

(9) Gas/Electric Coordination (WEQ-011, Version 002.1, March 11, 2009, with minor corrections applied May 29, 2009 and September 8, 2009);

(10) Public Key Infrastructure (PKI) (WEQ-012, Version 002.1, March 11, 2009, with minor corrections applied May 29, 2009 and September 8, 2009); and

(11) Open Access Same-Time Information Systems (OASIS) Implementation Guide, Version 1.5 (WEQ-013, Version 002.1, March 11, 2009, with minor corrections applied May 29, 2009 and September 8, 2009).

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 17

RIN 2900-AM82

#### Community Residential Care Program

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document amends the Department of Veterans Affairs (VA) Community Residential Care regulations to update the standards for VA approval of facilities, including standards for fire safety and heating and cooling systems. This rule also establishes a 12-month duration for VA approvals and would authorize provisional approval of certain facilities. Finally, this rule eliminates the statement of needed care requirement and clarifies that it is the care providers at the facility that determine the services needed by a particular veteran.

**DATES:** Effective Date: This amendment is effective January 4, 2010. The Director of the Federal Register approved the incorporation by reference of certain publications listed in this rule as of January 4, 2010.

**FOR FURTHER INFORMATION CONTACT:** Daniel Schoeps, Office of Geriatrics and Extended Care Services (114), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (202) 461-6763. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** In a document published in the **Federal Register** on November 26, 2008 (73 FR 71999), VA proposed to amend its community residential care regulations, which are codified at 38 CFR 17.61 through 17.72. The regulations implement 38 U.S.C. 1730, which provides that VA health care personnel

may assist veterans by referring them for placement in a privately or publicly-owned community residential care facility if certain criteria are met. As a condition of approval, the regulations require facilities to meet industry-wide fire safety standards and to have safe and functioning systems for heating. We proposed to amend the regulations to update the standards for VA approval of community residential care facilities and clarify program requirements.

We received two comments on the proposed rule. Both commenters fully supported the proposed rule and discussed generally the importance of VA's requirement that community residential care facilities comply with certain provisions of the National Fire Protection Association (NFPA) 101, Life Safety Code (2006 edition), and the NFPA 101A, Guide on Alternative Approaches to Life Safety (2007 edition). We are grateful to the commenters for their submissions, and make no changes based on the comments.

This final rule amends § 17.63 to ensure that veterans who are placed in privately or publicly owned community residential care facilities are provided safe living conditions by making VA's approval contingent upon a facility's implementation of the NFPA fire safety guidelines in chapters 1-11, 32-33, 43, and Annex A of the NFPA 101, NFPA's Life Safety Code Handbook, Tenth Edition (2006 edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (2007 edition). These documents are incorporated by reference in this final rule in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Further, the final rule amends § 17.63(a)(3) to require safe and functioning heating and cooling systems. VA intends that facilities will meet the standard for heating and cooling systems in the county, parish, or other similar jurisdiction where a facility is located. These provisions will help to ensure that veterans referred by VA to an approved facility for community care are provided with safe and comfortable living conditions.

The final rule removes the "statement of needed care" requirement in § 17.63(b) and (i)(2)(i) for veterans referred by VA to a community residential care facility. We are removing this requirement because VA does not determine or control the care that is provided to a veteran in an approved facility under this program. This amendment clarifies that VA relies on the health care professionals employed by the facility and facility officials to determine the care that a particular veteran needs.

We are also removing § 17.64, which prescribes exceptions to VA standards for community residential care facilities that participated in VA's program prior to the effective date of regulations promulgated in 1989. There are no facilities that currently qualify for the exceptions and there are no facilities that could qualify for an exception in the future.

Regarding VA approval of facilities, we clarify that such approvals shall be for a 12-month period if all the standards in § 17.63 are met. We also clarify that VA may grant a provisional approval if the facility does not meet one or more of the standards in § 17.63, provided that the deficiencies do not jeopardize the health or safety of the residents and that the facility management and VA have agreed to a plan for correcting any deficiencies in a specified amount of time. The provisional approval provision allows VA to continue recommending facilities with temporary deficiencies when it is in the best interest of residents to do so. These amendments will help to ensure that approvals are based on current information and, given VA's practice of inspecting each facility at least once in each 12-month period, should not impose an additional burden on VA or on facilities.

#### 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 an expenditure by the State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This final rule will have no such effect on State, local and tribal governments, or on the private sector.

#### Executive Order 12866

Executive Order 12866 directs agencies to assess all 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, and other advantages; distributive impacts; and equity). The Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB), 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, State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action planned or taken 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 the Executive Order.

The economic, interagency, legal and policy implications of this final rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

#### Paperwork Reduction Act

This document contains no collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

#### Regulatory Flexibility Act

The Secretary hereby certifies that this final rule would 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. The final rule would have an insignificant economic impact on a few small entities. The final rule would likely affect fewer than 100 of the 2,800 community residential care facilities approved for referral of veterans under the regulations. Also, the additional costs for compliance with the final rule would constitute an inconsequential amount of the operational costs of such facilities. Accordingly, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.005, Grants to States for Construction of State Home Facilities; 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; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence and 64.022, Veterans Home Based Primary Care.

#### 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, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Incorporation by reference, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, veterans.

Approved: November 13, 2009.

**John R. Gingrich,**

*Chief of Staff, Department of Veterans Affairs.*

■ For the reasons stated in the preamble, VA amends 38 CFR part 17 as follows:

#### PART 17—MEDICAL

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

**Authority:** 38 U.S.C. 501, 1721, and as stated in specific sections.

#### § 17.62 [Amended]

■ 2. Amend § 17.62 by removing paragraph (b) and redesignating paragraphs (c) through (g) as paragraphs (b) through (f), respectively.

■ 3. Amend § 17.63 by:

■ a. In paragraph (a)(2), removing “Office of Regulations Management (02D), Room 1154,” and adding, in its place, “Office of Regulation Policy and Management (02REG), Room 1068,” by removing “20420,” and adding, in its place, “20420, 202–461–6750,” and by revising the first sentence.

■ b. Revising paragraph (a)(3).

■ c. Removing and reserving paragraph (b).

■ d. In paragraph (g), removing “specified in the statement of heeded care”.

■ e. In paragraph (i), removing paragraph (i)(2)(i) and redesignating paragraphs (i)(2)(ii) and (i)(2)(iii) as paragraphs (i)(2)(i) and (i)(2)(ii), respectively.

The revisions read as follows:

#### § 17.63 Approval of community residential care facilities.

\* \* \* \* \*

(a) \* \* \*

(2) Meet the requirements of chapters 1–11, 32–33, and 43 and Annex A of the NFPA 101, the National Fire Protection Association's Life Safety Code Handbook, Tenth Edition (2006 Edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (2007 Edition). \* \* \*

(3) Have safe and functioning systems for heating and/or cooling, as needed (a heating or cooling system is deemed to be needed if VA determines that, in the county, parish, or similar jurisdiction where the facility is located, a majority of community residential care facilities or other extended care facilities have one), hot and cold water, electricity, plumbing, sewage, cooking, laundry, artificial and natural light, and ventilation.

\* \* \* \* \*

#### § 17.64 [Removed]

■ 4. Remove and reserve § 17.64.

■ 5. Revise § 17.65 to read as follows:

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

(a) An approval of a facility meeting all of the standards in 38 CFR 17.63 based on the report of a VA inspection and any findings of necessary interim monitoring of the facility shall be for a 12-month period.

(b) The approving official, based on the report of a VA inspection and on any findings of necessary interim monitoring of the facility, may provide a community residential care facility with a provisional approval if that facility does not meet one or more of the standards in 38 CFR 17.63, provided that the deficiencies do not jeopardize the health or safety of the residents, and that the facility management and VA agree to a plan of correcting the deficiencies in a specified amount of time. A provisional approval shall not be for more than 12 months and shall not be for more time than VA determines is reasonable for correcting the specific deficiencies.

(c) An approval may be changed to a provisional approval or terminated under the provisions of §§ 17.66 through 17.71 because of a subsequent failure to meet the standards of § 17.63 and a provisional approval may be terminated under the provisions of §§ 17.66 through 17.71 based on failure to meet the plan of correction or failure otherwise to meet the standards of § 17.63.

(Authority: 38 U.S.C. 1730)

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