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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Part 232

[Docket No. FR 6022-P-01]

RIN 2502-AJ46

#### Federal Housing Administration (FHA): Section 232 Healthcare Facility Insurance Program – Memory Care Residents

**AGENCY:** Office of the Assistant Secretary for Housing, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** HUD's Section 232 program insures mortgage loans to facilitate the construction, substantial rehabilitation, purchase, and refinancing of nursing homes, intermediate care facilities, board and care homes, and assisted-living facilities. Through this rule, HUD proposes changes to update the requirements for the location of bathrooms in board and care and assisted living facilities to allow providers to configure the facilities to meet the needs of memory care residents and allow for flexibility of the bathroom requirement when financing or refinancing existing facilities.

**DATES:** Comment due date: [Insert date 60 days from the date of publication in the Federal Register].

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule. All submissions must refer to the above docket number and title. There are two methods for submitting public comments.

**1. Submission of Comments by Mail.** Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

**2. Electronic Submission of Comments.** Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile (FAX) Comments.* FAX comments are not acceptable.

**Public Inspection of Public Comments.** HUD will make available all properly submitted comments and communications for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, you must schedule an appointment in advance to review the public comments by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** John M. Hartung, Director, Policy, Risk Analysis & Lender Relations Division, Office of Residential Care Facilities, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 1222 Spruce

Street, St. Louis, MO 63103-2836; telephone number 314-418-5238 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339 (this is a toll-free number).

## **SUPPLEMENTARY INFORMATION**

### **I. Background**

Under Section 232, 223(a)(7), and 223(f) of the National Housing Act (12 U.S.C. 1715w  
12 U.S.C. 1715n(a)(7), and 12 U.S.C. 1715n (f)(4), respectively), FHA insures mortgages to finance the purchase or refinance of nursing homes, intermediate care facilities, board and care homes, and assisted living facilities (collectively, residential healthcare facilities). To meet the needs of residents living in the Section 232 program facilities and those seeking to insure projects under the Section 232 program, HUD proposes to revise the current regulation at § 232.7 regarding bathroom requirements to meet the needs of memory care residents. Memory care residents are those patients in assisted living or board and care settings that have cognitive impairments, such as Alzheimer's disease and other dementias who require care in a secure setting. HUD proposes the revision to add flexibility for financing existing residential healthcare facilities.

#### **A. Memory Care Residents**

Residents of assisted living facilities need assistance with their “activities of daily living” (ADL). Activities of daily living include, but are not limited to, such things as bathing, dressing, eating, getting in or out of bed, using the toilet, preparing meals, taking medications, and performing light housework. Memory care residents’ care is often provided on a separate floor or wing to address the residents’ specific needs. The health and safety of persons with dementia and other cognitive impairments can be enhanced by environments with features

designed to accommodate cognitive and physical impairments. For example, Alzheimer residents' living environments have secured areas to prevent wandering—a common symptom of the disease. Memory care provides intensive, long-term medical care to seniors or others with serious health and dementia conditions in a fully-staffed and monitored facility.<sup>1</sup>

The research shows the growing need for memory care specific services. Based on estimates from the Aging, Demographics, and Memory study of a nationally representative sample of older adults, 13.9% of people aged 71 and over in the United States have Alzheimer's disease or other types of dementia.<sup>2</sup> A National Study of Long-Term Care Providers (NSLTCP) found that a sizeable portion of long-term care service users had a diagnosis of Alzheimer's disease or other dementias—almost one-third of adult day services center participants and home health patients, about four-tenths of residential care residents, and almost one-half of nursing home residents. The National Center for Assisted Living, a nonprofit entity within the American Health Care Association specializing in assisted living, developed a profile for the average resident of an assisted living facility<sup>3</sup> which found the average resident of an assisted living facility to be nearly 87 years old. Whereas, Section 232 of the National Housing Act defines frail elderly to be individuals 62 years and older who are in need of support for three ADLs. The data and research suggest that Alzheimer's disease or other dementias is a common precipitating

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<sup>1</sup> Office of the Assistant Secretary for Planning and Evaluation, "Measuring The Activities of Daily Living: Comparison Across National Surveys" <https://aspe.hhs.gov/basic-report/measuring-activities-daily-living-comparisons-across-national-surveys>.

<sup>2</sup> Long-Term Care Services in the United States: 2013 Overview Vital and Heath Statistics, Series 2, no 37, Center for Disease Control and Prevention, National Center for Health Statistics, U.S. Department of Health and Human Services p.39 (*citing* Plassman BL,et al. Prevalence of Dementia in the United States: The aging, demographics, and memory study. Neuroepidemiology 29(1–2):125–32. 2007).

<sup>3</sup> Overview of Assisted Living, published by the American Association of Homes and Services for the Aging, American Seniors Housing Association, Assisted Living Federation of American, National Center for Assisted Living, and National Investment Center for the Seniors Housing & Care Industry (2009).

factor for using formal long-term care services.<sup>4</sup>

## **B. State Regulation of Memory Care Facilities Bathing Arrangements.**

Although many Federal laws affect assisted living, oversight generally occurs at the state level through state licensure, statutes, and standards. Federal regulations issued by the Centers for Medicare and Medicaid Services (CMS) for long-term care facilities simply require that each resident room must be equipped with or located near toilet and bathing facilities.<sup>5</sup> State regulation is often much more precise, specifying minimum standards for toilet and bathing facilities locations and ratios. Thirty-five states have provisions for the physical features of dementia care units, including the residents' living units, access to bathrooms, and external locking doors or controlled methods of egress to prevent unsafe exits.<sup>6</sup> It is important to also note that Federal civil rights laws and regulations also contain accessibility and nondiscrimination requirements that apply, including the Fair Housing Act (24 CFR part 100), the Americans with Disabilities Act (28 CFR parts 35 (Title II) and 36 (Title III)), and Section 504 of the Rehabilitation Act (24 CFR part 8), as applicable.

## **II. This Proposed Rule**

HUD's Section 232 regulation at § 232.7 requires a specific number of bathrooms per residents and specifies the physical configuration of a board and care home or an assisted living facility. This regulation has not been updated in any substantial manner in over 20 years.

HUD is proposing to revise the regulations that govern the number and location of

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Overview of Assisted Living, published by the American Association of Homes and Services for the Aging, American Seniors Housing Association, Assisted Living Federation of America, National Center for Assisted Living, and National Investment Center for the Senior Housing & Care Industry (2009).  
Assisted Living Regulations and Policy: 2015 Edition  
06/15/2015, Office of The Assistant Secretary for Planning and Evaluation, U.S. Department of Health & Human Services,  
<https://aspe.hhs.gov/basic-report/compendium-residential-care-and-assisted-living-regulations-and-policy-2015-edition>

bathrooms in board and care homes and assisted living facilities currently insured or to be insured under the Section 232 program. The revisions would allow providers to configure existing facilities to meet the needs of residents, such as frail elderly individuals who have Alzheimer’s disease or related dementia, and who need specialized support, such as assistance with bathing. This revision will allow the financing of existing residential healthcare facilities that do not meet HUD’s existing bathroom standards, but which are currently providing necessary care to residents with Alzheimer’s disease or related dementia.

This proposed rule would not be applicable to substantial rehab and new construction. A substantially rehabilitated or new facility would be constructed in a manner which allows it to provide services for assisted living residents and memory care residents and meet HUD’s long-standing standards set forth in § 232.7.

#### **A. Configuration of Section 232 Insured Facilities to Meet Memory Care Residents’ Needs**

Subpart A of part 232 codified regulations entitled “Eligibility Requirements,” contains requirements for the number of bathrooms per residents and access to those bathrooms for board and care homes and assisted living facilities in § 232.7. Specifically, the regulations provide that not less than one full bathroom must be provided for every four residents of a board and care home or assisted living facility, and bathroom access from any bedroom or sleeping area must not pass through a public corridor or area.

Generally, owners of assisted living facilities that apply for FHA mortgage insurance meet the requirements of § 232.7, because those assisted living facilities serve seniors who seek an independent lifestyle and do not require the higher level of monitoring provided to memory care residents. Rather, these residents simply need assistance to meet ADLs. However, several facilities were unsuccessful when they sought HUD’s assistance in refinancing their debt because

they could not satisfy the bathroom requirements set forth in HUD's regulations, and several applicants have advised that the requirement regarding the number and location of bathrooms set forth in § 232.7 presented barriers to properly serving memory care residents, who need specialized support, including assistance with bathing. Accordingly, some owners seeking Section 232 financing sought and received waivers from the current requirements in § 232.7 to allow bathroom facility configurations that were better suited to meet the care of memory care residents. Over time, HUD realized that the current regulations are outdated and in need of revision.

## **B. Proposed Changes**

HUD's current prohibition on designs that allow residents to “[pass] through public areas” to a bathroom precludes insurance of existing facilities that meet the needs of memory care residents requiring assistance in bathing, and at which the physical redesign of the facility would be infeasible. Consequently, to provide flexibility in accepting the existing design of bedrooms and bathrooms to meet the greater care required for memory care residents, HUD proposes to revise § 232.7 to provide exceptions. Excepted facilities must still comply with any applicable State or local standards and requirements, including requirements specific to memory care facilities. See § 232.2. State or local standards that are more stringent than these requirements would not be preempted by this rule.

### Exemption for Facilities Insured Under Section 223(f) or 223(a)(7)

The exemption would apply to memory care facilities whose financing is being insured pursuant to Section 223(f) or 223(a)(7) of the National Housing Act, only when four considerations are satisfied: (1) memory care residents must reside in a separate secured locked area of the board and care home or assisted living facility; (2) any bathroom access from a

memory care resident's bedroom or sleeping area that passes through a public corridor or area must be in that separate, secured, and locked area of the board and care home or assisted living facility; (3) memory care residents of such areas require full assistance or supervision when bathing; and (4) wards serving memory care residents have no more than two beds per unit and a half-bath in each unit. Note that the codified rule prohibits bathroom access from a public area, and this section provides limited conditions under which access from public areas is allowable.

This exemption would not apply to new construction or substantial rehabilitation insured under Section 232, and those projects must continue to follow the long-standing bathroom requirements for board and care home or assisted living units.

### **III. Findings and Certifications**

#### Regulatory Review--Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made by the Office of Management and Budget regarding whether a regulatory action is significant and therefore subject to review in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule allows additional flexibility for the financing of residential healthcare facilities.

#### Executive Order 13771

Executive Order 13771, entitled “Reducing Regulation and Controlling Regulatory Costs,” was issued on January 30, 2017. This proposed rule is expected to be an Executive Order 13771 deregulatory action by providing additional flexibility for healthcare facilities, as discussed above.

#### Environmental Review

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC, 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339.

#### Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and on the private sector. This proposed rule does not impose any Federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency

to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

HUD believes that this proposed rule imposes no additional requirements on small businesses. Currently, HUD has a total of 3,673 residential healthcare facilities in its portfolio and completes approximately 300 firm commitments each year for 223(f) and 223(a)(7) refinances. HUD is providing waivers on 3 percent of those applications and waiver requests continue to increase. As noted in the preamble of the proposed rule, applicants have advised that the requirement regarding the number and location of bathrooms presented barriers to properly serving memory care residents, who need specialized support. HUD believes this proposed rule will resolve the inadequacy of the current bathroom requirements, thus, easing the existing burden on those entities seeking to accommodate memory care residents and entities seeking to finance or refinance facilities. Additionally, both owners, small and large, and memory care residents will benefit from the opportunity to finance their facility in compliance with this new framework.

Accordingly, the undersigned certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in the preamble to this rule.

**Executive Order 13132, Federalism**

Executive Order 13132 (entitled "Federalism") prohibits to the extent practicable and permitted by law, an agency from publishing any rule that has federalism implications if the rule

either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of Section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

#### Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance Number for the Mortgage Insurance Nursing Homes, Intermediate Care Facilities, Board and Care Homes and Assisted Living Facilities is 14.129.

#### **List of Subjects in 24 CFR Part 232**

Fire prevention, Health facilities, Loan programs-health, Loan programs-housing and community development, Mortgage insurance, Nursing homes, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated above, HUD proposes to amend 24 CFR part 232 as follows:

#### **PART 232 –MORTGAGE INSURANCE FOR NURSING HOMES, INTERMEDIATE CARE FACILITIES, BOARD AND CARE HOMES, AND ASSISTED LIVING FACILITIES**

1. The authority citation for part 232 continues to read as follows:

**Authority: 12 U.S.C. 1715b; 1715w; 1735d, and 1735f-19; 42 U.S.C. 3535(d).**

#### **Subpart A -- Eligibility Requirements**

2. Revise § 232.7 to read as follows:

## **§ 232.7 Bathroom.**

(a) General requirement. For a board and care home or assisted living facility to be eligible for insurance under this part:

- (1) The board and care home or assisted living facility must have no less than one full bathroom provided for every four residents; and
- (2) Bathroom access from any bedroom or sleeping area must not pass through a public corridor or area.

(b) Exemption for existing projects providing memory care. The following applies to a board and care home or assisted living facility that provides housing for residents in need of memory care, i.e., care for residents who have cognitive impairments, such as Alzheimer's disease or other dementias:

- (1) Subject to paragraph (b)(2) of this section, a project seeking insurance under subpart E, pursuant to Section 223(f) or 223(a)(7) of the National Housing Act, may be eligible for insurance without meeting the general requirement in paragraph (a) of this section, if the project meets the following four requirements:
  - (i) Memory care residents are in a separate, secured, and locked area of the board and care home or assisted living facility;
  - (ii) Any bathroom access from a memory care resident's bedroom or sleeping area that passes through a public corridor or area is in a separate, secured, and locked area of the board and care home or assisted living facility prescribed in paragraph (b)(1)(i) of this section;
  - (iii) Memory care residents receive full assistance or supervision while bathing; and
  - (iv) Memory care residents reside in wards that contain no more than two beds per unit and have a half-bath in each unit.

(2) If a facility serving memory care residents also serves residents who are not in a separate, secured, and locked area of the board and care home or assisted living facility, this exemption applies only to the separate, secured, and locked area in which solely memory care residents reside.

Dated: August 9, 2019.

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John L. Garvin  
General Deputy Assistant Secretary for Housing

**[Billing Code: 4210-67]**

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