17.66, paragraph (c) is amended by removing "\$ 17.51n" and adding, in its place, "\$ 17.67".

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BILLING CODE 8320-01-P

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 17

RIN 2900-AN99

#### VA Dental Insurance Program

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) amends its regulations to establish rules and procedures for the VA Dental Insurance Program (VADIP), a pilot program that offers premium-based dental insurance to enrolled veterans and certain survivors and dependents of veterans. Under the pilot program, VA will contract with a private insurer, through the Federal contracting