



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AP06

Ensuring a Safe Environment for Community Residential Care Residents

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as final, with changes, a proposed rule governing the approval of a community residential care facility (CRC). The final rule prohibits a CRC from employing an individual who has been convicted in a court of law of certain listed crimes within 7 years of conviction, or has had a finding within 6 months entered into an applicable State registry or with the applicable licensing authority concerning abuse, neglect, mistreatment of individuals or misappropriation of property. The CRC is required to conduct an individual assessment of suitability for employment for any conviction or finding outside either the 7 year or 6 month parameters. The CRCs is also required to develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property. The CRC must report and investigate any allegations of abuse or mistreatment. The CRC must also screen individuals who are not CRC residents, but have direct access to a veteran living in a CRC. In addition, we are amending the rule regarding the maximum number of beds allowed in a resident's bedroom. VA published the proposed rule on November 12, 2015, and we received four public comments. We also received correspondence from a federal agency with

recommendations. This final rule responds to public comments and feedback from that federal agency.

DATES: This rule is effective on [insert date 30 days after date of publication in the FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Dr. Richard Allman, Chief Consultant, Geriatrics and Extended Care Services (10P4G), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 461-6750. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA is authorized under 38 U.S.C. 1730 to assist veterans by referring them for placement, and aiding veterans in obtaining placement, in a community residential care facility (CRC). A CRC is a form of enriched housing that provides health care supervision to eligible veterans who do not need hospital or nursing home care, but who, because of medical, psychiatric and/or psychosocial limitations as determined through a statement of needed care, are unable to live independently and have no suitable family or significant others to provide the needed supervision and supportive care. VA maintains a list of approved CRCs. The cost of community residential care is financed by the veteran's own resources. A veteran may elect to reside in any CRC he or she wants; however, VA will only recommend CRCs that apply for approval and meet VA's standards. Once approved, the CRC is placed on VA's referral list and VA refers veterans for whom CRC care is an option to the VA-approved CRCs when those veterans are determining where they would like to live.

VA published regulations governing CRCs at title 38 Code of Federal Regulations (CFR), §§ 17.61-17.72. Standards for approval of CRCs are found at §

17.63. On November 12, 2015, VA published a proposed rule that would amend these standards. 80 FR 69909. Under the proposed rule, a CRC would be prohibited from employing an individual who has been convicted in a court of law of certain listed crimes, or has had a finding entered into an applicable State registry or with the applicable licensing authority concerning abuse, neglect, mistreatment of individuals or misappropriation of property. VA also proposed to require CRCs to develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property. The proposed rule would have also required CRCs to report and investigate any allegations of mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property. In addition, the proposed rule would require the CRC to screen individuals who are not CRC residents, but have direct access to a veteran living in a CRC. The proposed revisions would improve the safety and help prevent the neglect or abuse of veteran residents in CRCs. In addition, we proposed to amend the rule regarding the maximum number of beds allowed in a resident's bedroom.

The comment period for this proposed rule closed on January 11, 2016. We received four public comments which generally supported the proposed rule, but recommended several changes. In addition, we received a letter from the U.S. Equal Employment Opportunity Commission (EEOC) suggesting amendments to the proposed rule to avoid potential conflicts with Title VII of the of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), as amended (Title VII). Upon review, VA has determined that it will adopt the proposed rule as final, with changes that are discussed below. These changes are related to elements added to the proposed rule, and some paragraphs that

were in the proposed rule have been redesignated as a result. We have grouped the comments and responses into discrete subject areas.

State-related issues

One commenter raised several issues related to actions states may be required to take as a result of the proposed rule. As we discuss in greater detail below, this rulemaking imposes no requirements on states.

The commenter stated that many states will likely face challenges in implementing the new rule, and that VA should allow states flexibility in the specific details of their program and implementation time. The commenter also stated that some states may not include CRCs as “covered facilities” and state laws would have to be amended. In addition, the commenter noted that states do not define “employee” the same for purposes of requiring background checks. Given the issues of passing enabling state legislation, obtaining approval in states with rigorous information technology (IT) project reviews, and developing IT system interfaces with external partners, the commenter suggested that VA specify a timeframe for implementing the background check component of this rule. In addition, the commenter stated that the VA rule should designate a state agency to coordinate and make employment eligibility determinations for all CRCs in that state. The commenter noted that a state agency may receive rap-back notification of arrests from state law enforcement departments, and that arrest information may not be passed on to employers in some cases. However, state determination analysts could monitor and resolve the eligibility

status of the subject applicant or employee. The commenter listed several efficiencies that would be achieved by adopting this process.

The common thread in this series of comments is the potential impact this rulemaking will have on states. However, states are not mandated to pass any legislation, publish regulations, initiate any IT projects, or take any other action related to this rulemaking. Nor is this rulemaking such that VA would consider obligating a state to expend resources to coordinate and make employment eligibility determinations for all approved CRCs in the state. The section of part 17 that is being amended addresses standards that a CRC must meet to be listed by VA as an approved CRC, and all regulatory requirements are directed to the CRC operator, which is typically not a state entity. The rulemaking prohibits the CRC from employing an individual who has been convicted by a court of law of abusing, neglecting, or mistreating individuals within 7 years, or an individual who has had a finding entered into an applicable State registry or with the applicable licensing authority concerning abuse, neglect, mistreatment of individuals or misappropriation of property within 6 months. As we noted when we proposed this rule, many states have programs in place that the CRC can use to assist in complying with this requirement (80 FR 69909, 69910 (November 12, 2015)). In those states where no program is in place, we are not requiring the states to take any legislative or programmatic action. The CRC must identify an alternative means to meet the regulatory requirement. We make no changes based on these comments.

Standards for criminal history checks

One commenter stated that VA should require comprehensive background checks, including fingerprint-based criminal history checks and both state and Federal Bureau of Investigation (FBI) criminal history checks. The commenter also suggested that VA should require electronic fingerprinting to increase efficiency of that comprehensive criminal history check.

We agree that a criminal history check based on fingerprints is the gold standard, and that electronic fingerprinting increases the efficiency of a comprehensive criminal history check. However, it is unclear to VA whether fingerprinting services, and a criminal history check based on those fingerprints, can be requested or easily obtained by all approved CRCs in all states or localities; and, if so, the costs that would be incurred by a CRC related to such services. It is also unclear whether requiring fingerprints in this case would result in an outcome different than that contemplated under this rulemaking. VA will continue to review this issue, and may propose changes in the future based on additional data. We make no changes at this time based on this comment.

One commenter stated that VA should consider instituting a rap-back requirement and a validity period for criminal history checks. Rap-back is the process for notifications and review in the event that a previously cleared direct access worker is then subsequently arrested or convicted of a crime. The commenter asserted that in a 12-month period, one state participating in the Centers for Medicare and Medicaid Services' National Background Check Program received 9,500 criminal history notifications from state law enforcement agencies for "cleared" long term care

employees. Based on these notifications, 1,260 (13 percent) resulted in employees being determined ineligible for continued employment in direct access positions.

VA considered both issues when developing this rulemaking. Rap-back requires a system that remains in place and continuously monitors any change in status of an individual for which a criminal history check has been completed. The system would also have to include a mechanism for communicating to the CRC any change in status. To our knowledge, this type of system is not readily available to all CRC operators. One example of an existing rap-back initiative is operated by the FBI as part of its Next Generation Identification program. The FBI's rap-back service is available only to authorized state or federal agencies. Also, VA has insufficient information to determine whether a rap-back system would result in an outcome different than that contemplated under this rulemaking. VA will continue to review this issue, and may propose changes in the future based on additional data. We make no changes at this time based on this comment. Regarding the issue of imposing a validity period for criminal history checks, under § 17.63 a CRC is required to maintain compliance with regulatory standards in order to continue to be listed by VA as an approved facility. The approving official inspects each CRC at least annually, and ensuring that CRC staff is qualified to be employed in the CRC is one element of that inspection. Given this requirement, VA believes that establishing a validity period for criminal history checks is unnecessary. We make no changes based on this comment.

One commenter stated that VA should consider expanding the list of registries reviewed as part of the background check process. The commenter suggested that, at a minimum, the background check should include searches of the in-state nurse aide

registry and any out-of-state nurse aide registry as appropriate; professional licensing registries; the U.S. Department of Health and Human Services List of Excluded Individuals/Entities; state child abuse and adult abuse registries; and, state and national sex offender registries.

Under §17.63(j)(3)(i)(A)(2) of the proposed rule, we stated that a CRC provider must not employ an individual who has had a finding entered into an applicable State registry or with the applicable licensing authority concerning abuse, neglect, mistreatment of individuals or misappropriation of property. While we noted examples of applicable State registries in our discussion of this paragraph (80 FR 69909, 69910 (November 12, 2015)), the rule does not specify the number or types of State registries that should be reviewed. The issue of which State registry is “applicable” is wholly dependent on the occupation of the individual seeking or holding the job, or the requirements of the job. We make no changes based on this comment.

One commenter stated that VA should seek technical assistance from an experienced organization that has worked across many states implementing background check programs. The issue of seeking technical assistance from an outside organization is beyond the scope of this rulemaking. We make no changes based on this comment.

Bar for certain crimes, definition of “convicted of a criminal offense,” and Title VII concerns.

In addition to public comments, VA received a letter from EEOC recommending that VA consider revising the proposed rule to avoid potential conflict with Title VII of the

Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.). EEOC recommended that VA consider revising the provisions regarding the prohibition on CRCs employing individuals with conviction records or negative State registry or licensing authority findings; the definition of “‘convicted’ of a criminal offense”; and the types of State registry findings that may result in exclusion from employment with CRCs, to avoid potential conflicts with Title VII. It stated that VA’s careful consideration of the scope of its criminal conduct ban is important because, while Title VII does not preempt federally imposed criminal restrictions, such conflicts should be kept to a minimum.

In proposed § 17.63(j)(3)(i)(A), we stated that CRCs would be prohibited from employing individuals who have been convicted by a court of law of abuse, neglect, or mistreatment of individuals; and would be prohibited from employing individuals who have had a finding regarding abuse, neglect, mistreatment of individuals, or misappropriation of property entered into an applicable State registry or with an applicable licensing authority. EEOC noted that the proposed rule does not appear to impose any time limits on the convictions or State registry or licensing authority findings that may exclude CRC applicants from consideration. In addition, it stated that the prohibition is very broad, applying to a range of offenses over an unspecified time period, with no exceptions or consideration of potentially extenuating factors or circumstances. As an example, EEOC stated that if an individual was convicted of stealing candy as a minor this could be considered misappropriation of property under the proposed rule. However, this type of crime would not be job related and exclusion from employment would be inconsistent with business necessity, and would be discriminatory if it is shown to have a disparate impact. EEOC also stated that the

proposed rule would not allow for consideration of rehabilitation efforts, a long and positive work history and references positively attesting to an individual's work ethic and integrity.

In addition, EEOC recommended that VA consider narrowing the definition of conviction of a criminal offense to exclude expunged convictions and participation in first offender, deferred adjudication, or other arrangements or programs in which a judgment of conviction has not been made. EEOC noted that, consistent with its guidelines, a CRC could consider the conduct and circumstances that resulted in the expungement or the individual's participation in such programs when making employment decisions.

Further, EEOC recommended that VA narrow the prohibition of employment based on State registry findings to findings that resulted in convictions, or, at the very least, prosecution. EEOC stated that, as currently written, individuals with applicable State registry findings are excluded from employment with CRCs, even if they have not been prosecuted for or found guilty of any crime. These individuals may pose no greater threat to a CRC resident than applicants without such State registry findings. Consequently, such exclusions may not be job related and consistent with business necessity.

We generally agree. In 2012, EEOC issued "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964." One purpose of that guidance is to assist EEOC in coordinating "with other federal departments and agencies with the goal of maximizing federal regulatory consistency with respect to the use of criminal history information in employment decisions." Title VII prohibits employment discrimination based on race,

color, religion, sex, or national origin. The guidance addresses both disparate treatment (where an employer treats criminal history information differently for different applicants or employees based on race or national origin) and disparate impact (a neutral policy, such as excluding applicants from employment based on certain criminal conduct, that disproportionately impacts some individuals based on race or national origin, where the exclusion is not job related and consistent with business necessity).

An arrest, or mere allegation of misconduct, does not establish that criminal conduct has occurred. A criminal conviction, on the other hand, serves as legally sufficient evidence that a person engaged in particular conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

As an initial matter, we note that various federal or state laws effectively bar employment in certain positions if an individual is convicted of certain crimes. For instance, at the federal level, 18 U.S.C. 2381 bans from future federal employment an individual who has been convicted of treason. Similar types of bans are found in state law. The majority of states have laws or regulations governing hiring of individuals applying for positions in long term care, residential care, adult day care, nursing homes, and similar types of care provided to elderly or at risk individuals. Many states establish a permanent bar on employment in one or more of these service sectors for convictions of certain serious crimes, and a ban for a defined number of years for convictions of other types of crimes. The specific criminal offenses listed in the statutes and regulations vary by state, as does the length of the bar on employment following conviction. One example is South Carolina Regulation 61-84, Standards for Licensing

Community Residential Care Facilities, which provides that staff members, direct care volunteers, and private sitters of a licensed community residential care facility shall not have a prior conviction or pled no contest (nolo-contendere) to abuse, neglect, or exploitation of a child or a vulnerable adult as defined in state law. Another example is District of Columbia Code 44-552 which prohibits a long term care facility from employing or contracting with an unlicensed health care worker who has been convicted within 7 years of any of several enumerated offenses. Several states have opted for a similar approach.

The proposed rule listed classes of crimes that an individual could be convicted of, rather than specific crimes defined in law. Based on comments received, VA believes this formulation could lead to uncertainty and confusion. In addition, the proposed rule would impose a permanent bar on employment in a CRC for a conviction. VA has determined that a more nuanced approach is appropriate, and that the rule should align more closely with established state requirements. To address EEOC's concerns, VA will make several changes to the rule. First, we will more clearly define the types of criminal activity that could be disqualifying. VA's primary concern is to ensure that a veteran residing in a CRC is not subjected to abuse, neglect, mistreatment, or misappropriation of property. To that end, VA will state that a CRC may not employ an individual who has been convicted of any of the following offenses or their equivalent in a state or territory: murder, attempted murder, or manslaughter; arson; assault, battery, assault and battery, assault with a dangerous weapon, mayhem or threats to do bodily harm; burglary; robbery; kidnapping; theft, fraud, forgery, extortion or blackmail; illegal use or possession of a firearm; rape, sexual assault,

sexual battery, or sexual abuse; child or elder abuse or cruelty to children or elders; or unlawful distribution or possession with intent to distribute a controlled substance. VA believes that this list of criminal offenses is sufficiently narrow and well-defined in law to target only those types of crimes that are of concern to VA. Rather than imposing a lifetime ban for a conviction of an enumerated crime, we will require a 7 year ban. This is in line with several state statutes related to similar types of employment, and VA believes it is consistent with our objectives, and supports our goal of ensuring a safe environment for CRC residents. Employees, contractors and volunteers working in VA-operated facilities, such as community living centers or nursing homes, must undergo a background screening as required by Office of Personnel Management (OPM) regulations at 5 CFR parts 731 and 736. Veterans residing in these VA-operated facilities can be confident that VA staff members, contractors, and volunteers have been screened for previous criminal convictions. One purpose of this rulemaking is to provide the same or similar level of assurance to veterans residing in approved CRCs.

A finding in a State registry or with the applicable licensing authority concerning abuse, neglect, mistreatment of individuals or misappropriation of property is not equivalent to conviction of a crime, and we do not believe that a 7 year ban on employment based on a State registry or licensing authority is appropriate. However, we do not believe that an adverse finding in a relevant State registry or with an applicable licensing authority should be ignored, because even in the absence of a conviction the allegation of wrongdoing is by an individual or entity authorized to provide such information, and such information is subject to some level of investigation before it is approved for inclusion. We believe imposing a 6 month ban on employment in an

approved CRC is appropriate, as this recognizes the adverse finding while also recognizing that there may be a follow-up investigation of the alleged incident during the 6 months following an adverse finding.

Where the conviction by a court of law of a crime enumerated in this rule occurred greater than 7 years in the past, or a finding was entered into a State registry or with the applicable licensing authority more than 6 months in the past, the CRC must perform an individual assessment of the applicant or employee to determine suitability for employment. The individual assessment must include consideration of the following factors: the nature of the job held or sought; the nature and gravity of the offense or offenses; the time that has passed since the conviction and/or completion of the sentence; the facts or circumstances surrounding the offense or conduct; the number of offenses for which the individual was convicted; the employee or applicant's age at the time of conviction, or release from prison; the nexus between the criminal conduct of the person and the job duties of the position; evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct; the length and consistency of employment history before and after the offense or conduct; rehabilitation efforts, including education or training; and, employment or character references and any other information regarding fitness for the particular position.

The factors listed above are derived from leading court decisions on what should be included in an individual assessment for Title VII purposes. To ensure that post-conviction suitability for employment is properly assessed for individuals who are 7 years post-conviction, VA believes these factors should be utilized by CRC operators.

A conviction of a relevant offense alone greater than 7 years in the past is not a bar to employment; and the listed factors will be considered by the CRC in determining eligibility for employment. VA believes that requiring the CRC to take these listed factors into consideration when conducting an individual assessment of an applicant's or employee's prior conviction for a crime strikes the proper balance between VA's goal of providing a safe environment for veterans residing in a CRC, due process for the applicant or employee, and the need for the CRC operator to ensure the hiring of a suitable individual.

In addition, we are amending the definition of conviction of a criminal offense to exclude an expunged conviction, as an expunged conviction is considered in law to have never occurred.

We do not agree with EEOC that the definition of conviction of a criminal offense should be amended to exclude participation in first offender deferred adjudication, or other arrangements or programs in which a judgment of conviction has not been made. Several federal statutes include these, or similar, types of deferred adjudications in the definition of "conviction." Examples include an immigration statute, 8 U.S.C. 1101(a)(48)(A), and a statute excluding certain individuals and entities from participation in Medicare and State health care programs, 42 U.S.C. 1320a-7(i). Case law reflects that resolution of the issue of whether any particular deferred adjudication qualifies as a conviction under these statutes is wholly dependent on the facts of the case and the relevant underlying state or federal law (see, e.g., Crespo v. Holder, 631 F.3d 130 (4th Cir. 2011) and Travers v. Shalala, 20 F.3d 993 (9th Cir. 1994)). Rather than disregarding deferred adjudication in its entirety, VA has determined that a better

approach is to require the CRC operator to consider a deferred adjudication on a case by case basis, conducting an individual assessment utilizing the factors listed above to determine eligibility for employment. VA believes that the individual assessment will address the concerns raised by EEOC, and the rule is amended accordingly.

Appeals.

A commenter recommended the inclusion of an appeals process in those instances where an individual is denied employment because of the results of a criminal history check. While it is true that VA will review staffing as part of the inspection and approval process, employment decisions are made solely by the CRC. The CRC, in turn, is a business operating under the auspices of the state, county, or locality. Individuals seeking to contest employment decisions may have other recourse under state law, and sometimes under federal law. Any rulemaking by VA on the issue of appeals could have the effect of limiting an individual's right to challenge a CRC's decision under state law, in essence preempting relevant state law. VA believes that a better approach is to preserve those rights. We make no changes based on this comment.

Reporting and investigating alleged mistreatment, neglect, abuse, and misappropriation of resident's property.

One commenter supported VA requiring a CRC to report alleged mistreatment, neglect, abuse, and misappropriation of resident's property to the approving official within twenty-four hours of when the provider becomes aware, and the results of any

investigation within five working days. However, the commenter recommended that these reports also be shared with the appropriate state agency. Another commenter stated that VA should clarify under what circumstance, how, and when external authorities are engaged.

We agree. In some instances, approved CRCs are licensed by the state, and therefore must comply with any state requirements for reporting alleged mistreatment, neglect, abuse, and misappropriation of residents' property to the appropriate state agency. However, a CRC that is not required to obtain a license to operate may not have the same reporting requirement. We are amending the rule to require the CRC to immediately report, which means no more than 24 hours after the provider becomes aware of the alleged violation, all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property to the approving official and to other officials in accordance with state law.

One commenter stated that reports of abuse or neglect should include the name of the alleged victim, and contact person (such as a family member). In addition, the commenter stated that any identified caregiver or legal representative should be notified of the allegation, and the record should reflect resolution of the investigation. Further, the CRC should be required to provide copies of the written policy and procedure to residents, caregivers, and representatives.

In proposed § 17.63(j)(3)(i)(B) we stated that the CRC must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported to the approving official immediately, which means no more than 24 hours after the provider

becomes aware of the alleged violation. The report, at a minimum, must include: the facility name, address, telephone number, and owner; the date and time of the alleged violation; a summary of the alleged violation; the name of any public or private officials or VHA program offices that have been notified of the alleged violations, if any; whether additional investigation is necessary to provide VHA with more information about the alleged violation; and contact information for a person who can provide additional details at the community residential care provider, including a name, position, location, and phone number. We agree that the name of the alleged victim, contact information for the resident's next of kin or other designated family member, agent, personal representative, or fiduciary should be included in the report. We also agree that any identified caregiver or legal representative should be notified of the allegation, and we will amend the rule accordingly. The commenter noted that the record should reflect resolution of the investigation. To clarify the CRC's responsibility to report any corrective action taken as a result of the investigation, we amend the rule to require the CRC to report to the approving official, and other officials as required under all other applicable law, both the results of the investigation as well as any corrective action taken by the CRC as a result of such investigation.

One commenter supported the requirement that the CRC develop and implement written policies and procedures prohibiting mistreatment, abuse and neglect of residents, and misappropriation of resident property. However, the commenter urged VA to include the requirement that the written policies and procedures include specific protections for veterans who identify as lesbian, gay, bisexual and transgender (LGBT). The commenter noted recent studies that estimated that the population of

LGBT older adults will double by 2030, and the majority of LGBT aging adults fear they will experience discrimination in long term care organizations.

In § 17.63(j)(3) we state that the CRC provider must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property. In our discussion of this paragraph, we stated that VA intends to develop sample policies and boilerplate that could be adapted by a CRC to meet the facility's individual requirements. The policies and procedures implemented by the CRC must provide for a safe environment for all veterans residing in the facility. While the content of any policy developed and implemented under §17.63(j)(3) is beyond the scope of this rulemaking, VA will work to ensure that any policy provided to CRCs will include elements intended to provide a safe environment for all veteran residents, and, therefore, make no changes based on this comment.

Medical Foster Homes.

One commenter stated that VA should provide explicit guidance on how abuse is detected and reported in smaller CRCs, such as Medical Foster Homes. The commenter asserted that such behavior can be easier to observe and report in larger facilities, where any problem can be reported to the facility operator. However, in smaller facilities, a resident may have to rely on a single caregiver who may be able to hide the abuse, or the abuser may be the homeowner or service provider. On a related issue, the commenter supported removing an accused employee from resident care duties during an investigation, but urged VA to provide specific guidance on how this

provision would apply to a small CRC where a live-in owner of the CRC is suspected of abuse or neglect.

A Medical Foster Home is a type of CRC for care of disabled veterans with the more medically complex conditions, and is generally distinguished from other CRCs by the following factors: the home is owned or rented by the caregiver; the caregiver lives in the Medical Foster Home and provides personal care and supervision; there are no more than three residents receiving care in the Medical Foster Home, including both veterans and non-veterans; and the veteran residents are enrolled in a VA home based care or spinal cord injury program. As the commenter noted, a Medical Foster Home is smaller than other types of CRCs, and detecting/reporting abuse or neglect in that environment does present special challenges. The specific content of any guidance provided to a resident or operator of Medical Foster Homes is beyond the scope of this rulemaking. However, VA is aware of the issue and plans to address it through developing policy, which will include elements intended to provide a safe environment for all veteran residents. We make no changes based on this comment.

Consent to disclosure of resident records.

One commenter recommended that the regulation be amended to allow a designated individual other than the resident to authorize disclosure of resident records in those instances where the resident is no longer competent. We agree. Generally, when a person is no longer competent to consent to disclosure of records, someone else, either previously designated by the person or through operation of law, is given

authority to consent to disclosures, such as a fiduciary, agent, or personal representative. We are amending this rule to address this circumstance.

Based on the rationale set forth in the proposed rule and in this document, VA is adopting the provisions of the proposed rule as a final rule with changes as noted above.

Effect of rulemaking

Title 38 of the Code of Federal Regulations, as revised by this 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 are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible, or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. See also 5 CFR 1320.8(b)(2)(vi).

This final rule imposes information collection requirements in 38 CFR 17.63(i) and (j): VA has reviewed the information collection as presented in the proposed rule published on November 12, 2015 (80 FR 69909) and has determined that the proposed information collection was too broad. It included information collection related to both staffing and resident recordkeeping requirements that formerly approved by OMB under control number 2900-0491, which expired on July 31, 1990. By a separate action, VA is requesting that OMB reinstate this information collection under control number 2900-0491 rather than addressing that information collection under the current rulemaking. In addition, the proposed information collection included a collection related to the requirement that a CRC develop policy on the subject of mistreatment, neglect, or abuse of CRC residents. VA has determined that this is not a collection of information as that term is defined in 5 CFR 1320.3. VA has drafted policy on mistreatment, neglect, or abuse of CRC residents which is being provided to CRCs for use and implementation.

This rulemaking at § 17.63(i)(2) requires the CRC to maintain records related to paragraph (j)(3), which addresses procedures for ensuring that reports of alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported and fully investigated. Information collection related to those procedures is contained in paragraph (j)(6). That paragraph requires CRCs to immediately, meaning no more than 24 hours after the provider becomes aware of the alleged violation, report all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property to the approving official.

In the proposed information collection, we estimated the annual burden related to CRC reporting and investigation of alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property based on an assumption that VA would receive one such report from each CRC each year. VA determined that this estimate was too high, as we have not received any reports of mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property during the past ten years. VA believes that a more accurate estimate would be one report per four CRCs. Finally, we based our annual burden hour estimate on the number of approved CRCs as of Q4 FY2012, which was the most recent data available when the proposed rule was drafted. The most recent data from FY2017 reflects that the number of approved CRCs has decreased dramatically, from 1,293 in 2012 to 730 in 2017. We have adjusted the estimated annual burden hours accordingly. VA is not accepting new public comment on these changes, as a public comment period has already been provided on this information collection, and the substance of the information collection related to reporting of mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property has not changed.

As required by the 44 U.S.C. 3507(d), VA submitted this information collection to OMB for its review. OMB approved these new information collection requirements associated with the final rule and assigned OMB control number 2900-0844.

The collection of information is described here.

Title: Ensuring a Safe Environment for Community Residential Care Residents.

Summary of collection of information:

Paragraph (j)(6) requires CRCs to immediately, meaning no more than 24 hours after the provider becomes aware of the alleged violation, report all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property to the approving official. We require that the report, at a minimum, must include the facility name, address, telephone number, and owner; the date and time of the alleged violation; a summary of the alleged violation; the name of any public or private officials or VHA program offices that have been notified of the alleged violations, if any; whether additional investigation is necessary to provide VHA with more information about the alleged violation; and contact information for a person who can provide additional details at the community residential care provider, including a name, position, location, and phone number.

We require the CRCs to document and thoroughly investigate evidence of an alleged violation. The results of all investigations must be reported to the approving official within 5 working days of the incident and to other officials in accordance with State law. It would also require facilities to develop and implement written policies and procedures to prohibit the mistreatment, neglect, and abuse of residents and misappropriation of resident property.

The most current data available to VA (Q1FY2017) reflects that we have 730 approved CRCs, 150 of which are Medical Foster Homes at the 1 to 3 bed size. The total number of staff working in these facilities is 3,170. This aggregate number of CRC staff is distributed in CRCs as follows: 2.5 staff for a 1 to 3 bed facility, 4 staff for a 4 to 15 bed facility, 5 staff for a 15 to 26 bed facility and 11 staff for a 26 to 100+ bed facility.

CRCs are required to report information under this rule when the facility: (1) has an alleged violation involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property; or, (2) is reporting the results of an investigation into that alleged violation. CRCs are also required to document and investigate evidence of any alleged violation. We view the reporting, documenting, and investigating of an alleged incident and the subsequent report of the results of the investigation to be one collection of information, as it focuses on one set of alleged facts and the facility's investigation of those facts.

This rule formalizes the reporting and investigation requirement and we believe this would more likely than not result in an increase in the number of reports of alleged abuse mistreatment, neglect, or abuse, including injuries of unknown source, or misappropriation of resident property per year. However, for purposes of this estimate, we will assume that a maximum of one fourth of approved CRCs will have one incident per year related to an alleged violation involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property; or, reporting the results of an investigation into that alleged violation. The estimated average burden for an alleged violation response is three hours.

Description of need for information and proposed use of information: VA needs this information to ensure the health and safety of veterans placed in these facilities. In CRCs, where VA involvement is less intensive and to which VA does not provide any payments or services, we believe that information obtained under the proposed rule would provide necessary protection for veteran residents.

Description of likely respondents: One fourth of approved CRCs currently listed or that request future listing on VA's approved CRCs referral list.

Estimated number of respondents per year: 182 operators of CRCs.

Estimated frequency of responses: Once in a 12-month period.

Estimated average burden per response: 3 hours.

Estimated total annual reporting and recordkeeping burden: 546 hours.

Regulatory Flexibility Act

The Secretary hereby certifies that this 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 final rule will be small business neutral as it applies only to those CRCs seeking inclusion on VA's list of approved CRCs. The costs associated with this final rule are minimal, consisting of the administrative requirement to develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property; ensure that no employees are employed in contravention to the final rule; report to VA any alleged violation involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property; and investigate alleged resident abuse, take steps to prevent further harm, and implement appropriate corrective measures.

A CRC may elect to order background checks on employees from commercial sources or local law enforcement agencies. The cost of an individual background check varies dependent on the vendor, but VA believes the average cost is \$50. VA believes

that 75 percent of CRCs are required to, or could obtain, criminal background checks on employees through one or more existing federal or state programs. This includes: (1) the state grant program administered by the Centers for Medicare and Medicaid Services (CMS) for conducting federal and state criminal background checks on direct patient access employees of long-term care facilities and providers (42 U.S.C. 1320a-7l); (2) the CMS requirement applicable to facilities receiving Medicare and Medicaid funds; and (3) various state laws or regulations mandating criminal background screening for employment to work with the elderly or disabled. In addition, many CRCs that are currently servicing veterans already, voluntarily, have policies and procedures in place to review the backgrounds of their employees and make employment decisions consistent with this rulemaking as one way to ensure resident safety.

The remaining 25 percent of CRCs (91) will more likely than not opt to obtain criminal background checks on CRC staff in order to be approved by VA. The median number of staff in CRCs currently approved by VA is five. We estimate the cost that will be incurred for obtaining criminal background checks on CRC staff is \$250 per CRC. On this basis, the Secretary certifies that the adoption of this 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, under 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 Order 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 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 final rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact

analysis are available on VA's Web site at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date."

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

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles affected by this document are 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; and 64.018, Sharing Specialized Medical Resources.

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. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on July 18, 2017, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Government contracts, Grant programs-health, Government programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Veterans.

Dated: July 18, 2017.

Jeffrey Martin,
Office Program Manager,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons stated in the preamble, Department of Veterans Affairs 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, and as noted in specific sections.

Section 17.38 also issued under 38 U.S.C. 101, 501, 1701, 1705, 1710, 1710A, 1721, 1722, 1782, and 1786.

Section 17.169 also issued under 38 U.S.C. 1712C.

Sections 17.380 and 17.412 are also issued under sec. 260, Public Law 114-223, 130 Stat. 857.

Section 17.410 is also issued under 38 U.S.C. 1787.

Section 17.415 is also issued under 38 U.S.C. 7301, 7304, 7402, and 7403.

Sections 17.640 and 17.647 are also issued under sec. 4, Public Law 114-2, 129 Stat. 30.

Sections 17.641 through 17.646 are also issued under 38 U.S.C. 501(a) and sec. 4, Public Law 114-2, 129 Stat. 30.

2. Amend § 17.63 by:

a. Adding paragraphs (e)(1)(i) and (ii);

b. Revising paragraph (i);

c. Adding paragraphs (j)(3) through (9); and

d. Adding an OMB approval parenthetical to the end of the section.

The additions and revision read as follows:

§ 17.63 Approval of community residential care facilities.

* * * * *

(e) * * *

(1) * * *

(i) Facilities approved before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] may not establish any new resident bedrooms with more than two beds per room;

(ii) Facilities approved after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] may not provide resident bedrooms containing more than two beds per room.

* * * * *

(i) Records. (1) The facility must maintain records on each resident in a secure place. Resident records must include a copy of all signed agreements with the resident. Resident records may be disclosed only with the permission of the resident; an authorized agent, fiduciary, or personal representative if the resident is not competent; or when required by law.

(2) The facility must maintain and make available, upon request of the approving VA official, records establishing compliance with paragraphs (j)(1) and (2) of this section; written policies and procedures required under paragraph (j)(3) of this section; and, emergency notification procedures.

(j) * * *

(3) The community residential care provider must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

(4) Except as provided in paragraph (j)(5)(ii) of this section, the community residential care provider must not employ individuals who—

(i) Have been convicted within 7 years by a court of law of any of the following offenses or their equivalent in a state or territory:

(A) Murder, attempted murder, or manslaughter;

(B) Arson;

(C) Assault, battery, assault and battery, assault with a dangerous weapon, mayhem or threats to do bodily harm;

(D) Burglary;

(E) Robbery;

(F) Kidnapping;

(G) Theft, fraud, forgery, extortion or blackmail;

(H) Illegal use or possession of a firearm;

(I) Rape, sexual assault, sexual battery, or sexual abuse;

(J) Child or elder abuse, or cruelty to children or elders; or

(K) Unlawful distribution or possession with intent to distribute, a controlled substance; or

(ii) Have had a finding entered within 6 months into an applicable State registry or with the applicable licensing authority concerning abuse, neglect, mistreatment of individuals or misappropriation of property.

(5)(i) If the conviction by a court of law of a crime enumerated in paragraph (j)(4)(i) of this section occurred greater than 7 years in the past, or a finding was entered into an applicable State registry as specified in paragraph (j)(4)(ii) of this section more than 6 months in the past, the community residential care provider must perform an individual assessment of the applicant or employee to determine suitability for

employment. The individual assessment must include consideration of the following factors:

(A) The nature of the job held or sought;

(B) The nature and gravity of the offense or offenses;

(C) The time that has passed since the conviction and/or completion of the sentence;

(D) The facts or circumstances surrounding the offense or conduct;

(E) The number of offenses for which the individual was convicted;

(F) The employee or applicant's age at the time of conviction, or release from prison;

(G) The nexus between the criminal conduct of the person and the job duties of the position;

(H) Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;

(I) The length and consistency of employment history before and after the offense or conduct; rehabilitation efforts, including education or training; and,

(J) Employment or character references and any other information regarding fitness for the particular position.

(ii) An individual assessment must be performed to determine suitability for employment for any conviction defined in paragraph (j)(8)(iv), regardless of the age of the conviction.

(6)(i) The community residential care provider must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported to the approving official immediately, which means no more than 24 hours after the provider becomes aware of the alleged violation; and to other officials in accordance with State law. The report, at a minimum, must include—

- (A) The facility name, address, telephone number, and owner;
- (B) The date and time of the alleged violation;
- (C) A summary of the alleged violation;
- (D) The name of any public or private officials or VHA program offices that have been notified of the alleged violations, if any;
- (E) Whether additional investigation is necessary to provide VHA with more information about the alleged violation;
- (F) The name of the alleged victim;
- (G) Contact information for the resident's next of kin or other designated family member, agent, personal representative, or fiduciary; and
- (H) Contact information for a person who can provide additional details at the community residential care provider, including a name, position, location, and phone number.

(ii) The community residential care provider must notify the resident's next of kin, caregiver, other designated family member, agent, personal representative, or fiduciary of the alleged incident concurrently with submission of the incident report to the approving official.

(iii) The community residential care provider must have evidence that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are documented and thoroughly investigated, and must prevent further abuse while the investigation is in progress. The results of all investigations must be reported to the approving official within 5 working days of the incident and to other officials in accordance with all other applicable law, and appropriate corrective action must be taken if the alleged violation is verified. Any corrective action taken by the community residential care provider as a result of such investigation must be reported to the approving official, and to other officials as required under all other applicable law.

(iv) The community residential care provider must remove all duties requiring direct resident contact with veteran residents from any employee alleged to have violated this paragraph (j) during the investigation of such employee.

(7) For purposes of this paragraph (j), the term “employee” includes a:

(i) Non-VA health care provider at the community residential care facility;

(ii) Staff member of the community residential care facility who is not a health care provider, including a contractor; and

(iii) Person with direct resident access. The term "person with direct resident access" means an individual living in the facility who is not receiving services from the facility, who may have access to a resident or a resident's property, or may have one-on-one contact with a resident.

(8) For purposes of this paragraph (j), an employee is considered “convicted” of a criminal offense--

(i) When a judgment of conviction has been entered against the individual by a Federal, State, or local court, regardless of whether there is an appeal pending;

(ii) When there has been a finding of guilt against the individual by a Federal, State, or local court;

(iii) When a plea of guilty or nolo contendere by the individual has been accepted by a Federal, State, or local court; or

(iv) When the individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

(9) For purposes of this paragraph (j), the terms “abuse” and “neglect” have the same meaning set forth in 38 CFR 51.90(b).

* * * * *

(The information collection requirements in this section have been approved by the Office of Management and Budget under control number 2900–0844.)

[FR Doc. 2017-15519 Filed: 7/24/2017 8:45 am; Publication Date: 7/25/2017]