

appeal of the determination to the Department. Adverse determinations include denials of access to agency records, in whole or in part; "no agency records" responses; and adverse fee decisions, including denials of requests for fee waivers, and all aspects of fee assessments.

(b) *Appeal requirements.* A requester must submit an appeal within 35 calendar days of the date on the adverse determination letter issued by the Department or, where the requester has received no determination, at any time after the due date for such determination. An appeal must be in writing and must include a detailed statement of all legal and factual bases for the appeal. The requester's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(c) *Determination on appeal.* (1) The Department makes a written determination on an administrative appeal within 20 working days after receiving the appeal. The time limit may be extended in accordance with § 5.21(c) through (e). The Department's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(2) The Department's determination on an appeal constitutes the Department's final action on the FOIA request. Any Department determination denying an appeal in whole or in part includes the reasons for the denial, including any exemptions asserted under the Act, and notice of the requester's right to seek judicial review of the determination in accordance with 5 U.S.C. 552(a)(4). Where the Department makes a determination to grant an appeal in whole or in part, it processes the FOIA request subject to the appeal in accordance with the determination on appeal.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(6), 20 U.S.C. 3474)

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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: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its Community Residential Care regulations to update the standards for VA approval of facilities, including standards that would be adopted for fire safety and heating and cooling systems. This rule would also establish a single 12-month duration for VA approvals and would authorize provisional approval of certain facilities. Finally, this rule would eliminate the VA statement of needed care requirement in current regulations and clarify that it is the care providers at the facility that determine the services needed by a particular veteran. VA intends that the proposed amendments would help ensure that veterans are provided appropriate care at facilities that receive VA referrals.

DATES: *Comment Date:* Comments on the proposed rule must be received on or before January 26, 2009.

ADDRESSES: Written comments may be submitted through <http://www.regulations.gov>; by mail or hand-delivery to the Director, Regulations 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-AM82—Community Residential Care Program." Copies of comments received will be available for public inspection in the Office of Regulations Management, Room 1063B, between the hours of 8 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 <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Daniel Schoeps, Office of Geriatrics and Extended Care (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: This document proposes to amend the Community Residential Care regulations (referred to below as the regulations), which are set forth at 38 CFR 17.61 through 17.72. The regulations implement 38 U.S.C. 1730.

Under the provisions of 38 U.S.C. 1730, VA health care personnel may assist a veteran by referring such veteran for placement in a privately or publicly-

owned community residential care facility if:

- At the time of initiating the assistance, the veteran is receiving VA medical services on an outpatient basis or receiving care at a VA medical center, domiciliary, or nursing home; or such services or care were furnished to the veteran within the preceding 12 months;
- Placement of the veteran in a community residential care facility is appropriate; and
- The facility has been approved in accordance with the regulations.

This program has evolved through the years to encompass: Medical Foster Homes, Assisted Living facilities, Personal Care Homes, Family Care Homes, and Psychiatric Community Residential Care Homes. Care must consist of room, board, assistance with activities of daily living, and supervision as determined on an individual basis. The cost of residential care is financed by the veteran's own resources. Placement is made in residential settings inspected and approved by the appropriate VA facility, but chosen by the veteran.

Approval of Community Residential Care Facilities

As a condition of approval in the community residential care program, current 38 CFR 17.63 requires that a facility meet the requirements of chapters 1-7, 22-23, 31, and Appendix A of the National Fire Protection Association (NFPA) 101, NFPA's Life Safety Code (1994 edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (1995 edition). The Office of the Federal Register approved our incorporation by reference of the NFPA Code and Guide in current § 17.63 under 5 U.S.C. 552(a) and 1 CFR part 51. We propose to amend § 17.63 to require community residential care facilities seeking VA approval to meet the requirements of chapters 1-11, 32-33, and 43 and Appendix A of the NFPA 101, the NFPA's Life Safety Code (2006 edition), and NFPA 101A, Guide on Alternative Approaches to Life Safety (2007 edition). These changes reflect updates regarding the same subject matter that is currently incorporated by reference. This action is necessary to ensure that facilities meet current industry-wide standards regarding fire safety. We will request that the Office of the Federal Register approve our incorporation by reference of the updated NFPA Code and Guide in proposed § 17.63.

These materials for which we are seeking incorporation by reference are available for inspection at the Department of Veterans Affairs, Office

of Regulations Management (02REG), Room 1068, 810 Vermont Avenue, NW., Washington, DC 20420, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to: <http://www.archives.gov/federal-register/code-of-federal-regulations/ibr-locations.html>. Copies may be obtained from the National Fire Protection Association, Battery March Park, Quincy, MA 02269. (For ordering information, call toll-free 1-800-344-3555.)

As a condition of approval, current 38 CFR 17.63(a)(3), among other things, requires facilities to have safe and functioning systems for heating. We propose to amend § 17.63 to require facilities seeking VA approval to have safe and functioning systems for "heating and/or cooling, as needed." We also propose to add language indicating that, in the county, parish, or similar jurisdiction where the facility is located, a heating or cooling system is deemed to be needed if VA determines that a majority of community residential care facilities and other extended care facilities have one. We have determined that safe and functioning heating and cooling would be needed in some facilities to avoid extremes in temperature that might impair the care provided to veterans referred by VA. Some facilities may not need heating and other facilities may not need cooling to properly care for referred veterans. In any event, we believe that if a majority of the community residential care facilities and other extended care facilities in the county, parish, or other similar jurisdiction where the facility is located have a heating or cooling system, this would be a good indication that it is needed to avoid extremes in temperature and should be available to provide comfortable living conditions for approved facilities.

Current 38 CFR 17.63(b) and (i)(2)(i) prescribe preparation of a statement of needed care for each veteran referred by VA to a facility for community residential care and that the facility must maintain a copy of the statement and assist residents in obtaining the statement from VA. Current 38 CFR 17.62(b) defines *statement of needed care* as a "written description of needed assistance in daily living activities devised by VA." We propose to amend §§ 17.62 and 17.63 to remove all of the provisions concerning statements of needed care. These amendments are necessary to clarify that VA does not determine or control the care that is provided to a veteran in an approved

facility under this program. Rather, it is the health care professionals employed by the facility and other facility officials that determine the care that is needed for a particular veteran.

Exceptions to Standards in Community Residential Care Facilities

Current 38 CFR 17.64 prescribes exceptions to standards in community residential care facilities. This section provides criteria for utilizing or obtaining a "grandfather" clause for continued approval of facilities that participated in VA's community residential care program prior to the effective date of the regulations in 1989. There are no facilities that currently qualify for these exceptions and there are no facilities that could qualify for an exception in the future. Accordingly, we propose to remove § 17.64 because it is no longer relevant for the community residential care program.

Duration of Approval

Under current 38 CFR 17.65, facility approvals may be valid for up to 24 months if all the standards in § 17.63 are met. It also provides that facility approvals may be valid for shorter periods (15 months, 12 months, and 9 months) when VA finds specific deficiencies. We propose to amend the approval provisions to prescribe only that facility approvals would be valid for 12 months if inspections and monitoring establish that all the standards in 38 CFR 17.63 are met. This will help to ensure that approvals are based on more current information and should not impose an additional burden on VA or on facilities since our practice has been to inspect each facility at least once in each 12-month period. We also propose to change the approval provisions to state that, based on the report of a VA inspection and on any findings of necessary interim monitoring of the facility, the approving official may provide a community residential care facility with a provisional approval if the 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 have agreed to a plan for correcting any deficiencies in a specified amount of time. Under the proposal, a provisional approval would not be for more than 12 months, and would not be for more time than VA determines is reasonable for correcting the specific deficiencies. The provisional approval would allow VA to continue recommending facilities with some temporary deficiencies when it is in the best interest of residents to do so.

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 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 rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

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

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 Executive Order classifies a "significant regulatory action," requiring review by 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 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, economic, legal, and policy implications of this proposed rule have been examined and it has been determined to be a not significant regulatory action under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed 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. In addition to having an effect on individuals (veterans), the proposed

rule would have an insignificant economic impact on a few small entities. The proposed 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 proposed 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; 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: September 19, 2008.

James B. Peake,
Secretary of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 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, 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,” 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 needed 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 Appendix A of the NFPA 101, the National Fire Protection Association’s Life Safety Code (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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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2007–0209; FRL–8745–5]

Approval and Promulgation of Implementation Plans; Texas; Revisions to Chapters 39, 55, and 116 Which Relate to Public Participation on Permits for New and Modified Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing simultaneous limited approval and limited disapproval of revisions to the applicable implementation plan for the State of Texas which relate to public participation on air permits for new and modified sources. With noted exceptions, this proposed limited approval and limited disapproval affects portions of SIP revisions submitted by Texas on December 15, 1995; July 22, 1998; and the SIP revisions submitted October 25, 1999. EPA is taking comments on this proposal and plans to follow with a final action.

DATES: Any comments must arrive by January 26, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2007–0209, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.