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## Department of Housing and Urban Development

### 24 CFR Part 232

[Docket No. FR 6022-F-02]

RIN 2502-AJ46

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

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

**ACTION:** Final rule.

**SUMMARY:** This final rule updates the requirements for the location of bathrooms in board and care and assisted living facilities insured under HUD’s Section 232 program, which 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. The rule will 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. This final rule follows publication of a September 13, 2019 proposed rule and takes into consideration the public comments received on the proposed rule.

**DATES:** Effective Date: This final rule is effective **[Insert date 30 days from the date of publication in the Federal Register]**.

**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 – HUD’s September 13, 2019 Proposed Rule**

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). On September 13, 2019, HUD published a proposed rule in the Federal Register, at 84 FR 48321,<sup>1</sup> to revise the current regulation governing the Section 232 program. The proposed rule sought to amend the 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.

As described in the proposed rule, memory care residents are a significant and growing proportion of the residential healthcare facilities population.<sup>2</sup> Facilities must accommodate residents’ cognitive and physical impairments, and appropriate design enhances the health and safety of persons with Alzheimer’s disease or other forms of dementia. For insured facilities, HUD’s Section 232 regulation requires a specific number of bathrooms per residents and specifies the physical configuration of a board and care home or an assisted living facility, prohibiting configurations where the access path from a bedroom to a bathroom passes through a public area. HUD’s proposed rule, therefore, proposed revising the regulation to add flexibility for financing existing residential healthcare facilities where complying with § 232.7

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<sup>1</sup> HUD also published a September 26, 2019 proposed rule supplement, 84 FR 50805, correcting certain references in the September 13, 2019 proposed rule publication.

<sup>2</sup> See, Background on memory care residents at 84 FR 48321-48322.

requirements for number or configuration of bathrooms is not practicable or would not adequately serve memory care residents. This change would enable existing residential healthcare facilities that currently serve memory care residents to obtain Section 232 refinancing.

Specifically, HUD proposed an exemption from the current requirement for one full bathroom for every four residents, and from the current prohibition on bathroom access that passes through a public corridor or area. Additional details about the proposed rule may be found at 84 FR 48321 (September 12, 2019).

## **II. Final Rule**

This final rule adopts the proposed rule without change. The final rule provides an exemption from the current requirement of one full bathroom for every four residents, and from the current prohibition on bathroom access that passes through a public corridor or area, only for memory care facilities whose financing is being insured pursuant to Section 223(f) or 223(a)(7) of the National Housing Act, and only when four considerations are satisfied: (1) memory care residents must reside in a separate, secured, and 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. 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.

This final rule does not change the requirement in § 232.2 that all facilities must still

comply with any applicable Federal, State or local standards and requirements, including requirements specific to memory care facilities.<sup>3</sup>

### **III. Discussion of Public Comments Received on September 13, 2019, Proposed Rule**

The public comment period for the rule closed on November 12, 2019. HUD received two public comments in response to the proposed rule. These comments were submitted by a private citizen and an independent living specialist who works with the residential healthcare facility industry. Commenters were generally supportive of HUD's rule, but one commenter recommended the rule be expanded to address the Section 232 program as it relates to other Federal and State programs and requirements, particularly Medicaid. The commenter requested that HUD work with the Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) and States to implement CMS requirements for settings that are eligible for reimbursement for Medicaid home and community-based services. The commenter also requested that HUD clarify whether Medicaid enrollees will be able to use HUD programs to pay fair market rent or participate in rental assistance; and that HUD should address institutional bias related to Medicaid and housing systems. While HUD appreciates the comments, this final rule is limited to removing an impediment to providing needed mortgage insurance for existing memory care facilities.

### **IV. Findings and Certifications**

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

Under Executive Order 12866 (Regulatory Planning and Review), a determination

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<sup>3</sup> Federal civil rights statutes and regulations also contain accessibility and nondiscrimination requirements that apply, including regulations under 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.

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 final 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 was made prior to publication of the proposed rule, 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 remains applicable, and 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 final 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 final rule imposes no additional requirements on small businesses. Currently, HUD has a total of 3,738 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 final 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 final 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 final rule will not have a significant economic impact on a substantial number of small entities.

#### 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.

#### Congressional Review of Final Rules

The Office of Information and Regulatory Affairs has determined that this final rule is not a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking pursuant to the Congressional Review Act, Public Law 104-121, sec. 251, 110 Stat. 868, 873 (codified at 5 U.S.C. 804). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

#### 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**

### **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 amends 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 24 CFR part 232 continues to read as follows:

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

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 (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: June 11, 2020.

Brian D. Montgomery,  
Deputy Secretary.

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