STATE OF MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

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February 22, 2022

The Honorable Jessica Palmer-Denig
Administrative Law Judge
Office of Administrative Hearings 600 North Robert Street
P.O. Box 64620
Saint Paul, Minnesota 55164-0620

Re: In the Matter of the Proposed Amendments to Rules Governing Minnesota Department of Veterans Affairs, Minnesota Veterans Homes, Minnesota Rules, Chapter 9050; Revisor's ID Number R-4384, OAH Docket No. 71-9054-37629.

Dear Judge Palmer-Denig:

This letter contains the Minnesota Department of Veterans Affairs (MDVA) Response to Public Comments submitted during the pre-hearing public comment period (October 18, 2021, to November 23, 2021), at the January 31, 2022, Public Hearing, and During the Post-Hearing Public Comment Period up to 1:30pm February 22, 2022.

I. Introduction

A. Notice and public hearing

The MDVA published its Dual Notice of Intent to Adopt Rules in the State Register on October 18, 2021, (46 SR 497). The Notice was provided for the submission of comments from October 18, 2021 to November 23, 2021. A public hearing was held on January 31, 2022 with a post-hearing comment period of 20 days after the public hearing.

This rulemaking amends Minn. R. part parts 9050.0030 – 9050.1090 which comprise the practices currently used at the Minnesota Veterans Homes, as wells as practices that will be implemented upon the promulgation of these rules, and are based upon preexisting state rules and laws. The amendments are proposed under the authority of Minn. Stat. §§ 196.04 and 198.003. The MDVA has previously presented information demonstrating that the proposed amendments are submitted under the authority granted to the commissioner of MDVA as well as needed and reasonable.

The MDVA has met its burden to show that the proposed rule is needed and reasonable as required by Minn. Stat. §§ 14.131 and 14.14, subd. 2, through an affirmative presentation of facts at the hearing, and in the Statement of Need and Reasonableness Proposed Amendments to Rules Governing the Operation of Minnesota Veterans Homes, *Minnesota Rule* Chapter 9050 (SONAR) and along with supporting exhibits entered into the record at the January 31, 20022 hearing.

B. MDVA review of comments and organization of MDVA's response to comments

The MDVA received 47 written comments prior to the hearing as well as oral comments from seven individuals who testified at the hearing. The MDVA appreciates the extensive engagement on the proposed rules.

The MDVA reviewed and considered every comment submitted. This response letter and its attachments contain the MDVA's detailed responses to comments submitted during the public comment period, at the hearing, and during the post-hearing comment period. This response letter has multiple parts and addresses the comments received and available for MDVA to review by 4:30pm on February 22, 2022.[1] MDVA reserves rebuttal comments received and available for MDVA review by 4:30pm on March 1, 2022. This response letter is considered a supplement to the information in the SONAR as well as the information presented at the January 31, 2022 hearing.

This response letter provides the MDVA's response to common themes and topic areas that were frequently identified in the comments received by MDVA. Any changes the MDVA will make to the proposed rules as a result of the issues raised in the comments, as well as changes the MDVA determined were needed through its own review, are provided in this response letter, along with the MDVA's rationale for the rule changes. This response letter also identifies the additional information that the MDVA is submitting into the rule record at this time in support of its responses to the comments and the changes it is proposing.

Attachments Additional attachments and references include those documents and reference materials in support of the responses, which the MDVA has identified in this response letter.

Note - The comments are summarized and not presented verbatim. General comments submitted are about the proposed rule amendments and do not necessarily relate to a specific rule part. The comments on specific rule parts are organized sequentially by rule section. Each rule section is followed by a list of the comments submitted related to the rule section, and the MDVA's response.

II. List of Interested Parties

The following is a list of interested parties who submitted comments written comments on the proposed rules during the public notice comment period from October 18, 2021, through November 23, 2021.

1. Julian J. Zweber
2. Jill M. Sauber - Sauber Legal Services, LLC
3. Jill M. Sauber, on behalf of Minnesota National Academy of Elder Law Attorneys
4. Lauren Fink - Maser, Amundson, Boggio
5. Cathryn Reher - Barney, Guza, Steffen
6. Allison Frasier - Maser, Amundson, Boggio
7. Brenna M. Galvin - Maser, Amundson, Boggio

[1] The MDVA participated in the hearing and reviewed the hearing transcripts comments submitted to the Office of Administrative Hearings up to February 22, 2022.

8. Sarah Sicheneder - Maser, Amundson, Boggio
9. Amber Hildebrandt - Chair Elder Law Section & Suzanne Scheller - Chair Legislative Committee Elder Law Section
10. Cheryl Hennen - State Ombudsman, Office of Ombudsman for Long-Term Care
11. J. Noble Simpson
12. Kristen Rice - Regional Ombudsman for Long-Term Care
13. Lori Goetz - Regional Ombudsman for Long-Term Care
14. Christopher Bonander - Regional Ombudsman for Long-Term Care
15. Marit Peterson - MN Elder Justice Center
16. Sam Calvert
17. Colleen Salinas
18. Emily Weichsel
19. Christopher Kradle
20. S. Valerie Stedman
21. Sara Sommarstrom
22. Erin McCray
23. Miles Camp
24. Jessie Camp
25. Pastor Mark Van House
26. Megan Babb
27. Kate Brune
28. Nathaniel Saltz
29. Jacqueline Wright
30. Jonathan Hansen
31. Evan Tsai
32. Monica Nilsson
33. Jesse Maul
34. Ela Rausch
35. Jenna Couch
36. Ryan Else
37. Laura McLain
38. Dan Carney
39. Margaret Kaplan
40. Pat Shea
41. Dana Petersen
42. Lori Vrolson - Executive Director, Central MN Council on Aging
43. Darla Waldner - Director, Dancing Sky Area Agency on Aging
44. Judy Tilsen
45. Lindsey Erdmann
46. Dawn Simonson - President/CEO Trellis
47. Heather Anderson - Regional Ombudsman for Long-Term Care OOLTC
48. Mary Jo Schifsky - MN Board on Aging
49. Francis White
50. Deb Vizecky - Regional Ombudsman for Long-Term Care OOLTC
51. Melanie Ferris
52. David Nguyen

53. Brenda Shafer-Pellinen - Arrowhead Area Agency on Aging
54. Kristi Kane – Director, Arrowhead Area Agency on Aging
55. Laurie Brownell - Executive Director Southeastern MN Area Agency on Aging

The following is a list of interested parties who testified at the hearing on January 31, 2022.

1. Suzanne Scheller - Chair Legislative Committee Elder Law Section
2. Cathryn Reher - Barney, Guza, Steffen
3. Maisie Blaine-State Ombudsman, Office of Ombudsman for Long-Term Care
4. Francis White
5. Mary Frances Price
6. Brian Lewis
7. Mark Wermerskirchen

The following is a list of interested parties who submitted written comments during the post-hearing comment period from January 31, 2022, through February 22, 2022.

1. Julian Zweber
2. Maisie Blaine

III. MDVA's goals for the rulemaking.

From 1989 to present day, the bodies that have governed the Minnesota Veterans Homes have created and amended a series of rules which serve to create uniform conduct related to the admission, billing, and discharge of residents. To build on the basis of rules amendments from previous years, the current proposed amendments utilize the recommendations and concerns gathered from meetings with the MDVA staff, residents and the resident's family members.

The purpose of these rule amendments is to add new or modify existing definitions, obtain compliance with statutory changes, and make technical corrections to existing rule language. These amendments will permit the MDVA to: update and clarify definitions; clarify repayment options; update bed hold requirements; update the discharge process including the addition of an immediate discharge process; clarify the cost of care calculation; update income and property allowances for board and care residents; update Health Insurance Portability and Accountability Act (or HIPAA) requirements; and add new rules for the adult day health care program and pharmaceutical services.

IV. Comments received during the public comment period and the MDVA's responses.

Due process issues; lack of notice to those affected by these proposed changes; lack of input by *all* stakeholders. Commenters: Hennen. Peterson. Brune. Hildebrandt. Scheller. Reher. Fink. Sauber. Vrolson. Waldnerm. Rice. Simonson. Anderson. Goetz. Bonander. White. Vizecky. Shafer-Pellinen. Brownell. and Kane.

Comments: (Summary) In general many commenter raised concerns that no notice was given of the proposed rule changes, including no announcement, notice, or request for comments before the rule changes were proposed. The commenters also stated there was a lack of input from stakeholders and collaboration among stakeholders in the rule

promulgation process and the apparent "clandestine nature in which the rules were proposed and presented". Some commenters are requesting the proposed rules be rescinded and that MDVA be directed to, "engage in further meaningful discussion with stakeholders to collaborate on rule amendments to be issued at a later date with proper notice."

MDVA Response:

The Administrative Procedures Act (Minn. Stat. ch. 14) and the Office of Administrative Hearing rules (Minn. R. ch. 1400) govern how state agencies must adopt administrative rules. This includes providing required notifications to the general public and affected stakeholders, various state agencies and departments, the legislature, and Office of the Governor. The MDVA has followed all of the required procedures for providing notice and opportunity to comment on the proposed amendments to the rules governing the Minnesota Veterans Homes.

In its efforts to inform the public of the proposed rules and to provide their comments, the MDVA created a webpage and posted the rule notices and supporting documents in a timely manner for the public to review. In addition to the statutory required notifications to the general public and affected stakeholders, various state agencies and departments, the legislature, and Office of the Governor, the MDVA also provided notice of the proposed amendments to the Minnesota Elder bar, Minnesota Veterans Council, DHS' Office of Ombudsman for Long Term Care, the Minnesota Commanders Task Force, Minnesota Assistance Council for Veterans, and the Minnesota County Veterans Service Officers, Additionally, the MDVA's subsequent filings with the Office of Administrative Hearings and notices post-public comment period were conducted in accordance with the Administrative Procedures Act and Minn. R. ch. 1400.

Part 9050.0030, item L and Part 9050.0100, subpart 1. Commenter: Hennen.

Comments: The MDVA received comments about replacing the term "patient bill of rights" with "health care bill of rights") In Minn. R. part 9050.0030, item L and in Minn. R. part 9050.0100, subpart 1 the term "patient" bill of rights is replaced with "health care" bill of rights, referencing Minn. Stat. §144.651 which is now referred to as the "Health Care Bill of Rights". The commenter feels that this language change is unnecessary since various Bill of Rights language applies to these settings and supports leaving "patient bill of rights"

MDVA Response: Part 9050.0030, item L is being revised to delete "patients" Bill of Rights and replace it with "Health Care" Bill of Rights. Minn. Stat. § 144.651 has been updated since the last proposed rule change to Minn. R. ch. 9050 and the statute is now titled the "Health Care Bill of Rights". It is reasonable to revise state rules to align with changes in terminology in Minnesota statute.

Part 9050.0040, subpart 26b. Commenter: Zweber.

Comments: The commenter suggests that the MDVA change how someone who has power or authority delegated by the commissioner is referred to in the definition of "Commissioner."

MDVA Response: The MDVA agrees to modify the proposed definition of "Commissioner" in Minn. R. part 9050.0040, subpart 26b by removing the language, "or another department employee who has delegated authority from the commissioner". This modification is reasonable because it makes the definition clearer to the reader and is consistent with the definition of "commissioner" provided under Minn. Stat. Ch. 198, Veterans Homes. see Minn. Stat. §198.001, Subd. 5

Minn. R. part 9050.0040, subpart 26b

> *Subp. 26b.* ***Commissioner.*** *"Commissioner" means the commissioner of the Minnesota Department of Veterans Affairs ~~or another department employee who has delegated authority from the commissioner~~.*

Part 9050.0050, subparts 2 and 3. Commenter: Sicheneder.

Comments: The MDVA received comments about the requirement to provide current evidence of medical need for admission and financial information.) The commenter states that the proposed changes would have the effect of preventing veterans and their spouses from planning about where they want to receive their care. If financial and medical information is required to apply for admission, individuals with degenerative medical conditions who would otherwise qualify financially cannot be on the wait list for admission because they will not meet the medical criteria. The wait lists are currently 1 to 4 years[2]. The requirement to provide medical and financial information years in advance will deter deserving veterans or their spouses from preparing for admission."

MDVA Response: The proposed changes to subparts 2 and 3 of Minn. R. part 9050.0050 are necessary to ensure the facility can meet the care needs of the veteran or spouse and is accurate to the reference. The current language provides for criteria not needed for the individual identified in the Subpart 2 (Veterans) by referencing Minn. Stat. § 198.022, which is specifically for spouses of a veteran. The clarification assists with clarity and accuracy within the subpart by eliminating references that do not pertain to the person identified. The connection between Minn. R. part 9050.0050 and Minn. R. part 9050.0055 is important in this change. Specifically, Minn. R. part 9050.0050 establishes the criteria for admission to any of MDVA's Veterans Homes, and Minn. R. part 9050.0550 establishes the admission process, waiting list, and priority. The purpose of the proposed language to Minn. R. part 9050.0050 is to clearly identify criteria for admission as well as promote the concept of individuals that are in need of the care provided by the facility apply. Providing clear standards to admission requirements lessons the applicants who are not in need or don't qualify as a Veteran or veteran spouse

[2] The pre-COVID and current review of MDVA's wait times for the skilled nursing facilities operated by MDVA are as follows:

	Pre COVID	Current
Minneapolis	18 months	2 years
Silver Bay	18 months	2 years
Luverne	3-4 months	1 year
Fergus Falls	1 year	2 years

while at the same time eliminates confusion as well as limits the possibility of a cumbersome waiting list. Additionally, it is reasonable to provide clear criteria for applicants to determine, for the sake of planning, what the veteran's or spouse's financial obligation for a stay in a facility operated by MDVA. The information and standard applied at the beginning of the application process should be the same as at the point of admission so that the admission process is streamlined and the waiting list is accurate with eligible applicants.

Parts 9050.0050, subpart 3a, item A. Commenters: Sicheneder. Hildebrandt. Scheller. Sauber. Hennen. Weichsel. Van House. Babb. Wright. Hansen. Nilsson. Maul. Petersen. Nguyen.

Comments: The commenters point out that under the proposed amendments, a 90-day Minnesota residency requirement must be met before a veteran or spouse of a veteran could be admitted to a facility or would be permitted placement on a facility's active wait list, but that previously, there was no durational requirement. Historically, the wait list for admission to a facility is 1 - 2 years for a qualifying veteran and 2-4 years for the spouse of a veteran. The commenters state that adding this additional 90-day durational requirement serves only to delay potential admission and, in the context of other governmental programs, durational requirements have been found to be unconstitutional (see Mitchell v. Steffen, 504 N.W.2d 198).

Commenters: Sicheneder. Hildebrandt. Scheller. Sauber. Hennen. Salinas. Sommarstrom. McCray. Camp. Camp. Brune. Saltz. Wright. Hansen. Tsai. Nilsson. Maul. Rausch. Couch. Else. McLain. Carney. Kaplan. Shea. Petersen. Tilsen. Erdmann. Nguyen.

Comments: The definition of Minnesota resident fails to recognize unhoused veterans who may not rent, own, maintain, or occupy a residence in Minnesota as required by the proposed rules. As written homeless veterans and homeless veterans' spouses would not meet the residency requirements of "renting, owning, maintaining, or occupying as residence in Minnesota" in item A. Given that veterans are more likely to be unhoused compared to the general population, the residency requirement is unconscionable as it excludes an extremely vulnerable group of veterans.

MDVA Response: In seeking to define residency, the constitutional limitations on residency requirements, as determined by state and federal law, were taken into consideration. This rule is reasonable because it reflects these limitations yet assures that the Veterans Homes facility will be available to those eligible applicants who are residents of the state of Minnesota.

The 90-day residency requirement in conjunction with the requirement that an applicant not rent, own, maintain, or occupy a home in another state is necessary to ensure a veteran or veteran's spouse intends to make Minnesota their permanent residence. A clear and concise residency requirement mitigates the risk of migration to Minnesota for the sole purpose of admission to a Minnesota Veterans Home and placing more financial burden on the Minnesota tax payer. The proposed rule is consistent with residency requirements already enforced for eligibility to a Minnesota Veterans Home for a spouse of a veteran as provided under Minn. Stat. 198.022. Furthermore, other areas of the law require Minnesota residency requirement when accessing state benefits furnished by

Minnesota tax payers (see Minn. Stat. 256J.12-Residency requirement to be eligible for MFIP; Minn. Stat. 256D.02, subdivision 12a, Residency requirement to be eligible for general assistance, and Minn. Stat. 256L.09, Residency requirement to be eligible for health coverage under the MinnesotaCare program).

After reviewing public comments, the MDVA is modifying the proposed rule at part 9050.0050, subpart 3a, item A to remove the requirement that an applicant "must rent, own, maintain or occupy" a residence in Minnesota in order that homeless veterans are not unintentionally excluded on the grounds that they do not rent, own, maintain, or occupy a residence in Minnesota. This modification is necessary and reasonable to ensure that the most vulnerable of the veteran and veteran spouse populations are eligible for admission to a Veterans Home regardless of their housing status.

Minn. R. part 9050.0050, subpart 3a, item A

Subp. 3a. ***Residency.*** *For purposes of determining ~~residency under Minnesota Statutes, section 198.022, paragraphs (2) and (3)~~, a person is a permanent resident of Minnesota ~~if~~:*

A. the person physically resides ~~currently resides~~ in Minnesota ~~and intends to reside in the state permanently rents, owns, maintains, or occupies a residence in Minnesota suitable for year round use~~ for at least 90 days prior to application to a veterans home operated by the commissioner; and

B. the person does not rent, own ~~or,~~ maintain, or occupy a home in another state.

Part 9050.0050, subpart 3a, item B. Commenters: Fink. Sauber. Hennen.

Comments: The commenters state that veterans who reside out of state part of the year are penalized for having property outside of the state, and that the rule creates an unconstitutional barrier for veterans with out of state property. Example, if a veteran's spouse (nonapplicant) owns sole fee simple interest in out of state property located in a community property state, the veteran applicant will be ineligible for admission to a Minnesota Veterans Home because he/she retains an inchoate interest in the property – which differs from Minnesota as a separate property state. The commenters believe the residency requirements are unnecessary and prohibitive for veterans and non-veterans seeking admission who may be moving from another state and working on transferring residency to Minnesota and that there should be a process for someone living in Minnesota attempting to sell a property or end a rental agreement in another state can be considered for admission pending that process.

MDVA Response: This propose rule is needed to clarify what is required of a person in order to meet the eligibility requirements for admission to a Minnesota Veterans Homes facility. This rule is reasonable because it clearly identifies requirements and assures that the Veterans Homes facility will be available to those eligible applicants who are residents of the state of Minnesota.

The requirement that a person does not rent, own or, maintain, or occupy a home in another state was already established under the original rule, except for the addition of "rent" and "occupy" in the proposed rule. The original drafters back in 1989, specifically stated in the 1989 Statement of Need and Reasonableness for chapter 9050 that that the rule is "to accomplish the original purpose/intent of the homes – to care for Minnesota Veterans who could not care for themselves." Thus, resident of Minnesota, for eligibility purposes, is defined as someone who has lived in Minnesota." see Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900 p.8 (1989). Furthermore, without this original requirement, a veteran or veteran's spouse who is undoubtedly a resident of another state could secure a spot on a waiting list for admission to a Minnesota funded veterans home without ever having lived a day in Minnesota or paid taxes in Minnesota.

Part 9050.0055, subpart 4, item D and subpart 5. Commenter: Sicheneder.

Comments: The commenter states that the proposed rule changes would require reapplication by an applicant on the waiting list should placement be declined twice or if the request for placement is not answered within 3 business days and that such a requirement is administratively burdensome and punitive to the applicant without shorting the waiting list should the removed applicant re-apply.

MDVA Response: The purpose of the proposed amendments to this rule is to simplify the waiting process for admission into the Veterans Homes facility by maintaining one waiting list for each facility. Reference to the two types of waiting lists – "active" and "inactive," are deleted and replaced with "admission" waiting list. The applicants name will still be placed on a waiting list once the application is received, but the name will be recorded on one admission waiting list. The proposed rule is needed to prevent the accumulation of documentation that may be obsolete by the time an eligible applicants name switches from one waiting list to another one.

Additionally, the proposed changes provide a time limit on an offer of admission to a person. Imposing a time limit is necessary to prevent an indefinite option for admission by a person as well as maximizes the use of unoccupied beds. The time frame of three days that was identified in the current language of the rule is adequate time for a person to consider his or her options and to review them with their physician, family members, etc. If a veteran or veteran's spouse are on a waiting list for a facility operated by MDVA, it is reasonable to certify they qualify for admission but more importantly that they are in need of admission for health reasons. This being the case it is not unreasonable for the MDVA to create a requirement that after a declination of admission by a person or following two failures to respond to the offer of admission by an applicant, the applicant be placed on the bottom of the list for future determination or removed from the waiting list and make room for applicants that can be admitted. An applicant who fails to respond and is removed may still reapply if they determine they are needed of services offered by the MDVA facilities.

Additionally, the three-business day requirement for a response has been determined reasonable from previous amendments to the rule, The proposed amendment did not

amend or limit the three day requirement, but clarified it by adding the more common term of "business days" to the rule.

Part 9050.0070, subpart 3, item C. Commenter: Sauber. Hennen. Simonson.

Comments: The commenters state that the rule limits a resident's right to choose a provider, and limits the chosen outside provider to participate in care planning. The rule language in item C that reads, "if a resident has not specified a provider the provider must be a Minnesota Veterans Home staff physician" is in direct violation of 38 CFR §51.70. The commenters believe that this item should be modified to support resident choice as outlined in state and federal law.

MDVA Response: The need for and reasonableness of item C was established in the proposed rules in 1989. see Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900 p.21-22 (1989). The proposed amendment in subpart 3, item C deletes the term "attending physician" and replace it with "provider." This change aligns with the proposed definition of "provider" at Minn. R. part 9050.0040, subpart 94b. This change is needed to reflect current health care industry terminology. It is reasonable to update terminology to match the definitions used in the rule.

The current language of Minn. R. part 9050.0070, subpart 3, item C does not suggest or require that the person residing or applying to the board and care facility at the MDVA be limited in their choice of a provider. The primary focus of the MDVA and its boarding care facilities is the provision of their health care. As the facilities and funds of the MDVA are limited, a person should not be admitted to the boarding care home unless he or she has a legitimate use for services provided there. Admission of a person who does not need the services provided in boarding care results in underutilization of services at the facilities. Such admission requirements also confirm a person with the required need is allowed a bed at the facility. The Resident's Rights detailed in 38 CFR §51.70 are not violated or in conflict by the proposed amendments to this subpart.

Part 9050.0070, subpart 3, item D. Commenter: Hennen.

Comments: The commenter states that requiring a person with a mental illness to be, "reviewed and may be assessed by a staff psychiatrist or psychologist" places an additional layer of assessment on a resident or person seeking admission who also has a diagnosis of mental illness. This additional requirement, specific to only those with a diagnosis of mental illness, appears burdensome and discriminatory. The commenter also believes that the proposed rule requires that a person forgo their choice of provider for their psychiatric services.

MDVA Response: The proposed rule does provide for the possibility of an additional layer of assessment for a person with a mental illness diagnosis; however, it is necessary to confirm the facility can provide the services needed by the person and determine if the applicant meets the criteria for continued stay or admission into the facility. An "assessment" under this part is the process of appraising an applicant or resident for admission or continued stay, and the "review" focuses on making a judgment about performance of the applicant or resident. Furthermore, an assessment is made to identify the

level of performance of an individual, whereas a review is performed to determine the degree to which goals are attained. The proposed rule identifies for admission and continued stay the criteria necessary to identify the capabilities of the Veteran Home as it pertains to the person and if the facility can provide the necessary care needed.

The ultimate goal of the Veteran Home facility is to meet the applicant's needs. A staff psychiatrist or psychologist review of a diagnosis of mental illness in order to make such a determination has already been established in the rules and remains necessary and reasonable. A staff psychiatrist or psychologist is fully aware of the capabilities of the facility to meet the resident's needs whereas outside providers are not. see Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900 p.22 (1989). Therefore, the proposed language is reasonable to assure care of the resident and needed to confirm the proper care is available.

Part 9050.0070, subpart 3, item E. Commenter: Hennen,

Comments: The commenter states that subpart 3, item E as written requires the resident to waive any choice in provider and places an additional undue burden on only those with a diagnosis of mental illness. The commenter recommends that if the presented medical documentation at the time of admission, application for admission or interdisciplinary assessment of continued stay for an existing resident does not sufficiently determine whether the person is a risk to themselves or others, that MDVA permit the resident to seek additional assessment performed by a psychiatric or psychological provider of their choosing in accordance with rights afforded in the state and federal laws previously cited.

MDVA Response: The proposed rule does provide for the possibility of an additional layer of assessment for a person with a mental illness while at the same time ensures that the person does not pose a risk to themselves or other residents by confirming the care the facility can provide is available to them. As stated in the above referenced response to Minn. R. part 9050.0070, Subp. 3, item D, a staff psychiatrist or psychologist performs the review and possible assessment is already established in the rules and does not deprive the person of their right to choose the provider from whom they receive their care. The proposed amendments to the rule are necessary and reasonable to make clear that a mental illness diagnosis is reviewed appropriately so the associated care is available and can be provided. This subpart is necessary to ensure the safety of the person and facility residents.

Part 9055.0070, subpart 3, item L. Commenter: Zweber. Hennen.

Comments: In the proposed rule at line 21.22, the commenter points out that the term "evaluated" is changed to "assessed" but the next sentence refers to "The evaluation". Either "evaluation" in line 21.23 should be changed to "assessment" or "evaluated" should remain in line 21.21.

MDVA Response. In providing psychological services the terms "assess" and "evaluate" represent different processes. An "assessment" is the process of appraising someone or something. An "evaluation" focuses on making a judgment about values, numbers, or performance of someone or something. Assessments are but one part of an evaluation. Together, an assessment (which is ongoing) is performed until evaluative

conclusions can be determined. The primary benefit of obtaining an evaluation from ongoing assessments is to gain a better understanding of the underlying issues which are affecting the individual, so that specific and individually-tailored recommendations can be made regarding intervention and treatment.

Comments: The commenter recognizes the importance of collateral contacts in assessment of substance abuse disorders; however, the commenter points out that this item makes no mention of resident consent to communicate with the aforementioned collateral contacts or privacy provisions afforded in state and federal law.

MDVA Response: The need for and reasonableness of allowing a person's substance abuse disorder status to be verified by a "collateral contact" has been established. see Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900 p.18 (1993) As referenced by the original drafter in 1993, it is necessary to allow oral and written collateral contacts to obtain the information the facility needs to determine whether an applicant can be cared for in the facility. The author of the proposed language in 1993 did specify that any request would be done within the required data privacy guideline. see Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900 p.18 (1993). Nothing in the proposed rule would change that practice for facility staff. All applicable state and federal statutes governing privacy and consent must and will continue to be followed by the MDVA when using collateral contacts to verify a person's substance abuse disorder status.

Part 9050.0070, subpart 4, item B. Commenter: Hennen.

Comments: The commenter states that as proposed subpart 4, item B is in direct violation of 42 CFR §483.10(d) Choice of Attending physician.

MDVA Response: The need for and reasonableness of Minn. R. part 9050.0070, subpart 4, item B was established in Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900 p.25 (1989). The proposed rule to item B are as follows:

- The terms, "physician" and "attending physician" are removed and replaced with the term "provider." The term "nursing home" is replaced by the term "skilled nursing facility".

These changes align with the new definitions of "provider" and "skilled nursing facility" at part 9050.0040, subpart 94b and subpart 105a, respectively. These changes are needed to reflect current health care industry terminology.

The current language of Minn. R. part 9050.0070, subpart 4 item B does not suggest or require that the person residing or applying to the skilled nursing facility at the MDVA be limited in their choice of a provider. The primary focus of the MDVA and its skilled nursing facilities in particular is the provision of their health care. As the facilities and funds of the MDVA are limited, a person should not be admitted to the facility unless he or she has a legitimate use for services provided there. Admission of a person who does not need the services provided in the facility results in underutilization of services and the facilities. Such admission also deprives persons with greater need of a place at the

facility. Failure to have an avenue to confirm the diagnosis of a person does not exceed the facility capabilities which could create possible liability problems for the facility and deprives that person of appropriate care. The Resident's Rights detailed in 42 CFR §483.10(d), Choice of Attending Physician, are not violated, but the focal point of the original rule language in this subpart.

Part 9050.0070, subpart 4, item D. Commenter: Hennen.

Comments: The commenter states the intent of subpart 4, item D seems to be to outline the facility's obligations under Minn. R. part 9050.0300. The commenter believes the requirement to "demonstrate a history of cooperation" places and undue burden of proof on an applicant for admission to prove "cooperation", and does not leave room for consideration of the applicant or resident's right to decline care or treatment afforded under 42 CFR §483.10 (c)(6), which allows the right to request, refuse, and/or discontinue treatment, to participate in or refuse to participate in experimental research, and to formulate an advance directive. The commenter also cites similar rights under 38 CFR §51.70(b)(4) which reads, "The resident has the right to refuse treatment, to refuse to participate in experimental research, and to formulate an advance directive as specified in paragraph (b)(7) of this section; and". The commenter states that the word "cooperation" is subjective and the ability to "cooperate" should not be a necessary criteria for admission or continued stay beyond the facility's inability to meet needs. The commenter does not believe that this item is reasonable or necessary as it is in direct violation of Resident Rights under the aforementioned federal statutes.

MDVA Response: The proposed amendments to items B, C, D, and E delete the terms "attending physician" and replace it with "provider" and nursing "home" and replace it with "skilled nursing facility." As stated above, these change align with the new definitions of "provider" and "skilled nursing facility" and are needed to reflect current health care industry terminology.

The MDVA disagrees with the assertion that having to demonstrate a history of cooperation with one's treatment plan poses an undue burden of having to prove one's "cooperation" and does not leave room for consideration of a person's right to decline care or treatment afforded under 42 CFR §483.10 (c)(6).

The residents rights listed under 42 CFR §483.10 (c)(1)-(8) provide a person with the rights to be informed of, and to participate in the person's treatment to include the right to participate in the development and implementation of his or her person-centered plan of care. The commentor fails to provide information that the proposed amendments to this rule or the current rule violates 42 CFR §483.10 (c)(1)-(8).

The MDVA does not agree with the commenter that proving cooperation with a treatment plan that a person has been given the opportunity to participate in the creation of presents an undue burden. When a person seeks and is accepted into a facility, there is an acknowledgment on their part and the part of staff that they need a certain degree of monitoring to provide for their own health and safety and it is reasonable that this be done through the care planning process. Care planning helps to establish responsibility for the ongoing treatment and discharge planning of residents. It is necessary that the care

plans be reviewed and updated according to the appropriate regulatory standards and when there is a significant change in the resident's condition. The big part of a successful care plan is the involvement of the resident or applicant. Failure to have the resident or applicant involved in the care plan can cause issues with the validity of the persons care. The original drafters identified this need and the importance of being involved in the care planning and treatment, but still allow the resident to control the planning and implementation of care.

Also, the MDVA disagrees with the implication that a person exercising their rights under 42 CFR §483.10 (c)(6) will automatically be considered as not cooperating with their treatment plan. The residents' rights and responsibilities under this rule allows for a resident to refuse treatment in accordance with Minn. Stat. 144.651. See Minn. Rule 9050.1070, subp. 3.

Furthermore, the MDVA does not agree with the commentor that the use of the word "cooperation" is subjective and limits the resident's rights. A person can still cooperate with the care but at the same time disagree with the plan. It is the interactive approach that the facility is referring to in the rule along with the necessity of the person or their legal representatives to be involved to assure the best care.

Part 9050.0070, subpart 4, item F. Commenter: Hennen.

Comments: The commenter supports additional assessment when there is a history of violent or self-abusive behavior to ensure the resident and others in the facility can be safe. It is important to ensure resident choice is honored in that process, as outlined in various areas of our comments as afforded by Minn. Stat. §144.651 and §144A and 38 CFR §51.70 and §51.300, and 42 CFR §483.10. The commenter supports further amending the existing rule. The commenter requests language be added that requires resident has consented to the assessment.

MDVA Response: The proposed amendment at subpart 4, item F is revised to add that in addition to being assessed by an attending psychiatrist or psychologist, persons with a history of violent or self-abusive behavior or an active substance use disorder can also be assessed by the "provider or the facility medical director." This change is needed to clarify that a provider or the facility medical director can also conduct the assessment. This change is reasonable because it clearly identifies all personnel who are qualified to conduct the assessment in order to determine the facility's ability to meet the safety needs of the person being assessed and other persons at the facility.

The MDVA does not believe the additional rule language proposed by the commenter further ensures a person's choice is honored in the admission process. The MDVA fully recognizes the protections afforded to a person under Minn. Stat. §144.651 and §144A, 38 CFR §51.70 and §51.300, and 42 CFR §483.10. The MDVA will continue to follow all applicable state and federal statutes governing privacy and consent under the current rule when the MDVA assesses a person with a history of violent or self-abusive behavior in the process for admission or continued stay in a skilled nursing facility.

Part 9050.0070, subpart 4, item G. Commenter: Hennen.

Comments: The commenter supports additional assessments to ensure the facility's ability to meet the resident identified needs. It is important to ensure resident choice is honored in that process, as afforded by Minn. Stat. §144.651 and §144A and Federal Codes, 38 CFR §51.70 and §51.300 and 42 CFR §483.10. The commenter requests language be added that requires resident has consented to the assessment. The commenter recognizes the importance of collateral contacts in assessment of substance abuse disorders; however item G makes no mention of resident consent to communicate with the aforementioned collateral contacts. The commenter requests language be added requiring resident consent to collateral contact. This will ensure proper adherence to HIPPA and other necessary privacy laws to protected health information under both federal and state law.

MDVA Response: The proposed amendments at Subpart 4, item G is revised to add that in addition to being assessed by an attending psychiatrist or psychologist, persons with a history of violent or self-abusive behavior or an active substance use disorder can also be assessed by the "provider or the facility medical director." This change is needed to clarify that a provider or the facility medical director can also conduct the assessment. This change is reasonable because it clearly identifies all personnel who are qualified to conduct the assessment in order to determine the facility's ability to meet the safety needs of the person being assessed and other persons at the facility.

Again, the MDVA does not believe the additional rule language proposed by the commenter further ensures a person's choice is honored in the admission process. The MDVA fully recognizes and protects the rights afforded to a person under Minn. Stat. §144.651 and §144A, 38 CFR § 51.70 and §51.300, and 42 CFR §483.10. The need for and reasonableness of allowing a person's substance abuse disorder status to be verified by a "collateral contact" has been established (see Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900 p.20 (1993)). The MDVA will continue to follow all applicable state and federal statutes governing privacy and consent under the current rule when the MDVA assesses a person who has an active substance use disorder.

Parts 9050.0100, subpart 1 item C. Commenter: Hennen.

Comments: The commenter supports the rule language that a resident may only be transferred with resident consent. The commenter has concerns that the sentence "A resident who refuses consent for transfer to another health care facility or rehabilitation program or detoxification program on recommendation of the attending physician provider or the utilization review committee, or both, may be subject to discharge for noncompliance with the resident's individual care plan." The commenter states that this is unreasonable and unnecessary due to the fact that the rule does not give consideration for important resident rights previously cited and afforded by Minn. Stat. §144.651 and §144A, 38 CFR §51, and 42 CFR §483.

MDVA Response: Justification for subpart 1, item C is provided in the Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900 p.26-27 (1989). The drafters of the 1989 rule stated that:

This rule defines what type of movement constitutes a transfer, sets out the conditions under which transfer may be done, defines transfer as primarily voluntary and if not voluntary gives notice that lack of consent can result in discharge where inability to provide care results. Transfer is structured as voluntary only, except in emergencies, to allow full consideration of the person's freedom to refuse treatment. Therefore, if a person refuses treatment, he or she may only be discharged if such refusal jeopardizes his or her situation to the extent that the facility is, in accordance with established criteria, unable to provide adequate care for the person. A rule relating to transfer from the facility, which is intended in most cases to be temporary, is necessary to ensure due process rights. As transfer affects only persons who are currently Minnesota Veterans Homes residents, it affects the right of continued residency. The reasonableness of the criteria for transfer is that it can be based only on request of the person, or treatment need, long-term or emergency; or ability to provide appropriate care. This places the primary focus on the needs of an individual and the standard of whether the needs can be met at the facility. This also serves to provide notice that lack of consent may result in discharge if refusal prevents the facility from caring for the resident. This provides advance notice to a resident of the possible consequence of his or her decision.

The current rule states "A resident who refuses consent for transfer to another health care facility or rehabilitation program or detoxification program on recommendation of the attending physician provider or the utilization review committee, or both, may be subject to discharge for noncompliance with the resident's individual care plan." is still necessary and reasonable and does not usurp the rights previously cited and afforded by Minn. Stat. §144.651 and §144A, 38 CFR §51, and 42 CFR §483. Furthermore, Minn. R. part 4655.1500, subpart 2 provides that a patients or resident will not be accepted or retained for whom care cannot be provided in keeping with their known physical, mental or behavioral conditions. Therefore, if a person's refusal to give consent for a transfer results in a facility no longer being able to meet a person's care needs as provided under Minn. R. part 9050.0070, subparts 3 and 4, the person can be discharged under the limits of the Health Care Bill of Rights.

Comments: This subpart proposes to delete "patient" bill of rights and replace it with "health care" bill of rights, referencing Minn. Stat. §144.651 which is now referred to as the "Health Care Bill of Rights". The commenter states that this language change is unnecessary since various Bill of Rights language applies to these settings. The commenter supports leaving "patient bill of rights" and keeping the reference to resident rights provisions afforded in Minnesota Statutes §144.651, and for this subpart adding the additional rights afforded in §144A.13. MDVA has also left out any reference to important rights afforded to residents under 42 CFR §483 and 38 CFR §51, both of which apply in these settings. The commenter proposes adding the reference to §144A and both aforementioned federal statutes as important rights are afforded to residents in these provisions.

MDVA Response: The proposed amendments in subpart 1, item C delete the term "attending physician" and replace it with "provider," and change the term "Patient's Bill

of Rights" to "Health Care Bill of Rights." to align with Minn. Stat. § 144.651. These changes is needed to reflect current health care industry terminology and to update terminology to match the definitions used in the rule.

The MDVA does not feel adding additional references to different Minnesota Statutes and Codes of Federal Regulations to the current rule language is necessary to ensure a person's rights under these statutes and regulations. The MDVA fully recognizes and protects the rights afforded to a person under Minn. Stat. §144.651 and §144A.13, 42 CFR §483 and 38 CFR §51 when applicable.

Comments: The commenter states that the rule falsely points out that a resident declining to follow provider recommendations as an exercise of their rights would alone meet criteria for discharge. The commenter states the rule language, "The utilization review committee's decision to recommend discharge of a resident for refusing consent for transfer is limited by the Health Care Bill of Rights established in Minnesota Statutes, section 144.651, and must be based on the facility's ability to meet the person's care needs as determined by the criteria in Minn. R. part 9050.0070, subparts 3 and 4." should either be deleted because it is a violation of resident rights, or amended to leave the reference to "Patient Bill of Rights" and add reference to protections afforded by Minn. Stat. §144.651 and §144A, 38 CFR §51, and 42 CFR §483.

MDVA Response:

Neither the current rule nor the proposed rule reference that a resident declining to follow provider recommendations as an exercise of their rights alone meets criteria for discharge. The commenter's assertion that the sentence, "The utilization review committee's decision to recommend discharge of a resident for refusing consent for transfer is limited by the Health Care Bill of Rights established in Minnesota Statutes, section 144.651, and must be based on the facility's ability to meet the person's care needs as determined by the criteria in part 9050.0070, subparts 3 and 4" is a violation of a resident's rights is has no merit. The rule clearly states that discharge recommendations for refusing consent for transfer are limited by the Health Care Bill of Rights and the recommendations must be based on an assessment of the facility's ability to meet the resident's needs as determined under part 9050.0070, subparts 3 and 4. The additional protections are provided under the authority of and compliance with Minn. R. part 4655.1500, subpart 2 and Minn. R. part 9050.0200. Finally, Minn. Stat. §144.651 is already cross-referenced in the rule and the protections afforded by Minn. Stat. §144A, 38 CFR §51, and 42 CFR §483 when applicable.

Part 9050.0100, subpart 2, item C. Commenter: Hennen.

Comments: The commenter supports the proposed amendments in subpart 2, item are supported by the commenter but states that item C be further amended to add the language, "Nothing in this section shall negate the rights afforded to residents under Minn. Stat. §144.651, §144A and Federal Codes, CFR 38 §51 and 42 CFR §483."

MDVA Response: The MDVA does not agree that the commenters suggested rule change is needed. The MDVA will continue to follow all referenced state and federal law as applicable.

Part 9050.0150, subparts 4 and 7. Commenter: Sauber. Hennen.

Comments: The 96 hour limit on the duration of a therapeutic leave; involuntary discharge procedure being started if the resident is gone for longer than 96 hours; the limit of 12 calendar days of therapeutic leave per calendar year; and the every 7-day bed hold reviews are unreasonable and should not be imposed on residents if the resident continues to pay the required maintenance charge to maintain a bed hold. The commenter supports the language and definition change to change Personal Absence to Therapeutic Leave.

MDVA Response: The proposed rule at subpart 4 is amended to add rule language that specifies the allowable number of days per year a resident can take therapeutic leave, unless definitive arrangements have been made with the administrator for a longer absence. This change is needed to align with the federal per diem rate as provided under 38 CFR §51.40. It is reasonable that MDVA request federal funding when available and is allowed under federal law per Minn. Stat. 198.003, subd 4a.

Subpart 7 is proposed for amendment to change the review timeframe for the appropriateness of continued bed hold from at least once every 30 days to every seven days during the resident's ongoing absence. This revision is needed to update the amount of review time in which the facility will determine the appropriate length of absence so the MDVA conforms compliance with amended subpart 4 of this part and the federal per diem allowance under 38 CFR §51.4.

Comments: The commenter states in previous rule parts that "MDVA argues that they wish to adopt language that is consistent with standards for Minnesota Medical Assistance, Minn. Ch. §256B." At this time those receiving Medical Assistance in Minnesota are afforded *36 days* of therapeutic leave as outlined in the Minnesota Leave Day Guidance. The commenter states that there is a disparity between those reliant on Minnesota Medicaid and those reliant on reimbursement from the Veterans Administration for payment of their long-term care and what this means for a resident's ability to exercise their right to leave the facility without repercussion, including the threat of discharge. The commenter requests therapeutic leave be increased to 36 days.

MDVA Response: The proposed amendments in Subpart 4 provides additional language that specifies the allowable number of days per year a resident can take therapeutic leave, unless definitive arrangements have been made with the administrator for a longer absence. This change is needed to align with the federal per diem rate as provided under 38 CFR 51.40 It is reasonable that state rules comply with federal law. It is reasonable that MDVA request federal funding when available and is allowed under federal law per Minn. Stat. 198.003, subd 4.

Part 9050.0200, subpart 2, item A. Commenter: Hennen.

Comments: The commenter feels the proposed language, "Voluntary discharge begins when the resident or the resident's legal representative submits a written notice to the facility for discharge of the resident." places an undue burden for written notice on the resident or representative in order for a discharge to be deemed "voluntary". It also gives undue authority to the Administrator to "consent" to the resident and/or their legal representative's desire to leave. There is no distinction made related to voluntary discharge as it applies to the separate sections of the Minnesota Veterans Homes. This is important as 42 CFR §483 and The State Operations Manual differentiates between "facility initiated" and "resident initiated" transfers and the proposed language is not consistent with these definitions, which are further outlined in the next subpart.

MDVA Response: Subpart 2, item A establishes the requirements for a voluntary discharge. When a facility receives a request from a resident or the legal representative, the facility, through its administrator, refers to all its care providers before providing consent to the discharge. The proposed change is reasonable because it assures the necessary participants required to consent to a voluntary discharge are identified. Item A is next revised to add language identifying that a voluntary discharge begins when the resident or resident's legal representative submits written notice to the facility. This revision is needed so that is clear to the facility that the resident or resident's legal representative are the persons who are initiating the discharge request.

Part 9050.0200, subpart 2, item B, subitems 1-6. Commenter: Hennen. Goetz.

Comments: MDVA has not provided a distinction between the process of "involuntary" discharge for those residing in the Boarding Care (Domiciliary) and those residing in the Skilled Nursing Facility. Discharge protections afforded under 38 CFR §51.300 and 42 CFR §483.15, which applies to the Skilled Nursing Facility area of the Minnesota Veterans Homes are very specific. Additionally, the State Operations Manual, the tool used by state and federal surveyors further defines "involuntary" discharge as a discharge initiated by the facility (pages 169-170). Also, both 38 CFR §51.300 and 42 CFR §483.15 limits the provisions under which a person can be discharged by the facility to only six reasons (see full comment). Without modifications this entire item B, subitems 1-6, are in noncompliance with federal laws. The MDVA SONAR points out the importance that the Rules outlined in Minn. R. part 9050 comply with Federal Law; however, this subpart, item, and subitems do not currently meet that criteria.

MDVA Response: Subpart 2, item B establishes the requirements for involuntary discharge. When a facility acts to involuntarily discharge a resident, the facility, through its administrator, refers to all its care providers by relying on the utilization review committee described in Minn. R. part 9050.0400 before acting on the recommendation for discharge. This change is reasonable because it assures the necessary process and followed and the required participants are consulted before an involuntary discharge is acted upon.

The proposed rule language in parts 9050.0200 and 9050.0220 will ensure resident rights protections by adding an additional internal review process of the notice of discharge. The multi-level review conducted by MDVA will also ensure adherence to both federal and state law as it pertains to the discharge process.

Part 9050.0200, subpart 2, item B, item 4. Commenters: Fink. Simpson. Sauber. Hennen. Hildebrandt. Scheller.

Comments: The proposed rule adds a ground for discharge in Minn. R. part 9050.0200, Subp. 2(B)(4) of the resident's behavior exhibiting "willful or deliberate disregard for the veterans home facility's regulatory requirements or policies." Such grounds are considered overly broad, not tied to existing grounds in nursing home law. There is no requirement for a medical assessment or consideration of the safety of other residents. There is no allowance for residents with diminished capacity or cognitive impairment and their ability to understand the rules. This lacks adequate protections for residents in the discharge grounds, leaving too much to the interpretation of the Minnesota Department of Veterans Affairs.

MDVA Response: The proposed amendments to item B are needed to more clearly and concisely identify all the circumstances for which the MDVA may initiate involuntary discharge proceedings against a resident of one of its facilities. It is reasonable to provide the circumstances under which involuntary discharge procedures start in order to ensure that the facility and resident are informed that specific circumstances will lead to an involuntary discharge.

The proposed amendments to parts 9050.0200 and 9050.0220 provide additional protection to the resident by creating another level of internal review, which in turn will ensure proper adherence to both federal and state law as it pertains to the discharge process and resident's rights.

Part 9050.0200, subpart 2, item C. Commenters: Fink. Simpson. Sauber. Hennen. Hildebrandt. Scheller. Sommarstrom.

Comments: The commenter opposes this entire subpart for the reasons previously stated above under item B, in addition to direct rights violations and due process violations afforded in other areas of the law, namely Minn. Stat. §144.651, and 38 CFR §51 for Domiciliary resident discharges, and §144.651, §144A, 38 CFR §51 and 42 CFR §483 for Skilled Nursing Facility resident discharges. There is no distinction here between rights and protections afforded to those in the Boarding Care Home (Domiciliary) and those in the Skilled Nursing Facility. In addition, there is no mention of important due process rights, appeal, right to return and other rights afforded in the aforementioned State and Federal regulations.

MDVA Response: Proposed item C establishes the requirements for immediate discharge, previously established in Minn. R. part 9050.0200, subpart 3, which is proposed for repeal. The current rule language in subpart 3 was added in 1995 and referenced a ground for discharge to when a resident poses an immediate threat to the health and safety of the resident, other residents, or staff. The drafters of the current language found a need for discharge when immediate risk was created by the actions of a resident; however, the current language did not provide a clear process for the MDVA to follow. Proposed item C, along with the proposed amendment in Minn. R. part 9050.0220, subpart 7, creates a clear direction for the resident and the facility when

moving through the discharge process and provides the necessary protection of resident rights afforded to the resident under federal and state law.

Comments: A resident may be discharged immediately, with less than 48 hours' notice, under proposed rule Minn. R. part 9050.0200, Subp. 2(C) if the resident "willfully or deliberately disregards state or federal laws, rules, and regulations." Such language is again overly broad, not tied to a medical assessment or the safety of the resident or others, and represents concepts found in criminal law not medical facility discharge. In addition, the resident can be discharged pending an appeal of an immediate discharge, in contradiction of concepts in Minnesota nursing home law under Minn. Stat. 144A.135.

MDVA Response: Proposed item C identifies that a resident can be immediately discharged if they willfully or deliberately disregard state or federal laws, rules, and regulations; and the residents behavior poses an immediate threat to health and safety of the resident, other residents, or staff of the facility. Such protections were originally brought forward in 1995 when the rule was amended to add "immediate threat" as a grounds for discharge. See Statement of Need and Reasonableness in the Matter of the Proposed Amendment of Rules of the Veterans Homes Board Governing the Operations of the Minnesota Veterans Homes p.25 (1995). Furthermore, unlike the current rule the proposed rule in item C align with the process of executing the immediate discharge in part 9050.0220, subpart 7. This new subpart 7 is identifies that immediate discharge is a type of discharge allowed under part 9050.0200, and clearly identifies when it can be used as a preventive measure against unsafe conditions of the resident, other residents in the facility, or facility staff; as well as provide safeguards in the process to confirm compliance with state and federal laws. It is reasonable to have a discharge mechanism in place that provides for the safety of residents and facility staff.

Part 9050.0200, subparts 4 and 5. Commenter: Hennen.

Comments: (Summary-In regard to the proposed repeal of subparts 4 and 5) The commenter states proposed repeal of these subparts removes important protections outlined in State and Federal Law, including the discharge protections outlined in the prior several subparts. Removal of this subpart removes reference to important protections afforded to residents under the law. The MDVA SONAR justifies the removal based on the amendments to Minn. R. part 9050.0200, Discharge, Subp. 2, item B and the addition of Minn. R. part 9050.0200, Discharge, Subp. 2, item C but these subparts and items do not replicate any of the important language that outlines proper notice or what the contents of the notice must look like. These subparts and items also would need modifications to come fully into compliance with Federal protections afforded under both 38 CFR §51 and 42 CFR §483 related to the Skilled Nursing Facility and the Boarding Care (Domiciliary) portion of the homes.

MDVA Response: Current Minn. R. part 9050.0200, subpart 4 identifies the requirements for notice of involuntary discharge. Minn. R. part 9050.0200, subpart 4 is being repealed because Minn. R 9050.0220, involuntary discharge procedures, is being revised to include the existing subpart 4 requirements for involuntary discharge. It is reasonable to eliminate repetitive and redundant rule language. Existing Minn. R. part 9050.0200, subpart 5 identifies the contents of the notice of involuntary discharge. Minn.

R. part 9050.0200, subpart 5 is being repealed because Minn. R 9050.0220, involuntary discharge procedures, is being revised to include the existing subpart 5 requirements for notice of involuntary discharge. It is reasonable to eliminate repetitive and redundant rule language.

Part 9050.0210, subpart 1. Commenter: Hennen.

Comments: The commenter supports the language of subpart 1 that reads, "Voluntary discharge procedures must be used when a discharge from the facility operated by the commissioner of veterans affairs is voluntary as in Minn. R. part 9050.0200, subpart 2, item A," provided the definition of "voluntary discharge" is amended as the commenter suggests (see full text of comment). The commenter does not support the language, "or following review of an appeal from an involuntary discharge order when a court has issued an enforcement order or the resident has agreed to comply with the order for discharge." The commenter argues that this statement asserts that a resident leaving a facility after losing an appeal is the same as a "voluntary discharge" which, for those living the Skilled Nursing Facility portion of the Minnesota Veterans Home resident would not meet the federal definition of "involuntary discharge" as outlined in the State Operations Manual. The MDVA's assertion is that leaving the facility after losing an appeal where a resident was appealing for continued stay should be considered a "voluntary" discharge. This assertion does not meet any known definition of voluntary. This could have alarming implications, including the skewing of federally tracked data surrounding how and why discharges occur for those in both Federally Certified Skilled Nursing Facilities as well as data as it relates to the Veterans Homes overall.

MDVA Response: The rule language referenced by the commenter establishes a procedure for accomplishing discharge of a person, voluntary or involuntary. Such procedure ensures an orderly transition to a new placement and helps make sure a person's needs are met. Use of an established procedure helps the individual and the facility plan for the discharge and deal with the transition. The current rule does not reference the non-compliance with reporting requirement or misguidance of data.

Part 9050.0220, subpart 1. Commenter: Hennen.

Comments: (Summary-In regard to recommendations for involuntary discharges.) The revised subpart references Minn. R. part 9050.0200 Subp. 2, item B which the commenter believes is not in compliance with Federal law and lacks important rights protections afforded under the law. The commenter requests the MDVA either separate involuntary discharge protections afforded under Federal and State Laws for Skilled Nursing Facility residents or rewrite the subpart to include protections equally to both the Skilled Nursing Facility and Boarding Care Home (Domiciliary) residents.

MDVA Response: The proposed amendments to the Minn. R. part 9050.0220, subpart 1 provides clarity to the reader regarding who at the facility can recommend an involuntary discharge of a resident to the facility administrator. It is reasonable to correctly identify who has that authority. The MDVA has determined under its power provided to it under Minn. Stat. 198.003, subd 1 the individual staff listed are the personnel most qualified to recommend a discharge of a resident under their care. Additionally, providing a

consistent method for and specific grounds on which to discharge a resident is necessary ensures fair treatment of residents.

Part 9050.0220, Subpart 1a. Commenter: Hennen.

Comments: The commenter states that asking someone within the Veterans Home system, who holds the same role at another Veterans Home location, of which there are only 5 positions currently in the state creates a system that could work adversely against a resident. There is not a mechanism outlined here to limit bias that could be implicit by default.

MDVA Response: Under Minn. Stat. 198.003, the Commissioner of MDVA has the authority and duty to create rules that help operate the facilities of MDVA as well as protect the residents that live in those facilities. Subpart 1a is added to provide a specific definition to the term "neutral administrator" as used in this part. The term creates a specific identification of the individual that will oversee a discharge reconsideration hearing. MDVA's proposal provides additional safeguards to a resident facing an involuntary discharge by identifying a neutral individual to oversee the discharge and confirm if the recommendation by the utilization review committee and the notice of discharge by the administrator is consistent with the rules.

Part 9050.0220, subpart 2, item C. Commenter: Hennen.

Comments: The subpart does not contain important requirements afforded to residents of the Skilled Nursing Facility under both 38 CFR §51 and 42 CFR §483, specifically: 38 CFR §51.300(d)(6); 42 CFR §483.15(c)(5); 38 CFR 51.80(a)(7) and 42 CFR §483.15(c)(7); 38 CFR 51.80(b); and 42 CFR §483.15(d).

MDVA Response: Because Minn. R. part 9050.0200, subpart 5, contents of notice, is proposed for repeal, new item C is added to establish what information the notice of involuntary discharge must contain. The items listed in item C, subitems (1) to (5) align with the items listed in the current language provided within Minn. R. part 9050.0200, subpart 5 proposed for repeal. This rule is needed to identify the required content of the notice requirement when initiating an involuntary or immediate discharge, and to provide direct instructions as it pertains to the content of the notice and the appropriate individual to execute the notice. Additionally, the proposed language provides assurance that the resident receiving the notice has the proper information regarding the basis for discharge and options for appeal. It is reasonable to identify the information the notice must contain to help ensure the notice process and discharge process is clear.

Additionally, the proposed rule creates a notice provision that is similar to the current rule and one which is required by court decisions and due process requirements. The notice provides the necessary information regarding the basis of the discharge and affords the resident's rights under federal and state law.

Part 9055.0220, subpart 3. Commenters: Simpson. Sauber. Hildebrandt. Scheller. Hennen.

Comments: A reconsideration hearing for the discharge is automatically scheduled before a representative of the MDVA, with full fact finding and witnesses, prior to a right

to appeal the discharge to the Office of Administrative Hearings. The commenters state that this process adds to time and cost prior to the resident being able to avail themselves of an appeal before the Office of Administrative Hearings, an agency outside the MDVA. There is a concern that the reconsideration hearing is before a representative of the MDVA that may not afford due process while at the same time creating a record that will continue through an appeal process. In addition, the final decision is made by the agency that issued the discharge notice.

MDVA Response: Subpart 3, item A is revised to delete the rule language that allows a resident to request the reconsideration hearing. New rule language is added that requires the facility to schedule a reconsideration hearing at least 10 days from the date of the notice of involuntary discharge, and that the reconsideration must be before a neutral administrator or neutral designee. This revision provides additional due process protection for a resident facing an involuntary discharge and correctly identify the requirement for the facility to automatically create a reconsideration hearing when a notice of involuntary discharge is presented to a resident. The proposed language provides that the person overseeing the reconsideration is not the same person that approved the recommendation of discharge; therefore, providing an additional level of protection to the resident's rights and the process. Additionally, the revision is needed to specifically identify the facility personnel at the facility that will oversee the reconsideration hearing. Previously, a reconsideration hearing was only scheduled if requested by the resident identified in the notice of discharge. To protect a resident's rights, MDVA will now be required to provide a reconsideration hearing of each resident who receives a notice of involuntary discharge. The time requirement for the hearing is consistent with current language under Minn. R. part 9050.0220, subpart 3. This change is reasonable because it helps to ensure the process is clear and that the resident's due process rights are protected.

Part 9055.0220, subpart 3, item B. Commenter: Hennen.

Comments: The commenter recommends adding after the word "telephone" the language, "or agreed upon form of video or electronic communication".

MDVA Response: MDVA agrees with the commentor suggested rule change and proposes to modify subpart 3, item B to provide additional clarification on the types of alternative methods to conduct the hearing. This modification is necessary and reasonable to ensure that the most up to date methods are identified.

Minn. R. part 9050.0220, Subpart 3, item B

Any reconsideration hearing may be conducted via telephone, video, or electronic communication if the resident requests it or the parties mutually decide it would be advisable. If a telephone, video, or electronic communication reconsideration hearing is held, the parties must document the resident's consent for the telephone, video, or electronic communication hearing and why the hearing was held via telephone, video, or electronic communication.

Part 9055.0220, subpart 4, item A, subitem 1. Commenter: Hennen.

Comments: The commenter states the language, "Office of Ombudsman for Older Minnesotans" should be replaced with the office's accurate name, "Office of Ombudsman for Long-Term Care".

MDVA Response: The definition of "Ombudsman" as provided in Minn. R. part 9050.0040, subpart 86a, establishes that "Ombudsman" has the meaning given it in the Older Americans Act of 1965, United States Code, title 42, section 3027(a)(12), and Minnesota Statutes, section 256.974 which is an accurate reflection of the current reference in part 9055.0220, subpart 4, item A, subitem 1. However, if the Office of Administrative Hearing finds the commenter's proposed change necessary, MDVA does not have objection to the change.

Part 9055.0220, subpart 7, item C. Commenter: Simpson.

Comments: The commenter states Subpart 7, item C requires only that a resident "be notified in writing by the administrator or administrator's designee of the facility of its intent to proceed with immediate involuntary discharge of the resident at least 48 hours before the scheduled date of discharge." State and federal laws governing discharge from nursing homes include greater procedural protections. The MDVA's proposed discharge amendment is more restrictive and therefore does not conform to state and federal laws governing discharge from nursing homes.

MDVA Response: The proposed amendments in subpart 7, items A to F establish the requirements for immediate involuntary discharge of a resident, one of the types of discharges available to the facility, as identified in Minn. R. part 9050.0200, subpart 2, item C. Subpart 7 identifies the resident's rights and appropriate procedures when the facility conducts an immediate discharge of a resident based on an immediate threat to the health and safety of the resident, other residents, or staff. Failure not to have a process to properly discharge a resident when they are an immediate threat creates a situation where the facility will not be able to properly protect the resident, other residents or its staff. Subpart 7 identifies the internal decision process of the facility, notice requirement to the resident, the procedure to be implemented to assure resident's rights, as well as the appeal process. This change is reasonable because it helps to ensure the facility can maintain safety within its operations as well as provide due process to the resident. The MDVA must and will follow all applicable state and federal statutes governing discharge when conducting an immediate discharge.

Part 9055.0220, subpart 7, item, item F. Commenter: Hennen.

Comments: The last sentence of this item in the proposed rules reads, "If the order confirms immediate involuntary discharge of the resident, an appeal under subpart 6 does not delay the discharge date noted within the order." The commenter states that this statement removes important rights afforded under 42 CFR §483.15(c)(1)(ii), 42 CFR § 431.230 and § 431.220(a)(3). If the definition of "involuntary discharge" used in Minn. R. part 9050.0200 Discharge, Subp. 2, item B, which the commenter opposes due to its inconsistency with Federal protections, is used then a resident could be arbitrarily denied the right to stay or return to the Skilled Nursing Facility portion of the Veterans Home pending appeal.

MDVA Response: The proposed amendment under subpart 7, items A to F establish the requirements for immediate involuntary discharge of a resident, one of the types of discharges available to the facility, as identified in part 9050.0200, subpart 2, item C. Subpart 7 is needed to correctly identify the resident's rights and appropriate procedures when the facility conducts an immediate discharge of a resident based on an immediate threat to the health and safety of the resident, other residents, or staff. The commenter references federal law but fails to notice the additional language within the Code of Federal Regulations that allows for an exception to forgo delay of discharge when the "failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility". See 42 CFR §483.15(c)(1)(ii) The MDVA must and will follow all applicable state and federal statutes governing discharge when conducting an immediate discharge. This change is reasonable because it helps to ensure the facility can maintain safety within its operations as well as provide due process to the resident.

Part 9050.0560, subpart 1 (paragraph after item E). Commenter: Hennen.

Comments: The commenter states that the last sentence of the paragraph after item E as amended is not a permissible reason for involuntary discharge for those residing in Skilled Nursing Facilities under 38 CFR §51 and 42 CFR §483. A resident or authorized representative not disclosing a substantial change in financial status could be for a multitude of reasons including illness, injury, family circumstances, exploitation by someone else and more. Nondisclosure does not in itself equal a nonpayment. The commenter supports either separating protections for Skilled Nursing Facility residents or brining the rule into compliance with an extension of those protections to Boarding Care Home (Domiciliary) residents. It is arbitrary to propose that a discharge under this subpart, even for Domiciliary residents, could occur based on a mere nondisclosure when this in itself has not necessarily resulted in a nonpayment. This appears nether reasonable nor necessary since nonpayment is an established reason for discharge for both settings and has a defined process for discharge offered under both statute and rule.

MDVA Response: This proposed rule is needed to clarify that if there is a failure to identify the triggering event as required, discharge could be sought by the facility as provided in Minn. R. part 9050.0200, subpart 2, item B, subitem (6). Such an action by the resident allows for a notice of possible discharge but provides the resident the opportunity to update information in question. The failure of pay or accurate information is a common reasoning for a notice of discharge and is consistent state and federal law.

Part 9050.0600, subpart 1, item A. Commenters: Hildebrandt. Scheller. Fink. Sauber. Galvin. Zweber. Calvert. Van House. Stedman.

Comments: The commenters state that treating joint tenancy as tenancy-in-common is unconstitutional and is an infringement on real property rights. This treatment ignores property arrangements where there are inequitable joint tenancies, resulting in an interference in contract rights and a potential cloud on title. Treating property as such affects the rights of joint tenants to inherit the portion of property they are entitled to on death of the other tenant. Treating a joint tenant's interest in a property as a tenancy-in-common deprives the other joint tenants of the possibility of owning the entire property

free of a deceased joint tenant's interest in the property. Treating a joint tenancy as a tenancy-in-common and forcing efforts to sell compounds the unfairness to the owners of the property and impairs their vested rights. The Commissioner nor MDVA has the authority to abrogate the common law of joint tenancies by rule-making.

Comments: There is no basis for using the EPM for valuation purposes of the life estate interest, when outside of a Medicaid or Supplemental Security Income context. The appropriate valuation would be the IRS actuarial tables under Section 7520 of the Internal Revenue Code pertaining to life estates. Using the Department of Human Services Minnesota Health Care Programs Eligibility Policy Manual results in an unreasonably high valuation for the life estate interest owner.

MDVA Response: MDVA agrees with the commentor suggested rule change and proposes to modify subpart 1, item A to provide additional clarification on the method to evaluate life estate for non-excluded property and to create an equitable and compliant rule.

Minn. R. part 9050.0600, subpart 1, Item A

Subpart 1. ***General provisions of property ownership.*** *The equity value of all nonexcluded real and personal property owned by an applicant or resident must not exceed $3,000. The facility financial staff must use the equity value of legally available real and personal property, except property excluded in subpart 2 or 3, determine the resources available to or on behalf of an applicant or resident.*

A. If real or personal property is jointly owned by two or more persons, the facility financial staff shall assume that each person owns an equal share. When the owners document greater or smaller ownership, the facility financial staff shall use that greater or smaller share to determine the equity value held by or on behalf of an applicant or resident. Other types of ownership, such as a life estate, must be evaluated according to law using the Internal Revenue Service actuarial tables under Section 7520 of the Internal Revenue Code pertaining to life estates ~~table in the Department of Human Services Minnesota Health Care Programs Eligibility Policy Manual. Ownership of any property in joint tenancy shall be treated as ownership as tenants in common for purposes of its designation as available or excluded property.~~

Part 9050.0600, subpart 2, item E. Commenters: Hildebrandt. Scheller. Fink. Sauber. Stedman.

Comments: The commenters raise the issue that there is not a process outlined within the proposed rules for when a property would be considered non-saleable, and leaves it solely in the discretion of the financial staff to make the determination on whether property owned by two or more people can be liquidated or reduced to cash by the resident. This creates an undue burden in the applicant having to list property for sale under these rules where under real property law they do not have the legal authority or ability to sell

individually. This ignores complex property ownership situations such as joint tenants of cabin or farm property with multiple other owners or life estates where there is not a market for these properties. It creates an undue burden for the applicant in listing the property for sale where no sale is possible.

MDVA Response. The proposed language to this item initially provides specific guidance of when item E would apply. The amendment identifies (1) the real property must be a resource under Minn. R. part 9050.0550 and (2) is not excluded under Minn. R. part 9050.0600. Exclusions of real property are generally based on whether that property benefits the person or his or her family. Therefore, property which is homesteaded and occupied by family, is excluded, as is property which produces an income. Therefore, only after those two criteria are met, can the facility require the property to be determined as available and requires a resident to liquidate the real property. The intent of the current rule language is to avoid the State from becoming a broker to recover cash. In many circumstance, some properties determined not excluded or available just needs more time to liquidate. The proposed rule provides clarification of a continued good faith effort by the resident to sell the property. The property continues to be excluded as long as an effort to sell is established.

Furthermore, Minn. R. part 9050.0600, subpart 1 states, "The facility financial staff must use the equity value of *legally available* real and personal property, except property excluded in subpart 2 or 3, to determine the resources available to or on behalf of an applicant or resident." Subpart 1, item B continues to identify that if real or personal property *is not legally available*, its equity *must not* be applied against the limits identified in subparts 2 and 3. Therefore, real or personal property that is "*not legally available*" to the applicant or resident is excluded and is not saleable. The part goes on to provide examples of property that is not legally available to a person, to include one of which is property that is owned together with one or more other people that the facility determines cannot be liquidated or reduced to cash through exercise of the applicant's or resident's legal rights.

The claim made by the commenters that there is not a process outlined within the proposed rules for when a property would be considered non-saleable is not accurate. The process for determining whether a property is saleable or non-saleable is the process for determining if the property is legally available or not legally available to the applicant or resident to sell. Minn. R. part 9050.0600 subpart 1, item B identifies that property is not legally available to an applicant or resident if it is owned together with one or more other people and the property cannot be sold through the exercise the applicant's or resident's legal rights. Finally, each of the situations brought up by the commenters, joint tenancies and life estates, are those in which an applicant or resident owns the property with another person or persons. Under each of these forms of ownership the property would be evaluated to determine if it is legally available to the applicant or resident by determining if the applicant or resident has a legal right to sell the property. The proposed rule under subpart 2, item E is consistent with part 9050.0600 and protects the property rights of the applicant or resident.

Part 9050.650, subpart 1. Commenter: Zweber. Sauber. Hildebrandt. Sheller. Calvert.

Comments: The commenter states that this is contrary to MN real property law which recognizes that a deed to abstract property in Minnesota is effective when it is delivered unconditionally for recording or is recorded, whichever occurs first. For Torrens property, the deed must be filed to become effective between the grantor and grantee. The amendment (lines 55.4 and 55.6) allows a deed to be treated effective only when it is recorded. This abrogates long-standing real estate law in Minnesota and will result in unnecessary litigation due to conflicting rules.

MDVA Response: The intent of this part is to impose a reporting requirement on applicants and residents with respect to transfers of property. The part is necessary to "track" disposition of property to eliminate transfers which are done solely to avoid payment for care. An effective transfer period is a reasonable condition of admission or continued residence as it requires minimal action on the part of the affected person and has the potential to prevent significant abuse of tax funds by discouraging transfers without appropriate consideration. For the purpose of evaluating real property of an applicant or resident that was transferred, it is reasonable to confirm the time frame of the transfer by identifying an effective date and value. The value of the property transferred or sold must be correctly documented and confirmed as an available resource. It is reasonable to identify a common requirement in a real estate transaction to provide staff a consistent and pinpoint action to evaluate the real property in question to accurately calculate value. The language does not change or alter the effectiveness of the transfer in real estate law, as the language only applies for the purpose of evaluating real property in the specific area of available property.

Part 9050.650, subpart 1. Commenter: Zweber.

Comments: The commenter states that using the county property tax statement to determine the market value of real property raises an impermissible irrebuttable presumption of the actual fair market value of the property (agreed sale price between a willing seller and a willing buyer in an arms-length transaction).

MDVA Response: The current language of Minn. R. ch. 9050 defines market values as:

Minn. R. part 9050.0040, subpart 71

> **Market value.** *"Market value" means the most probable price in terms of money that property should bring in a competitive open market under all conditions requisite to a fair sale. The value on the most recent property tax statement must be presumed to be the market value for purposes of calculating the maintenance charge unless the person or the commissioner of veterans affairs or the commissioner's designated representative provides convincing evidence to overcome the presumption.*

Using the property tax valuation as the market value of a property for the purposes of calculating the maintenance charge, which Minn. R. part 9050.0600 and Minn. R. part 9050.0650 play a role in, is already established in Minn. R. part 9050.0040. The assessed value of a property as shown on the most recent property tax statement provides a clear and objective standard by which the amount of assets available to an applicant or resident

can be calculated; the value of property transferred or sold can be assigned; and provides a method to determine if an applicant or resident appropriately transferred the property.

The MDVA is proposing the following rule modifications to eliminate any confusion caused by use of the word “fair” before the term “market value”; thereby, implying that “fair market value” is a separate term. The proposed change to the amendment is to remove “fair” from the rule when placed before “market value”.

Minn. R. part 9050.0040, subpart 40.

> *Subp. 40.* ***Equity.*** *"Equity" means the amount of equity in real or personal property owned by a person. Equity is determined by subtracting any outstanding encumbrances on* ~~***fair***~~ *market value.*

Minn. R. part 9050.0600, subpart 2, item E, new subitem (1) (Line 52.25)

> ~~*(2)*~~ *(1) an actual good faith sale attempt was made at a* ~~***fair***~~ *market value price* ~~*not more than an estimate of*~~ *based on the* ~~*highest current market value obtained within six months of application for admission or since the last determination of the maintenance charge, but no offer to purchase was received. The market value price estimate must be based upon the written estimates from two licensed real estate professionals*~~ *current property tax evaluation for the property. If a purchase offer at the* ~~*lowest professional market value price estimate*~~ *current property tax evaluation amount was received but was rejected by the* ~~*seller*~~ *resident or applicant, it is presumed that the failure to sell the property was due to an improper action on the part of the* ~~*seller*~~ *resident or applicant. Upon failure by the resident or applicant to attempt to sell the real property, the* ~~*lowest market price estimate*~~ *current property tax evaluation must be the figure taken into account in determining the resident's maintenance charge or the spousal allowance.*

Minn. R. part 9050.0650, subpart 3, second paragraph (Line 56.6)

Subp. 3. **Incorrect transfers.**

> *If a resident's maintenance charge or a spousal allowance is adjusted because of a transfer for less than* ~~***fair***~~ *market value, the resident, spouse, dependent, or their legal representative may request from the administrator a waiver if the adjusted maintenance charge or spousal allowance will cause undue hardship resulting in an imminent threat to the individual's health or well-being. In evaluating a request for a waiver, the administrator shall take into account whether the individual was the victim of financial exploitation, whether the individual has made reasonable efforts to recover the transferred property or resource, and other factors relevant to a determination of hardship. If the administrator does not approve a waiver, the administrator shall issue a written notice to the individual stating the reasons for the denial and the process for*

appealing the decision. The decision may be appealed to the commissioner of ~~veterans affairs~~. An appeal to the commissioner ~~of veterans~~ affairs must be handled in the same manner as a hearing under part 9050.0580.

Part 9050.0750, subpart 1. Commenter: Hildebrandt. Sheller. Frasier. Fink. Sauber.

Comments: The commenters state that with the proposed rule change, a community spouse will no longer be able to qualify for a dependency income allocation from the resident spouse unless the couple meet the asset limits set under the United States Department of Veterans Affairs (USDVA) Aid and Attendance program. The commenters point out that the USDVA program was never intended to provide benefits sufficient to cover institutional care; therefore, borrowing from the rules and applying them to this benefit for eligibility seems illogical. The commenters state that this change is significantly more restrictive than Medical Assistance which allows the community spouse to retain excess income producing assets as needed to enable the community spouse to meet a minimum monthly income level but that the proposed rule does not create a provision for the spouse in the community to retain income-producing assets.

MDVA Response: The proposed revision to Minn. R. part 9050.0750, subpart 1 continues with the overall intent of Minn. R. part 9050.0750 but adds the consistency between state and federal regulations by referencing 38 CFR 3.351, special monthly dependency and indemnity compensation, death compensation, pension and spouse's compensation ratings. It is necessary to create equality in the calculation of spousal allowance while keeping consistency with the federal regulations that determine the qualification of federal Aid and Attendance for the resident. Currently, a resident can be disqualified from federal Aid and Attendance due to excessive assets, yet the spouse can draw off the remaining income of that resident to meet her/his monthly living expenses, not tapping into what the USDVA views as excessive assets. The assets that create the dis-allowance of federal Aid and Attendance could likely not be reduced for a very long time due to the fact that the spouse is using the resident's monthly income to provide for their needs instead of reducing the assets to meet the qualifications of federal Aid and Attendance. Because MDVA's facilities are part of the State Veterans Home program and the USDVA provides federal assistance to states by providing percentage of costs and per diem, it is reasonable to be consistent with federal regulations by requiring a resident and the spouse to use the assets that the USDVA views as excessive to support the spouse until the assets are reduced to what the USDVA views as allowable Aid and Attendance.

Part 9050.0770. Commenter: Hennen.

Comments: The commenter supports that the second paragraph of the rule part be amended to incorporate the language, "only if the resident has been deemed unable to manage their finances by standards outlined under 38 U.S. Code § CHAPTER 55 (which governs the appointment of a fiduciary for Veterans benefits) or under U.S. Code § 20 CFR 416, Subpart F (which governs Representative Payee appointment for payments under the Social Security Act)." to ensure proper protections are afforded to residents and they are not arbitrarily deemed unable to manage their personal financial affairs.

MDVA Response: The comment addresses rule language that has not been proposed for amendment . However, the current rule language under Minn. R. part 9050.0770 is necessary to clarify that the facilities may request that the applicant's or resident's specific facility be appointed representative payee if a resident is unable to manage his or her financial affairs. This amendment does not mandate that the facility be named if another payee is willing and able to be appointed. It is reasonable that the facilities be allowed to arrange for representative payee status on behalf of residents, to assure that benefit payments are properly made and applied. Under the current rule language, all applicable state and federal statutes governing fiduciary for veterans benefits are being complied with by MDVA.

Part 9050.1030, subpart 1 (second paragraph). Commenter: Hennen.

Comments: The commenter supports the proposed rule amendment, but notes the paragraph omits any specific reference to either 42 CFR §483 which applies to Skilled Nursing Facility Care or 38 CFR §51 which applies to both the Skilled Nursing Facility and Boarding Care (Domiciliary) portion of the Minnesota Veterans Homes. The commenter proposes language that references chapters 4655 and 4658; Minnesota Statutes, chapters §144 and §144A; Federal Code 42 CFR §483 and 38 CFR §51 United States Department of Veterans Affairs Code M-1, part 1, chapter 3 United States Department of Veterans Affairs Guide for Inspection of State Veterans Homes Nursing Home Care Standards; and United States Department of Veterans Affairs Guide for Inspection of State Veterans Homes: Domiciliary Care Standards and that these publications are available for review.

MDVA Response: MDVA provided a technical change to this subpart so as to correctly identify the regulations that oversee the care services of residents as well as reference the agencies that oversee the enforcement of pertinent regulations. The commenter suggests adding additional references to federal law, however the list provided by the commenter is limited in scope and could create confusion to the regulatory authority. The rule currently identifies the federal agencies that oversee the operations of the MDVA facilities as well as state regulatory authority. Under the current rule language and operation model by MDVA, all applicable state and federal statutes governing the care of residents are being complied with by MDVA.

Part 9050.1030, subpart 1a, item B. Commenters: Sauber. Hennen.

Comments: The commenters state that even if a resident has chosen a private attending provider, there are limitations or restrictions to that provider's ability to create a care plan, or to order certain treatments or procedures, unless the medical director or designee of the department approves. Additionally, the commenters point out that the proposed rule (lines 69.21 and 69.22) simplifies the Medical Directors obligations to simply, "approving the care plan treatment or procedures" without any mention of obligations to resolve or mediate potential differences in these areas.

MDVA Response: Part 9050.1030, subpart 1a, item B is revised to add rule language that requires all care plans, treatments, or procedures ordered by the private attending provider to be approved by the department's medical director or designee to assure the

facility can provide for the services and meet the care needs of the resident. This change provides clarity to the process when a resident chooses a private attending provider and assures consistent and agreed upon care plans of the residents at the MDVA facilities. The language also identifies that the facility is in the best position to determine what services are available to the resident or applicant while residing in a MDVA facility. The proposed rule does not restrict a resident in their choice of provider or their involvement in the creation of their care plan, but confirms that any care ordered by the resident's provider can be adhered to at the MDVA facility. All applicable state and federal statutes governing resident's right to choose their own attending provider must and will be followed by the MDVA.

Part 9050.1070, subpart 2. **.** Commenter: Hennen.

Comments: This amendment proposes to delete "patient and resident" bill of rights and replace it with "health care" bill of rights (lines 71.19 and 71.21), referencing Minn. Statute §144.651 which is now referred to as the "Health Care Bill of Rights". The commenter feels that this language change is unnecessary since various Bill of Rights language applies to these settings. The commenter supports leaving "patient bill of rights" and keeping the reference to resident rights provisions afforded in Minn. Stat. §144.651 and adding reference to Minn. Stat. §144A.13. MDVA has also left out any reference to important rights afforded to residents under 42 CFR §483 and 38 CFR §51 both of which apply to the Minnesota Veterans Homes.

MDVA Response: Minn. R. part 9050.1070, subpart 2 proposes to delete "Patients and Resident's" Bill of Rights and replace it with "Health Care" Bill of Rights. This change is needed to provide the updated and proper identification of Minn. Stat. § 144.651 as the "Health Care Bill of Rights." It is reasonable to properly identify the appropriate title and reference to the Health Care Bill of Rights within the rule to align with the reference to Minn. Stat. § 144.651.

Part 9050.1070, subpart 3. Commenter: Hennen.

Comments: The commenter supports deleting lines 72.16 and 72.17 as the commenter believes that it denies important rights as outlined in our comments related to Minn. R. part 9050.0070 Subparts 3 and 4.

MDVA Response: The comment addresses rule language that has not been amended. However, it is necessary that the facility follow Minn. R. part 9050.0070, subparts 3 and 4, that if the facility cannot meet the care needs of the person due to the limitations of the facility, such as licensure or resources, or due to limitations of the resident, such as a medical condition, inability or unwillingness to cooperate, then the facility must be able to discharge the resident for the protection of the resident and others.

Part 9050.1070, subpart 5. Commenter: Hennen.

Comments: The commenter states the proposed language is not reasonable and the requirement of a resident to sign that they have received a copy of and reviewed the resident handbook (Lines 73.4 -73.6) is unnecessary and burdensome. The requirement that a resident must sign that they have received and read the handbook appears punitive.

Resident or their representative should have the right to decline signing of such a document without recourse, as outlined in resident rights provisions under Minn. Stat. §144.651, §144A and 42 CFR §483 and 38 CFR §51. If Minn. R. part 9050.0200 Subpart 2, C is not amended this rule could permits the MDVA to pursue an immediate discharge of a resident merely for not signing, based on the language, "A discharge is immediate if the resident willfully or deliberately disregards state or federal laws, rules, and regulations."

MDVA Response: This rule part was adopted in 1991 and remains necessary and reasonable for the same reasons previously stated in the Statement of Need and Reasonableness in the Matter of the Proposed Rule of the Minnesota Veterans Homes Board Relating to Facility Services Provided to Residents of the Minnesota Veterans Homes and Residents Rights and Responsibilities Parts 9050.0040 and 9050.1000 to 9050.1070 p.20-21 (1991). The only proposed amendment in the first paragraph of the subpart are the words "nursing staff" which is proposed to be replaced by the word "designee". And at line 73.15 the words "as appropriate" are added after the word "changes". In regard to the comments pertaining to the resident handbook the MDVA believes that the rule as written and with the proposed revisions remains in full compliance with state and federal statutes and regulations governing residents' rights and the requirements to provide information and notices about resident's rights. The requirement that a resident or a resident's representative sign a statement that they received and reviewed the resident handbook is not only necessary and reasonable to confirm they have received the appropriate information but it creates little to no burden upon the resident or applicant. This method of confirmation of receiving important documentation is a widely accepted reasonable process in the industry.

Part 9050.1070, subpart 5, item D. Commenter: Hennen.

Comments: This amendment proposes to delete "patient" bill of rights and replace it with "health care" bill of rights, referencing Minn. Stat. §144.651 which is now referred to as the "Health Care Bill of Rights". The commenter feels that this language change is unnecessary as defined in several prior comments.

MDVA Response: Item D is revised to delete "Patients and Resident's" Bill of Rights and replace it with "Health Care" Bill of Rights. This change is needed to provide the updated and proper identification of Minn. Stat. § 144.651 as the "Health Care Bill of Rights." It is reasonable to properly identify the appropriate title and reference to the Health Care Bill of Rights within the rule to align with Minn. Stat. § 144.651.

Part 9050.1070, subpart 6. Commenter: Hennen.

Comments: The commenter supports the amendment to this subpart but requests that Federal Codes 42 CFR §483 and 38 CFR §51 be specifically cited for reference to alleviate confusion related to the interpretation of rights that apply pertaining to resident councils.

MDVA Response: This rule part was adopted in 1991 and revised in 1993 and remains necessary and reasonable for the same reasons previously stated in previously submitted

SONARs. Subpart 6 is revised to delete "United States Department of Veterans Affairs Code M-1, part 1, chapter 3." It is reasonable to delete reference to federal regulations or supporting material that have been repealed. The MDVA contends that as written and with the proposed revisions this rule remains in compliance with all state and federal statutes and regulations governing resident councils and that cross-referencing 42 CFR §483 and 38 CFR §51 is not necessary. The rights afforded under Minn. Stat. § 144.651, subdivision 27 apply to both skilled nursing and domiciliary residents and even though Minn. Stat. § 144A covers only nursing homes and home care, Minn. Stat. § 144A.33 cross-references Minn. Stat. § 144.651, subdivision 27. The rule as written is not intended to differentiate between skilled nursing and domiciliary residents because the rule and the rights afforded under Minn. Stat. § 144.651, subdivision 27 apply equally to both residents of skilled nursing and domiciliary facilities.

In addition, both the United States Department of Veterans Affairs Guide for Inspection of State Veterans Homes Nursing Home Care Standards and Guide for Inspection of State Veterans Homes: Domiciliary Care Standards are referenced in the rule and provide direct reference to the agency overseeing compliance of the State Veterans Home program.

Part 9050.1070, subpart 7. Commenter: Hennen.

Comments: The commenter is requesting that 42 CFR §483 and 38 CFR §51 be specifically cited for reference. The commenter states that the United States department of Veterans Affairs in its 2018 amendments to 38 CFR §51 did implement protections for State Home Domiciliary residents that formerly applied only to Skilled Nursing Facility residents. Namely, §51.100(c) and §51.100(d)(6) requiring the state to listen to the views of any resident or family group. The absence of these specified references provides confusion related to interpretation of what rights apply in this subpart.

MDVA Response: The MDVA proposed rule includes revisions at lines 74.13 and 74.14 where the words "of veterans affairs" are removed from after the word "commissioner". The MDVA believes that as written and with the proposed revisions this rule remains in compliance with all state and federal statutes and regulations governing family councils and that cross-referencing 42 CFR §483 and 38 CFR §51 is not necessary. The rights afforded under Minn. Stat. § 144.651, subdivision 27 apply to both skilled nursing and domiciliary residents and even though Minn. Stat. § 144A covers only nursing homes and home care, Minn. Stat. § 144A.33 cross-references Minn. Stat. § 144.651, subdivision 27. The rule as written is not intended to differentiate between skilled nursing and domiciliary residents because the rule and the rights afforded under Minn. Stat. § 144.651, subdivision 27 apply equally to both residents of skilled nursing and domiciliary facilities.

Part 9050.1070, subpart 8. Commenter: Hennen.

Comments: The commenter requests that references to rights afforded in Minn. Stat. §144A and Federal Codes 42 CFR §483 and 38 CFR §51 be specifically cited for reference. The absence of these specified references provides confusion related to interpretation of what rights apply in this subpart.

MDVA Response: The MDVA proposed rule includes revisions at lines 75.8 and 75.9 where the words "of veterans affairs" are removed from after the word "commissioner". The MDVA contends that as written and with the proposed revisions this rule remains in compliance with all state and federal statutes and regulations governing legal assistance for residents. In regard to the comments made, the MDVA does not agree that Minn. Stat. § 144A, and federal codes 38 CFR §51 and 42 CFR §483 must be cross-referenced in the rule language in order for the rights and protections afforded under the statute and regulations to apply, nor does MDVA agree that these additional modifications are necessary to bring the rule into compliance with state and federal statutes and regulations. The MDVA fully recognizes the applicability of the provisions of Minn. Stat. § 144A, 38 CFR §51 and 42 CFR §483 and abides by their provisions in all matters concerning residents' rights to outside legal assistance and advocacy.

Part 9050.1070, subpart 9. Commenter: Hennen.

Comments: The commenter request that references to Federal Codes 42 CFR §483 and 38 CFR §51 be specifically cited. The absence of these specified Federal Codes provides confusion related to interpretation of what rights apply in this subpart.

MDVA Response: Minn. R. part 9050.1070, subpart 9 is revised to delete "United States Department of Veterans Affairs Code M-1, part 1, chapter 3." It is reasonable to delete reference to federal regulations or supporting documentation that have been repealed. The federal regulations overseeing state veterans homes are now under 38 CFR.

The MDVA believes that the rule as written and with the proposed revisions remains incompliance with all state and federal statutes and regulations governing the rights of residents to file complaints and grievances. The MDVA disagrees with the commenter's claim that 42 CFR §483 and 38 CFR §51 must be cross-referenced to avoid confusion in what rights apply to this section for the following reason. It is not necessary nor reasonable to incorporate or cross-reference all references that may or could cover the terms within this subpart. Cross-referencing or inserting into the rule the exact language of the regulation and the content that the regulation already stipulates must be provided in writing to each resident individually is redundant and is unreasonable and not necessary to make the rule in compliance with the regulation as the commenter states.

Comments: At lines 75.22-75.25 The commenter states the language, "including the Office of Ombudsman for Long-Term Care" should be added to be consistent with requirements set forth later in the rule, including §483.10(g)(5) and §483.10(j)(4).

MDVA Response: The proposed amendment to Minn. R. part 9050.1070, subp 9 at line 75.23, the words "of veterans affairs" are removed from after the word "commissioner". The MDVA contends that as written and with the proposed revisions this paragraph of the rule remains in compliance with all state and federal statutes and regulations governing grievance and complaint procedures. As explained above, this language addition suggested by the commenter is not necessary. 42 CFR §§483.10(g)(5)(i) and 483.10(j)(4)(i) clearly state all of the agencies a resident may contact and that this information must be provided to the resident. The direct reference to all regulations

pertaining to the facilities are not necessary for MDVA to be in compliance with federal regulation and can create a very cumbersome rule.

Comments: The commenter notes that items A to F are not included in the rule draft, but that items A-F are missing important federal requirements. Items A-F are relevant as the rest of the subpart does not address important language that is notably missing and afforded under the various rights that govern these settings, namely 38 CFR §51.300 and 42 CFR §483.10. (See full text of the comment)

MDVA Response: The only revision to paragraph 4 is at lines 76.1 and 76.2 the words "of veterans affairs" are removed from after the word "commissioner". What the commenter proposes is a massive "cut and paste" of large sections of regulation language into the rule language in order for the rule to be incompliance with the regulation. To quote the commenter, "OOLTC supports adding to this section language that mirrors the above language (which is copied and pasted directly from 42 CFR §483.10(g)(5)) to bring the rule in compliance with federal regulations." MDVA contends that the commenter's claim is incorrect and that the rule as written is in compliance with all state and federal statutes and regulations governing the grievances procedures at the facilities operated by MDVA. Again, it is MDVA's position that inserting into the rule the exact language of the regulation and the content that the regulation already stipulates must be provided in writing to each resident individually is redundant and is not necessary to confirm that the rule is in compliance with the regulation.

Comments: The commenter states that the rule, 9050.0040 Subp. 86a, does not mention the Ombudsman authority as outlined in 38 CFR §51 or 42 CFR §483.

MDVA Response: The commenter addresses rule language that has not been amended. Under the current rule, the definition of "ombudsman" is consistent with all applicable state and federal statutes and regulations defining and establishing the authority of the OOLTC to include Minn. Stat. §§ 256.974 and 256.01, subdivision 7, and United States Code, title 42, sections 3027(a)(9) and 3058g(a), and Code of Federal Regulations, title 45, parts 1321 and 1327.

Comments: The commenter states that under 38 CFR §51 or 42 CFR §483 residents in both the Skilled Nursing Facility and Domiciliary settings must have access to an Ombudsman, have information on how to contact an Ombudsman, have information on how to file complaints with various outside agencies, and that publicly posted information about those agencies is in a conspicuous place in the facility.

MDVA Response: The MDVA recognizes this requirement but points to the rule which references "a list of community resources available to the resident". See Minn. R. part 9050.1070, subpart 9, item A. Item A complies with the necessary standards to provide access to resident resources like the ombudsman. MDVA is consistent in its compliance with state and federal law to include the Center for Medicare and Medicaid Services, United States Department of Veterans Affairs Guide for Inspection of State Veterans Homes Nursing Home Care Standards, and Guide for Inspection of State Veterans Homes: Domiciliary Care Standards.

Comments: The commenter notes that §51.300 now makes the nursing home standards regarding grievances applicable to State domiciliary care programs and these standards include the resident's right to voice grievances and have the facility implement prompt efforts to resolve these grievances.

MDVA Response: As written the rule is in compliance with all state and federal regulations and statutes governing the rights of residents in both skilled nursing facility and domiciliary settings to file a complaint or grievance. The MDVA recognizes these rights which is why the rule does not differentiate between the rights of residents in skilled nursing facility and domiciliary settings and why the rule speaks of facility grievance and complaint procedures and does not differentiate between the two settings nor does the rule as written contradict the requirements in either facility.

Part 9050.1070, subpart 11. Commenter: Hennen.

Comments: The commenter states that this subpart references only rights afforded under §144.651 despite multiple other provisions applying to this subpart, including Minn. Stat. §144A, 38 CFR §51 and 42 CFR §483. The commenter proposes references to the rights provided in these statutes and regulations.

MDVA Response: The only proposed revisions to this part is in the second and third paragraphs. At line 77.2 the words "veterans affairs" are removed from after the word "commissioner". At line 77.3 the word "external" is inserted before the word "personal". On line 77.4 the word "physician" is replaced by the word "provider" and the spelling of the word "adviser" is corrected.

In regard to this comment, the MDVA contends that further revision of the first paragraph of the partis not necessary or reasonable for the sole purpose of cross-referencing or "acknowledging" in the rule language the obligations that exist under the statutes and regulations cited by the commenter. Cross-referencing and acknowledging statutes and regulations can make the part cumbersome and unclear. The current reference is accurate and up to date. The MDVA still must adhere to all statutes and regulations that govern its operation.

Comments: The commenter states that lines 76.23-77.2 are in direct violation to access and visitation rights afforded under 42 CFR §483.10(f)(4) that state visiting hours cannot be established for Skilled Nursing Facilities. The commenter states restricted visiting hours are allowed under §4655.1910 in the Boarding Care Home (Domiciliary) setting, but are not permitted for residents of the Skilled Nursing Facility and that the subpart needs to be modified to distinguish between the rights afforded Skilled Nursing Facility residents or extend protections afforded Skilled Nursing Facility residents to Boarding Care Home (Domiciliary) residents.

MDVA Response: The MDVA disagrees with the commenter's contention that the current language within this subpart which references visiting hours is a direct violation of 42 CFR §483.10(f)(4). The commenter is inferring 42 CFR §483.10(f)(4) restricts visiting hours because it states that the resident has a right to receive visitors of his or her choosing at the time of his or her choosing. What the commenter ignores is the direction

within the federal regulations that includes the resident must do so in a manner that does not impose on the rights of another resident. Id. Under the CFR, a facility must provide reasonable access to a resident by any entity or individual that provides health, social, legal, or other services to the resident, subject to the resident's right to deny or withdraw consent at any time. See 42 CFR §483.10(f)(4)(iv). The CFR goes on to instruct that written policy and procedures are allowed to set restrictions or limitations on visitation as long as they are reasonable. 42 CFR §483.10(f)(4)(v). The MDVA does not dispute the access given specifically to the parties identified in 42 CFR §483.10(f)(4)(i-ii); however, the MDVA does contend that the provisions of 42 CFR do allow for the creation of necessary yet reasonable visiting hours when applicable and contends the current language is in compliance with state and federal law.

Comments: (Third paragraph-In regard to private visits at any time from the resident's external personal provider, religious advisor, or attorney and visits at any time for critically ill residents.) Lines 77.3-77.6. The commenter states the subpart does not make a distinction between residents in the Boarding Care Home (Domiciliary) and those of residents residing in the Skilled Nursing Facility who are afforded the following protections as outlined in federal law.

MDVA Response: Part 9050.170, subpart 11 establishes a resident's right to associate with others in compliance with Minn. Stat. § 144.651 which provides a resident the option of association and communication with persons of the resident's choosing as long as the resident's activities do not infringe on the rights of other residents at the facility. The changes to subpart 11 clarify that visiting external personal providers, religious advisers, and attorneys are afforded this right. It does not change the intent of the original language, but clarifies the personnel the subpart is referencing.

Part 9050.1070, subpart 15. Commenter: Hennen.

Comments: (Summary-First paragraph-In regard to treatment of medical records.) The commenter states that lines 77.20 -77.22 would *and should* apply, however the subpart fails to acknowledge the obligations that exist under the Older Americans Act, Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191 (codified in scattered sections of 42 U.S.C.); and "Standards for Privacy of Individually Identifiable Health Information," (The Privacy Rule) (45 CFR Parts 160 and 164). (Reference OOLTC "Infor Memorandum HIPPA and full text of comment.)

MDVA Response: The proposed revisions to this part are in lines 77.22 and 77.24 where the words "veterans affairs" are removed from after the word "commissioner".

In regard to the specific concern of the commenter, the MDVA does not believe that further revision of the first paragraph of the rule is necessary or reasonable for the sole purpose of cross-referencing or "acknowledging" in the rule language the obligations that exist under the statutes and regulations cited by the commenter. The MDVA contends it is in compliance with the applicable state and federal regulations pertaining to privacy of a resident's records.

In addition, the commenter proposes adding the following language to the end of the first paragraph, *"with the exception of those health or regulatory agencies, including the*

Office of Ombudsman for Long-Term Care, entitled to access under federal and state law." The MDVA believes this language is not necessary because 42 CFR §483.10(h)(3)(ii) and CFR §51.70(j)(3) already provide the OOLTC with access to examine a resident's medical records with the permission of the resident or resident's legal representative in accordance with state law.

Comments: (Third paragraph-In regard to written consent required for release of information). Lines 78.3 to 78.6. The commenter states the rule should be amended to include reference specific agencies for which written consent for release of information is required.

MDVA Response: The commenter addresses rule language that has not been amended. After the first sentence in the third paragraph the commenter proposes adding language to the paragraph reads:

> "Written consent of the resident or the resident's guardian or conservator is required for the release of information concerning the resident to persons not otherwise authorized to receive it *under applicable state and federal law, which would include representatives of the Minnesota Department of Health, federal survey representatives of the Centers for Medicare and Medicaid Services and representatives of the Office of Ombudsman for Long-Term Care.*

Written consent of the resident must be handled in a manner consistent with HIPAA and Minnesota Statutes, section 13.04, subdivision 2. The MDVA agrees there are several regulations that cover the protections of a resident's private records but disagrees with this proposed language as it is confusing and not necessary to confirm resident's rights to access records.

Comments: (Fifth paragraph-In regard to when written consent for release of information is not needed) Line 78.9 and items A to D. The commenter states items A to D contain inaccuracies that need to be corrected.

MDVA Response: The comment addresses rule language that has not been amended. The commenter is proposing to add language at the end to part 9050.1070, subpart 15, item D so item D reads as follows:

> **"**release is mandated by statute, regulation, or court order, *which includes access required to state agencies including representatives from the Minnesota Department of Health, survey representatives from the Center for Medicare and Medicaid Services and representatives of the Office of Ombudsman for Long-Term Care".*

The MDVA believes that the added language is not necessary. If these agencies are already authorized to receive a resident's medical private information without written consent, item D of this subpart (release is mandated by statute, regulations, or court order) would cover the commenters concern.

Part 9050.1070, subpart 21. Commenter: Hennen.

Comments: The commenter state they have had much complaint work in the area of resident work therapy programs. That residents feel they are arbitrarily denied continued participation in the program, have been suspended from the program, or have had restrictions placed on their participation that they feel are arbitrary, retaliatory, or menial.

MDVA Response: The only revisions proposed by MDVA to this rule part are at lines 81.8 and 81.9 where the word "physician" is replaced by the word "provider".

In regard to the comment, the MDVA contends that the rule as written with the proposed revision is in compliance with all state and federal statutes and regulations governing work and work therapy programs in the veterans homes. MDVA disagrees with the commenter that additional references are needed to ensure resident rights. The MDVA already recognizes and respects the rights referenced in the commenters proposed language revisions. The MDVA's Work Therapy program is in full compliance with and ensures each resident's rights to work under 38 CFR §§51.70(h); 51.300(b); and 51.310(c) and 42 CFR §483.10(f)(9)(i-iv) and Minn. Stat. §144.651, subdivision 23. The MDVA's operation of the work therapy program is consistent with the regulations that govern it.

Part 9050.1070, subpart 22. Commenter: Hennen.

Comments: The commenter states that this subpart omits any reference to important protections afforded under, §144A, 38 CFR §51 and 42 CFR §483. The commenter suggests that these statutory references must be added and additional modifications made to this subpart to bring the rule into compliance with the aforementioned laws.

MDVA Response: The only proposed revisions by MDVA to this rule part are in item C (lines 82.2, 82.8, 82.10, and 82.11) the words "of veterans affairs" are deleted after the word "commissioner". In regard to the comments received pertaining to this subpart, , the MDVA does not agree that Minn. Stat. § 144A, 38 CFR §51 and 42 CFR §483 must be cross-referenced in the rule language in order for the rights and protections afforded under the statute and regulations to apply, nor does MDVA agree additional modifications are necessary to bring the rule into compliance with state and federal statutes and regulations. The MDVA fully recognizes the applicability of the provisions of Minn. Stat. § 144A, 38 CFR §51 and 42 CFR §483 and abides by their provisions in all matters concerning residents' funds.

Part 9050.1070, subpart 31. Commenter: Hennen.

Comments: The commenter states they often receives calls related to resident smoking and has had much case work related to this topic at the various Minnesota Veterans Homes. The commenter states residents' right to smoke has been whittled away and overly controlled under facility policy. At lines 85.3-85 The commenter states The provision of "smoking times" is not consistent with requirements for a person-centered approach to care delivery as defined under 42 CFR §483.24 Quality of Life and cited in the State Operations Manual (page 244). This places undue restrictions on a resident's ability to choose smoking times consistent with their needs and preferences. Additionally,

this subpart leaves out any reference to important protections afforded under 42 CFR §483.

MDVA Response: Facilities must be in compliance with Minn. Stat. § 16B.24, subdivision 9(b), Minn. Stat. §§ 144.411 to 144.417, and Minn. R. part 4658.4515 and 4658.0520. This subpart is revised to add that residents may smoke during designated smoking times and that the facility will take the necessary interventions to assure the safety of the residents and staff. The rule language that allows for a resident to smoke in their room under specific conditions is proposed for deletion. These changes are needed to continue compliance with other areas of the law that restrict smoking in state office buildings and smoking in designated licensed residential health care facilities. As the continued restrictions of smoking grow and the need to keep the Veterans Homes residents safe, it is reasonable to update the rules to continue compliance with state laws and to secure the care and safety needs of its residents.

The MDVA contends that the rule as proposed for amendment is in compliance with state and federal law. The federal code 42 CFR §483.90(i)(5) directs the facility to provide a safe environment and that the establishing of "smoking times" accomplishes that requirement. The federal code 42 CFR § 483.24 establishes that quality of life is a fundamental principle that applies to all care and services provided to facility residents, however creating limitations on smoking does not infringe upon a residents quality of life. Because MDVA completes a comprehensive assessment of its residents by focusing on what is consistent with the resident's needs and choices, MDVA provides the necessary care and services to ensure that a resident's abilities in *activities of daily living* do not diminish. However, certain restriction may be necessary to validate a safe environment for all in the facility. MDVA is constantly reviewing its practices to ensure the safety of its residents, providing safe and high quality of care as well as ensuring the resident's rights are not restricted. The proposed language accomplishes that balance and is necessary to continue the safety of all residents in the facility.

Part 9050.1070, subpart 32. Commenter: Hennen.

Comments: The commenter notes that in the absence of a resident or authorized representatives ability to give notice that they are leaving the facility campus, this subpart could again be used to cite noncompliance with provisions outlined under Minn. R. part 9050.0200, Subpart 2, item C and result in immediate discharge proceedings being initiated. The commenter states that nothing in the subpart should override the right of the resident to leave without notice and that the word "shall" (which by legal definition means "must") creates an undue burden on the resident or authorized representative that could be misconstrued as willful or deliberate.

MDVA Response: The proposed language establishes the process that residents must follow when leaving the facility campus and represents a reasonable compromise between the resident's freedom to come and go or leave as the resident chooses and the facility's duty to care for the residents. Minn. R. part 9050.1070, subpart 32 is revised to add "or authorized representatives" as personnel who can notify administration or direct care staff before a resident leaves the facility campus. This change provides flexibility and direction to facility staff and residents that when a leave of absence from the facility

is needed, the resident or their "authorized representative" can provide the facility notice. The MDVA disagrees with the commenters claim that requiring residents or authorized representatives to notify administration or direct care staff before leaving a facility campus creates an undue burden. It remains necessary and reasonable that residents should notify administration or the direct care staff before leaving the facility so that the resident's leaving is not in conflict with their medical plan of care, such as doctor appointments and treatments or medical prescriptions. Additionally, the language allows the facility to maintain an accurate census so that during an emergency staff can account for resident safety . The proposed rule is reasonable because it continues compliance with decision making power of the resident and the resident's selected or appointed authority as well as continues safety of the residents.

Part 9050.1070, subpart 34. Commenter: Hennen.

Comments: The commenter states the subpart contradicts itself by citing that the consumption of alcoholic beverages is both "allowed" and "not allowed".

MDVA Response: This subpart is also revised to add that alcohol during facility-sponsored events is managed in accordance with Minn. Stat. § 198.33, and that "alcohol consumption may be allowed" when prescribed by the resident's attending "provider." This change is reasonable because the use and possession of alcohol at the facilities must be monitored so that residents may not jeopardize their own health care by consuming it.

The MDVA is proposing the following rule modifications to eliminate any confusion identified by the commenter. The proposed change to the amendment is as follows:

Minn. R. part 9050.1070, subpart 34.

> *Subp. 34.* ***Alcoholic beverages and illegal narcotics.*** *The sale, distribution, consumption, and possession of alcoholic beverages and illegal narcotics are not allowed on the campuses of the Minnesota veterans homes. ~~or Alcohol during facility-sponsored events according to is managed in accordance with Minnesota Statutes, section 198.33. , except.~~ However, alcohol consumption may be allowed when consumption is prescribed by the resident's ~~attending physician~~ provider and documented in the resident's chart. An alcoholic beverage is a beverage containing any amount of alcohol.*

Part 9050.1070, subpart 37. Commenter: Hennen.

Comments: Commenter states the proposed language of line 86.12 is, "vague and overly broad."

MDVA Response: This subpart is revised to add "and other items identified by facility policy" to the list of items in this subpart identified as contraband. There may be circumstances where a facility has identified an item in possession of a resident that it considers to be contraband that is not listed in this subpart. Because it is not possible to identify every type of item that could be considered contraband and ultimately harmful to the resident's and facility staff, it is necessary the facility and the residents consider all guidance and regulations regarding contraband at the facilities, including the facility's

internal policies. This change is reasonable because it provides notice to residents that the facility's policies continuously applied to its residents is also a reference that must be referred to when determining what is contraband.

Furthermore, the MDVA does not agree with the commenter that the revised rule is vague and overly broad. The commenter suggests using the language, "and other items posing a clinically indicated concern for resident safety". The MDVA contends the commenter's proposed language creates inconsistency in application as there is no explanation what the term "clinically indicated" means nor is there guidance as to what constitutes a concern for resident safety and when it is or is not clinically indicated. Ultimately it would fall upon facility policy for further guidance which is what the revised rule already provides. It is reasonable for the facility to provide further guidance to specifics in a policy.

Part 9050.1070, subpart 39. Commenter: Hennen.

Comments: The commenter proposes that this subpart also be updated to be in compliance with important provisions passed under the Elder Care and Vulnerable Adult Protection Act of 2019, including the resident's rights afforded under Minn. Stat. §144.6502 Electronic Monitoring in Certain Facilities.

MDVA Response: Subpart 39 is revised to add that informed written consent is required "for nonbusiness or nonresident care purposes." This change is needed to make a distinction between when written consent is needed and when it is not. Because of additional health care uses with photography or video recordings, the addition of "non-business or nonresident care purposes" is reasonable because it provides flexibility for the facility when photography, recording or videotapes are used for the residents' health care. Nothing in this amendment allows for the facility to avoid situations where written consent is required under the Minnesota Data Privacy Act (Minn. Stat. ch. 13) or the federal Health Insurance Portability and Accountability Act of 1996.

Additionally, the MDVA's proposed rule is in compliance with the Elder Care and Vulnerable Adult Protection Act of 2019 in addition to the rights afforded under Minn. Stat. §144.6502. There lacks any reference by the commenter that the proposed rule allows the MDVA to set aside the requirements of any of the applicable privacy laws. This rule part governs written consent as it applies to a resident being photographed, voice recorded, or videotaped for nonbusiness or nonresident care purposes and as stated above the purpose of the revision is to distinguish between situations for nonbusiness and nonresident care purposes and those situations that do involve resident care.

V. Comments received during public hearing (January 31, 2022.).

Commenter: Scheller

Comments: The commenter states that the SONAR fails to identify the problems that exist that the proposed rules are intended to solve. The SONAR fails to assess the differences between the proposed rules and existing federal and state regulations as well as the cost for veterans and various other agencies.

MDVA Response: MDVA has complied with the required contents of the SONAR as required within Minn. Stat. Ch. 14 and Minn. R. ch. 1400.

Comments: MDVA creating the proposed rule with a lack of stakeholder participation.

MDVA Response: This is a reiteration of a comment submitted during the public comment period prior to the hearing. The response by MDVA to this comment is stated above.

Comments: The commenter states the proposed rules do not reflect the medical model that the Veterans Homes are. Minn. R. part 9050.0030 does not include references to 42 CFR 483 or Minn. R. ch. 4658. Minn. R. part 9050.0040, subpart 105a (definition of a skilled nursing facility) leaves out Minn. R. ch. 4658 as well as some parts of section 144A that do not comport with subpart 105a.

MDVA Response: As stated throughout this response to commenters, the MDVA compliance is consistent with the applicable laws and regulations that govern its facilities. The preference with Minn. R 9050.0030 requires the commissioner of MDVA to comply with applicable health, safety. sanitation, building, zoning, and operation codes. Failure to list and identify all of applicable laws that govern the required compliance identified in this part would be burdensome to the agency. However, the regulations listed are accurate and current based on the proposed amendments submitted with MDVA's proposal.

Comments: The commenter raises concerns that there are inconsistencies in the concepts contained in Minn. R. part 9050.0040, subpart 21 (the definition of "care plan review") and subpart 10 (the definition of "assessment") which create vagueness between the "care plan" and the "assessment", the latter of which forms the basis of the care plan.

MDVA Response: Subpart 21 defines the term "care plan review" and identifies the types of review included . This subpart is proposed for amendment to delete the rule language assessment of a resident's "physical and mental condition and treatment needs by the care plan team" and replace it with assessment of a resident's "medical, nursing, mental, and psychological needs." The current definition of "assessment" under subp. 10 of Minn. R. part 9050.0040 identifies the determination of an applicant's or resident's need for services. The two definitions do not contradict one another but are consistent with the approach of services needed and the development of a care plan review.

Comments: The commenter states that proposed Minn. R. part 9050.0040, subpart 88b (definition of "patient classification system") is vague and it is unclear to the veteran and those serving the veteran what goes into the patient classification system.

MDVA Response: The proposed addition of the definition of a patient classification system applies an evidence-based approach enabling the Minnesota Veterans Homes to assign, match, and schedule nurses where they are needed the most. This term is used in Minn. R. ch. 9050 but was not defined previously. Definition is consistent with industry terminology and compliant with applicable federal and state laws and regulations.

Comments: Commenter suggest that Minn. R. part 9050.0050, subparts 2 and 3, definitions of veteran and nonveteran and the requirement to provide current evidence of medical need for admission and financial information as specified in Minn. R. part 9050.0800 to 9050.0900 are vague. The commenter questions where in the rule is the criteria for establishing medical need and believes that the rule is missing any definition of the evidence required to establish medical need.

MDVA Response: Minn. R. part 9050.0050 establishes the eligibility requirements for admission to a Minnesota Veterans Homes facility. This part is needed to ensure every veteran and nonveteran seeking admission to a Veterans Homes facility is informed of the requirements for admission. The proposed rule to this part are needed to make corrections to statutory references as well as clarifications of what is required for a "veteran" or "nonveteran" to gain admission to a Veterans Homes facility operated by the MDVA. The term "medical need" comes from the current language under Subp. 1 (proposed for repeal) referencing medical need and financial information. The proposed amendment places the identical language within the appropriate subpart for each identified person for admission under Minn. R. part 9050.0050, subp. 2 and subp. 3. The term used under admission is consistent with the use of the term throughout Minn. R. ch. 9050, to include medical need, need for services, and care needs.

Comments: The commenter raises concerns that both those who are employed or under contract by MDVA are setting the standards and basis for admission, for changes in services, and for discharge. The commenter cites other long-term care models where there is a greater separation of independent providers providing information because this could be seen as a conflict of interest in the other procedures under the rules.

MDVA Response: The commenter presents concerns but fails to identify specific areas in where the conflict of interest will or could occur. The MDVA is consistently monitored and surveyed to confirm they are in compliance with the Minnesota Department of Health, the Center for Medicare and Medicaid Services and the Federal Veterans Affairs. The consistent monitoring from external agencies assures that MDVA is complying with the standards that assure residents rights, safety and protections in the area of admission, services and discharges. MDVA contends the proposed changes are in compliance with current and applicable state and federal laws.

Comments: Commenter address the utilization review under Minn. R. part 9050.0040, subpart 115 and the utilization committee under Minn. R. part 9050.0400. The commenter contends that there are no criteria for the quality of services. The commenter raises concerns about the administrator appointing the utilization review committee without criteria related to quality of services and without some definition of quality of services there are concerns of the scope and nature of those who are being chosen for the review committee. Finally, the commenter states that under many aspects of the rules the utilization review committee is the decision-maker.

MDVA Response: Under the current and original language, the MDVA delegates to the facility administrator the authority to appoint a utilization review committee. The utilization review committee members are identified in subp 2 of the Minn. R. part 9050.0400. The primary concerns of the committee, relate to the facility's ability to care

for a person. The utilization review committee duty is not to make decisions, but to evaluate, review and recommend. MDVA contends the proposed changes are in compliance with current and applicable state and federal laws.

Comments: (Summary-In regard to Minn. R. part 9050.0220, subpart 1, involuntary discharge procedures.) The commenter points out that under Minn. R. part 9050.0220, subpart 1 there is a requirement for a recommendation for discharge by the utilization review committee and/or facility financial staff or facility social services staff and that typically a discharge is related to the level of services needed and whether or not the facility can provide the level of services needed. The commenter raises concerns that there is no requirement in the rules for members of the utilization review committee to have any nursing qualifications, et cetera, and that it is not in any long-term care regulation that a social services staff member can make a recommendation for discharge based on a medical need, which under the proposed rule it appears that social services staff can make such recommendations.

MDVA Response: Involuntary discharge must be based on specific, limited reasons or conditions. The source of the discharge recommendation is also limited by this section to those staff members best equipped to know if discharge is warranted and those best able to document the need. The addition of the social worker is important to identify personnel the administrator can rely on to provide accurate and concise recommendation when dealing with a serious request like a discharge. The number of safeguards in place, to include the propose added neutral fact finder and the required reconsideration hearing, assures a resident who receives a notice of discharge has the ability to challenge the recommendation approved by the administrator.

Commenter: Reher

Comments: Commenter suggests the mission and the values behind serving veterans which is to afford veterans and their spouses with a similar financial status when they went into the Veterans Homes as they had before. Commenter states the underling intent of the rule is premised on the fact the veteran provided service to the country. The commenter states the reasonableness and necessity of the proposed rule changes needs be evaluated in light of the mission and values governing how veterans are served.

MDVA Response: Within its approximately 1500 employees who serve veterans every day, ten percent of those employees are veterans themselves. The mission and focus of MDVA is to serve Minnesota Veterans and their families and because of the percentage of its employees who have served and the veterans it serves every day, there is a constant reminder on how important a successful outcome of MDVA's programs and services are. The purpose of the proposed rule amendments to Minn. R. parts 9050.0030-9050.1090 is to continue to further clarify the authoritative basis for the internal functioning and operation of the Minnesota Veterans Homes. These proposed rules comprise the practices currently used at the Minnesota Veterans Homes, as wells as practices that will be implemented upon the promulgation of these rules which are based upon preexisting state rules and laws. The intent of the rule amendments is to add new or modify existing definitions, obtain compliance with statutory changes, and make technical corrections to existing rule language. Furthermore,

MDVA has complied with the required contents of the SONAR as well as notice requirements as required within Minn. Stat. Ch. 14 and Minn. R. ch.1400.

Comments: The commenter is concerned about the integrity of the entire proposed rule process and the fact that there should have been opportunities well in advance of coming up with final published rules to have input from the stakeholders. The reasonableness and the necessity of these rules is called into question by the lack of input from the stakeholders.

MDVA Response: This is a reiteration of a comment submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: Comments provided in regard to rule Minn. R. part 9050.0600, subpart 2, item E and proof of nonsalability of property. The commenter states that under the proposed rule change there is no way to prove nonsalability when there are remainder holders (life estate) who will not agree to sell the property.

MDVA Response: This is a reiteration of several comments submitted during the public comment period prior to the hearing. MDVA's response is provided above

Comments: The commenter states that the valuation of property can vary greatly from the assessed value if there are defects to the property such as toxic waste or malfunctioning septic system, and that use of the assessed value on a tax statement constitutes an irrebuttable presumption without other evidence being submittable.

MDVA Response: This is a reiteration of several comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter states that there are many different ways to value a life estate that may have been used by the parties to the agreement. Use of the IRS code leaves no room for contractual changes to account for how the remainder were set up. The commenter states that use of only one mechanism, the IRS code, that applies in all cases, is arbitrary and capricious.

MDVA Response: The change is consistent with the process of admission or continued stay by placing a defined value on the interest of a life estate so it can consistently be valued for the purpose of admission and maintenance. The proposed revision only applies to resources that are available. MDVA agreed to supplement the proposed amendment with the IRS model from DHS life estate mortality table based off of several comments and responses to the language from the public.

Comments: Commenter states that when there is a failure to meet the requirements of the proposed rules because a real property interest is not liquid, presumably because there are other persons who are joint owners or who have a remainderman interest, the applicant will be assessed the maximum maintenance charge, which is based on the current property tax valuation. And, if the applicant cannot pay the maximum maintenance charge the applicant will be discharged. The commenter states that because of all of the intertwined issues and the rules have so many pieces the rules should not be approved until they are more thoroughly evaluated.

MDVA Response: The focus of the property identified by the proposed rule pertains to real property that is predetermined available. If the property is owned by another, home of another, or is continued to be on the market for sale, the property would not be considered as "available". The commenter presents concerns but fails to identify specific areas in where the conflict of interest will or could occur. The MDVA is consistently monitored and surveyed to confirm they are in compliance with the Minnesota Department of Health, the Center for Medicare and Medicaid Services and the Federal Veterans Affairs. the consistent monitoring from external agencies assures that MDVA is complying with the standards that assure residents rights, safety and protections in the area of admission, services and discharges. MDVA contends the proposed changes are in compliance with current and applicable state and federal laws. Furthermore, the number of safeguards in place, to include the propose added neutral fact finder and the required reconsideration hearing, assures a resident who receives any notice of discharge due to lack of payment of maintenance charge has the ability to challenge the recommendation if approved by the administrator and ultimately would be reviewed by an OAH judge.

Commenter: Blaine

Comments: The commenter states they have heard from residents and family members who claim no knowledge of these proposed rule amendments. The commenter states they were listed as an involved stakeholder in the SONAR but were not involved in drafting the rules, nor were they invited to provide input. The commenter states that in spite of asking about the proposed rules and what was in them, they were not made aware of the proposed rules until posting for public comment. The commenter states there was little transparency about notifying anyone about the rules through any of the means that MDVA has at their disposal. The commenter believes the MDVA's failure to notify stakeholders in their publications and other means is in noncompliance with Minnesota Statutes, section 14.14, subdivision 1a.

MDVA Response: This is a reiteration of a comment already submitted during the hearing. MDVA's response is provided above.

Comments: The commenter agrees with previous commenters that there is a lack of detail in the SONAR as well as noncompliance, presumably in the proposed rules, with Minn. R. ch. 4658 for skilled nursing facilities and 4655 for board and care homes.

MDVA Response: This is a reiteration of a comment already submitted during the hearing. MDVA's response is provided above.

Comments: Commenter identifies the proposal for changes to the admission criteria in Minn. R. part 9050.0050, subpart 3a and the 90 day residency requirement. The commenter states that the 90 day residency requirement be for a person can be considered for admission to a veterans home still excludes veterans who live in another state.

MDVA Response: This is a reiteration of a comment already submitted during the public comment period and hearing. MDVA's response is provided above.

Comments: The commenter states that in addition to the protections under Minnesota Statute 144A, Minnesota Veterans Homes as federally-certified CMS sites, are subject to

federal conditions of participation, including 42 CFR 483 and 38 CFR 51. Commenter referred to numerous examples our written comments of where the proposed rules are not in compliance with those regulations.

MDVA Response: This is a reiteration of several comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: Commenter focuses on the resident's right to a provider of their choice and references the changes to Minn. R. part 9050.0070, subpart 3, item C and Minn. R. part 9050.0070, subpart 4, item B The commenter states that these requirements are in direct violation of 42 CFR 483.10 (d) and 38 CFR 51.70, which ensure a resident's choice of physician.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: Minn. R. part 9050.1070, subpart 11 contains a method for establishing visiting hours, which the commenter states is prohibited under state law for skilled nursing facilities. The commenter calls for extending protections afforded skilled nursing facility residents to those living in the domiciliary, or separate out the rights and protections afforded to each category of resident based on which part of the building they reside in, as is applicable and differentiated under federal and state law.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: (Summary-In regard to federal requirements that dignity, choice, and person centered care to be at the core of service delivery.) The commenter cites as examples of overly-paternalistic rules that are not consistent with supporting person-centered planning, self-directed care, and resident rights: (a) Minn. R. part 9050.0070, subpart 3, items D and E, which require those with mental illness to undergo additional scrutiny for admission; and (b) Minn. R. part 9050.0070, subpart 4, item D, which requires a demonstrated history of cooperation to even be considered for admission to include the potential waiving of people's rights in order to gain entry in the building.

MDVA Response: The commenter presents concerns but fails to identify specific areas in where the MDVA does not support person centered care or assure a resident's dignity in its facilities. The MDVA is consistently monitored and surveyed to confirm they are in compliance with the Minnesota Department of Health, the Center for Medicare and Medicaid Services and the Federal Veterans Affairs. The consistent monitoring from external agencies assures that MDVA is complying with the standards that assure residents rights, safety and protections in the area of admission, services and discharges. MDVA contends the proposed changes are in compliance with current and applicable state and federal laws and the underlying focus is to provide the best care for its residents. Furthermore, the proposed rule adds a number of safeguards, to include the propose added neutral fact finder and the required reconsideration hearing. MDVA contends that the proposed rule create a better bases to apply to level care deserving to the residents at MDVA facilities.

Comments: The commenter states that Minn. R. part 9050.1030, subpart 1a, item B, which requires all care and treatment plans by an external or non-MDVA provider to be approved by the MDVA medical director, is an egregious overreach of the role (medical director) and also takes away a resident's right to coordinate care with their own physician.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter states that requiring a signature to acknowledge receipt of a resident handbook (in Minn. R. part 9050.1070, subpart 5) is unnecessary, punitive, and does not need to be in state law.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter states that requiring a resident to sign out to leave campus is punitive, violates the resident's rights, and is not reasonable or necessary to be in state law. There are provisions that already exist for the MDVA to be able to safely know who is in and out of their building.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter states that failure to report income changes accurately and timely as a reasonable stand-alone reason for discharge is not appropriate.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter states that the policies regulating on-site smoking and work therapy programs are restrictive.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter states that an "immediate discharge" is a timeline for discharge and not a type of discharge recognized by state or federal statutes. The commenter points out that discharges can already be accelerated to less than 30 days (health and safety risks) under Minnesota Statute, chapter 144A, and Codes of Federal Regulations, chapters 42, 43, 38, and 51; therefore, any proposed rules regarding immediate discharges are neither necessary nor reasonable.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter states there are numerous inconsistencies between Minn. R. part 9050.0200, subpart 2, items B and C and federal law. The rules do not but should

separate resident rights according to domiciliary or skilled nursing settings. The commenter states that the rights afforded to skilled nursing facility residents should be extended to the domiciliary residents or the differentiation in rights should be included in Minn. R. ch. 9050.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter calls attention to what is termed an inaccurate definition of "voluntary discharge" applied in multiple rule parts. In particular Minn. R. part 9050.0210, subpart 1. The commenter also points out the rules contain no distinction between discharge rights for domiciliary residents and skilled nursing facility residents even though skilled nursing resident have more rights by law.

MDVA Response: The comment addresses rule language that has not been amended by these proposed changes. However, the language referenced establishes a procedure for accomplishing discharge of a person, voluntary or involuntary. Such procedure ensures an orderly transition to a new placement and helps make sure a person's needs are met. Use of an established procedure helps the individual and the facility plan for the discharge and deal with the transition. Furthermore, the MDVA is consistently monitored and surveyed to confirm they are in compliance with the Minnesota Department of Health, the Center for Medicare and Medicaid Services and the Federal Veterans Affairs. the consistent monitoring from external agencies assures that MDVA is complying with the standards that assure residents rights, safety and protections in the area of admission, services and discharges. MDVA contends the proposed changes are in compliance with current and applicable state and federal laws as it pertains to discharges. Furthermore, the number of safeguards in place, to include the propose added neutral fact finder and the required consideration hearing, assures a resident who receives any notice of discharge has the required due process protections in place to confirm resident's rights were provided.

Comments: The commenter references proposed language for Minn. R. part 9050.0100, subpart 1 which would allow for a resident to be discharged for refusing to transfer to another facility or setting if their provider or the utilization committee recommends so. The commenter states this action is not legal under law because it violates a resident's right to decline care or treatment.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter states the proposed repeal of Minn. R. part 9050.0200, subparts 4 and 5 eliminate important federal protections for residents.

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Comments: The commenter states that several proposed rule amendments do not contain language that complies with state and federal law governing the required contents of the discharge notice

MDVA Response: This is a reiteration of comments submitted during the public comment period prior to the hearing. MDVA's response is provided above.

Commenter: White

Comments: The commenter is concerned that the term "immediate threat" is void for vagueness because item A references Minn. R. part 9050.0070, subparts 3 and 4 which are rules governing admission to a facility and not a discharge from a facility.

MDVA Response: The proposed amendment under subpart 7, items A to F establish the requirements for immediate involuntary discharge of a resident, one of the types of discharges available to the facility, as identified in Minn. R. part 9050.0200, subpart 2, item C. Subpart 7 is needed to correctly identify the resident's rights and appropriate procedures when the facility conducts an immediate discharge of a resident based on an immediate threat to the health and safety of the resident, other residents, or staff. The commenter references federal law but fails to notice the additional language within the CFR that allows for an exception to forgo delay of discharge when the "failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility". See 42 CFR §483.15(c)(1)(ii) All applicable state and federal statutes governing discharge must and will be followed by the MDVA when conducting an immediate discharge. This change is reasonable because it helps to ensure the facility can maintain safety within its operations as well as provide due process to the resident.

The MDVA recognizes the commenters concern to Minn. R. part 9050.0220, subp 7A and agrees to supplement the proposed change by replacing the reference to Minn. R. part 9050.0070 to 9050.0400:

> Minn. R. part 9050.0220, Subp 7A:
>
> When a resident's behavior poses an immediate threat to the health or safety of the resident, other residents, or staff of a facility operated by the commissioner, as determined by the utilization review committee according to *Minn. R. part 9050.0400* ~~9050.00700~~, subpart 3 or 4 and confirmed by the facility administrator, a resident can be immediately and involuntarily discharged from the facility.

Comments: Commenter references Minn. R. part 9050.0070, subpart 3, item F and the provision that a resident exercising their right to refuse care may lead to their discharge if the facility is unable to care for them under Minn. R. part 4655.1500, subpart 2. The commenter cites MN Stat 12.39, subdivision 1, which allows Minnesota residents to refuse treatment and as an entity of the State, the statute would not allow MDVA to discharge a resident for failing to comply with something which the resident is statutorily allowed to do.

MDVA Response: This is a reiteration of comments received during the public comment period and already made in the hearing. MDVA's response is provided above.

Comments: The commenter states that a care plan as applicable to Minn. R part 9050.0070, subpart 4, item D is generally drafted by a nurse. And because a care plan does not always take into account an individual's desires, the care plan may include a treatment that the veteran is statutorily committed to refuse to state.

MDVA Response: This is a reiteration of comments received during the public comment period and already made in the hearing. MDVA's response is provided above.

Comments: The commenter states that trying to maximize a veteran's VA disability benefit could actually result in a decrease in the benefit due to the nature of the VA disability system. The commenter states that the requirement of the rule interferes with an attorney's representation and is an intrusion on the bar because the rule mandates a legal representative to take certain action, which could be considered the unlicensed practice of law. Finally, the commenter states that the rule is not about what the veteran needs.

MDVA Response: Minn. R. part 9050.0770 requires an applicant or resident apply for the maximum of every benefit for which they may be eligible for. Residents of the MDVA's facilities are frequently eligible for increased or additional benefits, either governmental or private. As an increase in the person's income in most cases results in an increase in the person's maintenance charge, there is often a reluctance on the resident's part to apply for benefits – because the resulting increase in benefits goes towards cost of care rather than into the individual's pocket. This part is revised to add clarifying language that the maximum of every benefit the applicant or resident may be eligible that will increase the income or "eligible benefits" and "reduce the facility's expenditures." These changes identify the MDVA's intent to maximize the benefits residents receive which could potentially decrease costs to the State and are not likely to result in any detriment to the resident. These changes are reasonable because they clearly identify the types of benefits available and that can offset the State's cost of operating the facility. The commenter fails to represent how the proposed changes to the rule interferes with the attorney's representation of veteran or limits the veterans needs

Commenter: Price

Comments: Commenter references the 90-day residency requirement prior to application for admission to a veterans home, Minn. R. part 9050.0050, subpart 3a, item A. The commenter states that it is well-settled-law that the imposition of durational residency requirements for applying for admission to a veterans home is unconstitutional.

MDVA Response: This is a reiteration of comments received during the public comment period and already made in the hearing. MDVA's response is provided above.

Comments: Commenter references the deduction for voluntary support of a dependent spouse or household by establishing asset limits for determining eligibility for income support for a dependent spouse or household. Minn. R. part 9050.0750, subpart 1. The commenter states that referencing a medical rating of "Aid and Attendance" that is part of the United States Department of Veterans Affairs (USDVA) "Nonservice-connected Pension" benefit creates a "technical ambiguity" and a lack of clarity. The commenter

considers the proposed rule to be, “punitive” on the grounds that the asset limit of the USDVA Nonservice-connected Pension benefit is less than the asset limit for Medicaid eligibility in Minnesota.

MDVA Response: The provisions of subpart 1 assist in preventing the State from having to assume financial responsibility for both the resident and his or her family. Subpart 1 also aids in the resident's overall treatment plan/rehabilitation and care as it eliminates concern over whether his/her family is taken care of. The proposed revision to subpart 1 continues with the overall intent of Minn. R. part 9050.0750 but adds the consistency between state and federal regulations by referencing 38 CFR 3.351, special monthly dependency and indemnity compensation, death compensation, pension and spouse’s compensation ratings. It is necessary to create equality in the calculation of spousal allowance while keeping consistency with the federal regulations that determine the qualification of federal Aid and Attendance for the resident. (The USDVA Aid and Attendance Program benefit is a monetary benefit that helps eligible veterans and their surviving spouses (widows/widowers) to pay for the assistance they need in everyday functioning (eating, bathing, dressing, and medication management.)) Currently, a resident can be disqualified from federal Aid and Attendance due to excessive assets, yet the spouse can draw off the remaining income of that resident to meet her/his monthly living expenses, not tapping into what the USDVA views as excessive assets. The assets that create the dis-allowance of federal Aid and Attendance could likely not be reduced for a very long time due to the fact that the spouse is using the resident’s monthly income to provide for their needs instead of reducing the assets to meet the qualifications of federal Aid and Attendance. It is reasonable to be consistent with federal regulations by requiring a resident and the spouse to use the assets that the USDVA views as excessive to support the spouse until the assets are reduced to what the USDVA views as allowable Aid and Attendance.

Comments: Citing the income disparities in the majority of cases, between a veteran and the veteran’s spouse, the commenter states that the rule asks a spouse remaining in the community to choose between the right to marital income and the ability to retain retirement savings, a situation that encourages divorce and the division of property. The commenter concludes that from an income standpoint, the proposed rule makes divorce or the veteran entering a Medicaid facility a much better option for the spouse of a veteran who remains in the community.

MDVA Response: The commenter presents a situations but lacks the clarity in her comment to identify where exactly within the rule the concern is presented. Minn. R. part 9050.0750 assist the MDVA from preventing the State from having to assume financial responsibility for both the resident and his or her family. The part also aids in the resident's overall treatment plan/rehabilitation and care as it eliminates concern over whether his/her family is taken care of. The proposed revision to Minn. R. part 9050.0750 adds the consistency between state and federal regulations by referencing 38 CFR 3.351, special monthly dependency and indemnity compensation, death compensation, pension and spouse’s compensation ratings. It is necessary to create equality in the calculation of spousal allowance while keeping consistency with the federal regulations that determine the qualification of federal Aid and Attendance for the resident. (The USDVA Aid and

Attendance Program benefit is a monetary benefit that helps eligible veterans and their surviving spouses (widows/widowers) to pay for the assistance they need in everyday functioning (eating, bathing, dressing, and medication management.)) Currently, a resident can be disqualified from federal Aid and Attendance due to excessive assets, yet the spouse can draw off the remaining income of that resident to meet her/his monthly living expenses, not tapping into what the USDVA views as excessive assets. The assets that create the dis-allowance of federal Aid and Attendance could likely not be reduced for a very long time due to the fact that the spouse is using the resident's monthly income to provide for their needs instead of reducing the assets to meet the qualifications of federal Aid and Attendance. It is reasonable to be consistent with federal regulations by requiring a resident and the spouse to use the assets that the USDVA views as excessive to support the spouse until the assets are reduced to what the USDVA views as allowable Aid and Attendance.

Commenter: Lewis

Comments: (Summary-The rules were drafted without the consultation of subject matter experts in the field.)

MDVA Response: This is a reiteration of comments received during the public comment period and already made in the hearing. MDVA's response is provided above.

Comments: Commenter references Minn. R. part 9050.0220, subpart 7, item A and the language, "immediate threat". The commenter states that the rules do not define what is considered an "immediate threat to the health or safety" of the resident, other residents, or staff of a facility; therefore, the rule should be considered void for vagueness. Not having a clear definition or criteria of what constitutes an "immediate threat to health or safety" does not adequately put the resident on notice as to what behavior can result in being immediately involuntarily discharged.

MDVA Response: This is a reiteration of a comment already made in the hearing. MDVA's response is provided above.

Comments: Commenter addresses the use of a telephone to conduct a reconsideration hearing, Minn. R. part 9050.0220, subpart 3, item B. The commenter raises concerns about the conduction of reconsideration hearings by telephone and why the proposed rule does not include such platforms as Zoom or Microsoft Teams.

MDVA Response: This is a reiteration of a comment already received during the public comment period. MDVA's response is provided above.

Comments: Commenter references the second paragraph of Minn. R. part 9050.0770 which states that if the facility staff determines an applicant or resident is not able to manage personal financial affairs, the facility staff shall recommend that the facility be authorized. The commenter states that this rule intrudes upon 38 CFR, section 13.100-Fiduciary Appointments and intrudes on the relationship between the veteran and the United States Department of Veterans Affairs.

MDVA Response: Minn. R. part 9050.0770 requires an applicant or resident apply for the maximum of every benefit for which they may be eligible for. Residents of the MDVA's facilities are frequently eligible for increased or additional benefits, either governmental or private. As an increase in the person's income in most cases results in an increase in the person's maintenance charge, there is often a reluctance on the resident's part to apply for benefits – because the resulting increase in benefits goes towards cost of care rather than into the individual's pocket. This part is revised to add clarifying language that the maximum of every benefit the applicant or resident may be eligible that will increase the income or "eligible benefits" and "reduce the facility's expenditures." These changes identify the MDVA's intent to maximize the benefits residents receive which could potentially decrease costs to the State and are not likely to result in any detriment to the resident. These changes are reasonable because they clearly identify the types of benefits available and that can offset the State's cost of operating the facility. The commenter fails to represent how the proposed changes to the rule interferes with the 38 CFR 13.100 or how it intrudes on the relationship between the veteran and the USDVA.

Comments: Commenter references the first paragraph of Minn. R. part 9050.0770 and the requirement that an applicant, resident, or legal representative, if any, must apply for the maximum of every benefit for which the applicant or resident may be eligible for that will increase the income or eligible benefits of the applicant or resident and reduce the facility's expenditures. The commenter states that the rule will result in veteran service officers being asked to maximize veterans' benefits without having an appropriate knowledge base upon which to determine if a maxim benefit should be applied for. The commenter states that this intrudes on the practice of law and interferes with the bar's prerogatives. The commenter states that these individuals are unlicensed and untrained laypersons act as a de facto arm of the MDVA and should not be allowed to be mandated to apply for a maximum benefit if they're truly independent practitioners.

MDVA Response: This is a reiteration of a comment already made in the hearing. MDVA's response is provided above.

Comments: Commenter references the neutral administrator used in the involuntary or immediate discharge process, Minn. R. part 9050.0220, subpart 1a. The commenter states that the persons identified in the rule as possible neutral administrators are not truly independent and neutral. The commenter cites that the persons identified in the rule as possible neutral administrators are handpicked by the Commissioner to operate the facilities and administer the different lines of care. The commenter questions the neutrality of the persons listed in the rule because each relies on the commissioner for their appointment. The commenter recommends an ALJ be appointed to oversee these hearings as keeping the hearings within the MDVA "tramples" on the due process rights of veterans.

MDVA Response: This is a reiteration of a comment already made during the public comment period. MDVA's response is provided above.

Commenter: Wermerskirchen

Comments: Commenter references the effective transfer date for real property as the date the document conveying the real estate is recorded, Minn. R. part 9050.0650, subpart 1. The commenter cites several court cases which establish Minnesota law that in order to transfer title in Minnesota, deed must be delivered and the elements of "delivery" are surrendering control of the property and the intent to convey title. The commenter states the proposed rule clearly violates Minnesota law.

MDVA Response: This is a reiteration of a comment already made during the public comment period. MDVA's response is provided above.

VI. Comments received during the post-hearing comment period and the MDVA's responses.

Commenter: Zweber

Comments: Commenter submitted a letter from attorneys Chuck Hoyum and Eileen Robert's expressing their concerns over the MDVA's treatment of joint tenancies and tenancies in common and when the transfer of property is considered effective.

MDVA Response: This is a reiteration of several comments submitted during the public comment period prior to the hearing. MDVA's response is provided above at Part 9050.0600, subpart 1, item A and Part 9050.0650, subpart 1.

Commenter: Blaine

Comments: Commenter submitted a written copy of the testimony given at the hearing on January 31, 2022.

MDVA Response: This is a written copy of the comments made during the public hearing on January 31, 2022. MDVA's responses are provided throughout this document.

VII. Attachments

Attachment 1. Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900(1989).

Attachment 2. Statement of Need and Reasonableness in the Matter of the Proposed Rule of the Minnesota Veterans Homes Board Relating to Facility Services Provided to Residents of the Minnesota Veterans Homes and Residents Rights and Responsibilities Parts 9050.0040 and 9050.1000 to 9050.1070 (1991).

Attachment 3. Statement of Need and Reasonableness of Proposed Minnesota Rule Parts 9050.0010 to 9050.0900 (1993).

Attachment 4. Statement of Need and Reasonableness in the Matter of the Proposed Amendment of Rules of the Veterans Homes Board Governing the Operations of the Minnesota Veterans Homes (1995).

Attachment 5. Comments Supporting Hoyum-Roberts Letter. eComment received 02-22-2022.

Attachment 6. Hoyum-Roberts Letter 01-22-2022-eComment received 02-22-2022.

Attachment 7. 9050 testimony Final_01-31-2022-eComment received 02-22-2022.

Respectfully submitted,

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