



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Parts 38 and 39

RIN 2900-AQ36

Prohibition of Interment or Memorialization of Persons Who Have Been Convicted of Federal or State Capital Crimes or Certain Sex Offenses

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its national cemetery regulations prohibiting the interment or memorialization of certain persons who have been convicted of Federal or State capital crimes. This final rule incorporates the statutory prohibition against interment or memorialization in a VA national cemetery or VA-funded State or Tribal veterans' cemetery of a person who has been convicted of a Federal or State crime causing the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act; who, for such crime, is sentenced to a minimum of life imprisonment; and whose conviction is final (other than a person whose sentence was commuted by the President or Governor of a State). This prohibition was enacted as part of the Dignified Burial and Other Veterans' Benefits Improvement Act of 2012.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Eric D. Powell, Deputy Director, Memorial Programs Service, Office of Field Programs, National Cemetery Administration (NCA), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 632-8670 (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: Title 38, U.S.C., section 2411 originally prohibited the interment or memorialization in a VA national cemetery of an individual who had been convicted of a Federal or State capital crime or had been found to have committed a Federal or State capital crime but had not been convicted of such crime due to the person's death or flight to avoid prosecution. VA published regulations implementing this prohibition applicable to VA national cemeteries at 38 CFR 38.617 and 38.618, and for State and Tribal veteran cemeteries funded through grants from VA at 38 CFR 39.10(b). The Dignified Burial and Other Veterans' Benefits Improvement Act of 2012, Public Law 112-260, Sec. 105 (codified at 38 U.S.C. 2411(b)(4)), expanded the prohibition on interment or memorialization in a VA national cemetery to include an individual who has been convicted of a Federal or State crime causing the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (42 U.S.C. 16901, et seq.); who, for such crime, is sentenced to a minimum of life imprisonment; and whose conviction is final (other than a person whose sentence was commuted by the President or Governor of a State).

The Sex Offender Registration and Notification Act was previously codified at 42 U.S.C. 16901, et seq., but has been transferred to 34 U.S.C. 20901, et seq. A “tier III sex offender” is defined at 34 U.S.C. 20911(4) to mean a sex offender whose offense is punishable by imprisonment for more than 1 year and (1) is comparable to or more severe than aggravated sexual abuse or sexual abuse (18 U.S.C. 2241 and 2242) or abusive sexual contact (18 U.S.C. 2244) against a minor who has not attained the age of 13 years, or is an attempt or conspiracy to commit such offenses; or (2) involves kidnapping of a minor (unless the offense is committed by a parent or guardian); or (3) occurs after the offender becomes a tier II sex offender.

This final rule amends VA regulations to accurately reflect the statutory mandate in 38 U.S.C. 2411, including the prohibition added by Pub. L. 112-260, Sec. 105. VA has acted in compliance with the statutory mandate prohibiting interment or memorialization to individuals who meet the statutory definitions since enactment of Pub. L. 112-260, and this final rule brings VA’s regulations into compliance with the statutory mandate. In addition, VA is making technical amendments to 38 CFR 38.617 to clarify that the prohibition added by Pub. L. 112-260 also prohibits individuals who meet the statutory definitions from receiving other memorialization benefits, even outside the national cemeteries. Although the language in 38 U.S.C. 2411 prohibits burial and memorialization only in VA national cemeteries, the prohibition also pertains to other types of memorialization provided by VA in other statutes. In particular, 38 U.S.C.

2306(h) prohibits provision of the various types of headstone and marker benefits to individuals identified in 38 U.S.C. 2411(b), including those buried in cemeteries other than VA national cemeteries. Similarly, 38 U.S.C. 112(c) prohibits the provision of a Presidential Memorial Certificate to any individual identified in 38 U.S.C. 2411(b), and 38 U.S.C. 2301(g) prohibits VA from providing a United States flag to drape the casket of such individuals. To address these other benefits, we are removing, in 38 CFR 38.617(a), the phrase “in such a cemetery,” because these memorialization benefits may be provided outside the national cemeteries, according to the relevant statutory mandates. In addition, because cemetery directors do not have any responsibility for providing (or prohibiting the provision of) benefits outside the national cemeteries, we are also removing the phrase “the affected cemetery director, or” so that the Under Secretary for Memorial Affairs, or his or her designee, (which may include cemetery directors) is noted as responsible for such determinations. We are replacing all other references to “cemetery director” with “Under Secretary for Memorial Affairs, or his or her designee,” throughout 38 CFR 38.617. Referring to the Under Secretary for Memorial Affairs, or his or her designee, ensures that the regulation references the office currently responsible for implementing the bar to receiving benefits other than burial, and will remain correct even if the responsibility is reassigned to a different office in the future.

In § 38.617, the heading is amended to read “Prohibition of interment or memorialization of persons who have been convicted of Federal or State capital crimes or certain sex offenses”.

A new paragraph (a)(4) is added, to include in the list of individuals prohibited from interment or memorialization a person who has been convicted of a Federal or State crime causing the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901, et seq.); who, for such crime, is sentenced to a minimum of life imprisonment; and whose conviction is final (other than a person whose sentence was commuted by the President or Governor of a State).

References in paragraphs (c) and (d) are updated to include a reference to new paragraph (a)(4).

Current paragraph (e) addresses VA inquiries to the United States Attorney General in the case of a Federal capital crime, or an appropriate State official in the case of a State capital crime. Such references to either Federal or State capital crimes are revised to also include Federal or State crimes referred to in new paragraph (a)(4).

To administer support to State and Tribal veterans’ cemeteries, VA is authorized under 38 U.S.C. 2408 to make a grant for the establishment, expansion, or improvement of a State or Tribal veterans’ cemetery, or the

operation and maintenance of such cemetery. Pursuant to 38 U.S.C. 2408(d), as a condition for receiving such a grant, the State or Tribal Organization, after the date of the receipt of the grant, must prohibit the interment or memorialization in that cemetery of a person described in 38 U.S.C. 2411(b), subject to the receipt of notice described in 38 U.S.C. 2411(a)(2). Notice that the decedent has been convicted of a crime as described in 38 U.S.C. 2411(b)(1), (b)(2), or (b)(4) must be furnished to an appropriate official of the State or Tribal Organization; or a finding as described in 38 U.S.C. 2411(b)(3) must be made by an appropriate official of the State or Tribal Organization. Regulations governing grants to State and Tribal Organizations to establish, expand or improve a veterans' cemetery are published at 38 CFR part 39, and § 39.10(b) addresses the prohibition on interment of decedents who committed a Federal or State capital crime.

This final rule amends § 39.10, which establishes cemetery requirements, prohibitions, and recapture rules applicable to grants to State and Tribal veteran cemeteries. A new paragraph (b)(4) is added, to include in the criteria of individuals prohibited from interment or memorialization a person who has been convicted of a Federal or State crime causing the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901, et seq.); who, for such crime, is sentenced to a minimum of life imprisonment; and whose conviction is final (other than a person whose sentence was commuted by the President or Governor of a State).

Additionally, the authority citation for part 39 currently cites to, among other statutes, 25 U.S.C. 450b(l). This citation was included because the statute includes definitions relevant to tribal authorities to whom VA may make grants for veterans' cemeteries. However, 25 U.S.C. 450b(l) has been transferred to 25 U.S.C. 5304(l). In addition, the pertinent definitions are also included in 38 U.S.C. 3765, which is among the other statutes cited in this authority citation, making the additional (and now outdated) reference to title 25 unnecessary. This final rule amends the authority citation for part 39 by removing the citation to 25 U.S.C. 450b(l).

Administrative Procedure Act

In accordance with 5 U.S.C. 553(b)(B) and (d)(3), the Secretary of Veterans Affairs concludes that there is good cause to publish this rule without prior opportunity for public comment and to publish this rule with an immediate effective date, as such procedures would be unnecessary and contrary to the public interest. As stated above, this final rule reflects amendments to 38 U.S.C. 2411, prohibiting the interment or memorialization in a VA national cemetery of a person who has been convicted of a Federal or State crime causing the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901, et seq.); who, for such crime, is sentenced to a minimum of life imprisonment; and whose conviction is final (other than a person whose sentence was commuted by the President or Governor of a State). The final rule is not an exercise of agency discretion as it addresses only that which

Congress mandates, and VA's actions in this rulemaking would not be changed as a result of public comment. This final rule amends our regulations to accurately reflect the statutory mandate in 38 U.S.C. 2411, to include the prohibition added by Pub. L. 112-260, Sec. 105. Further, delaying the effective date of this rulemaking would not benefit veterans and family members, and could lead to confusion regarding an individual's eligibility for burial in a VA national cemetery. For the above reasons, the Secretary issues this rule as a final rule, effective immediately.

Effect of rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to these regulations or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

This final rule is exempt from the Regulatory Flexibility Act, 5 U.S.C. 601-612, because a general notice of proposed rulemaking is not required for this rulemaking under 5 U.S.C. 553, as discussed above. See 5 U.S.C. 601(2), 603(a), 604(a).

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4)

Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action and determined that the action is not a significant regulatory action under E.O. 12866. VA's impact analysis can be found as a supporting document at <http://www.Regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at <http://www.va.gov/orpm> by following the link for VA Regulations Published from FY 2004 through FYTD.

This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.201 National Cemeteries; 64.202 Procurement of Headstones and Markers and/or Presidential Memorial Certificates; and, 64.203 State Cemetery Grants.

List of Subjects

38 CFR Part 38

Administrative practice and procedure, Cemeteries, Claims, Crime, Veterans.

38 CFR Part 39

Cemeteries, Grant programs-veterans, Veterans.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Robert L. Wilkie, Secretary, Department of Veterans Affairs, approved this document on January 11, 2019, for publication.

Dated: February 19, 2019.

Luvenia Potts,

Program Specialist,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR parts 38 and 39 as follows:

PART 38 – NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

1. The authority citation for part 38 continues to read as follows:

AUTHORITY: 38 U.S.C. 107, 501, 512, 2306, 2402, 2403, 2404, 2408, 2411, 7105.

2. Amend § 38.617 as follows:

- a. Revise the section heading and paragraph (a) introductory text.
- b. Add paragraph (a)(4).
- c. Revise paragraphs (c), (d), (e)(1) introductory text, (e)(1)(i) and (ii), (e)(2), (f), and (g).

The revisions and additions read as follows:

§ 38.617 Prohibition of interment or memorialization of persons who have been convicted of Federal or State capital crimes or certain sex offenses.

(a) *Persons prohibited.* The interment in a national cemetery under control of the National Cemetery Administration of the remains of any person, or memorialization of such person, shall not take place absent a good faith effort by the Under Secretary for Memorial Affairs, or his or her designee, to determine

whether such person is barred from receipt of such benefits because the individual for whom interment or memorialization is sought is:

* * * * *

(4) A person identified to the Secretary of Veterans Affairs, by the United States Attorney General, in the case of a Federal crime, or by an appropriate State official, in the case of a State crime, as an individual who has been convicted of a Federal or State crime causing the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901, et seq.); who, for such crime, is sentenced to a minimum of life imprisonment; and whose conviction is final (other than a person whose sentence was commuted by the President or Governor of a State).

* * * * *

(c) *Receipt of notification.* The Under Secretary for Memorial Affairs is delegated authority to receive from the United States Attorney General and appropriate State officials on behalf of the Secretary of Veterans Affairs the notification referred to in paragraphs (a)(1), (2), and (4) of this section.

(d) *Decision where notification previously received.* Upon receipt of a request for interment or memorialization, where the Secretary of Veterans Affairs has received the notification referred to in paragraph (a)(1), (2), or (4) of this section with regard to the deceased, the Under Secretary for Memorial Affairs, or his or her designee, will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411.

(e) * * *

(1) Upon receipt of a request for interment or memorialization, where the Secretary of Veterans Affairs has not received the notification referred to in paragraph (a)(1), (2), or (4) of this section with regard to the deceased, but the Under Secretary for Memorial Affairs, or his or her designee, has reason to believe that the deceased may have been convicted of a Federal or State capital crime or sex offense as referred to in paragraph (a)(1), (2), or (4) of this section, the Under Secretary for Memorial Affairs, or his or her designee, will initiate an inquiry to either:

(i) The United States Attorney General, requesting notification of whether the deceased has been convicted of a Federal capital crime or sex offense as referred to in paragraph (a)(1) or (4) of this section; or

(ii) An appropriate State official, requesting notification of whether the deceased has been convicted of a State capital crime or sex offense as referred to in paragraph (a)(2) or (4) of this section.

(2) The Under Secretary for Memorial Affairs, or his or her designee, will defer decision on whether to approve interment or memorialization until after a response is received from the Attorney General or appropriate State official.

(f) *Decision after inquiry.* Where an inquiry has been initiated under paragraph (e) of this section, the Under Secretary for Memorial Affairs, or his or her designee, will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411 upon receipt of the notification requested, unless the Under Secretary for Memorial Affairs, or his or her designee, initiates an inquiry pursuant to § 38.618(a).

(g) *Notice of decision.* Written notice of a decision under paragraph (d) or (f) of this section will be provided by the Under Secretary for Memorial Affairs, or his or her designee, to the personal representative of the deceased, along with written notice of appellate rights in accordance with § 19.25 of this title. This notice of appellate rights will include notice of the opportunity to file a notice of disagreement with the decision of the Under Secretary for Memorial Affairs, or his or her designee. Action following receipt of a notice of disagreement with a denial of eligibility for interment or memorialization under this section will be in accordance with §§ 19.26 through 19.38 of this title.

**PART 39 – AID FOR THE ESTABLISHMENT, EXPANSION, AND
IMPROVEMENT, OR OPERATION AND MAINTENANCE, OF VETERANS
CEMETERIES**

3. The authority citation for part 39 is revised to read as follows:

AUTHORITY: 38 U.S.C. 101, 501, 2408, 2411, 3765.

4. Amend § 39.10 by adding paragraph (b)(4) to read as follows:

§ 39.10 Cemetery requirements and prohibitions and recapture provisions.

* * * * *

(b) * * *

(4) Who has been convicted of a Federal or State crime causing the person to be a tier III sex offender for purposes of the Sex Offender Registration and Notification Act (34 U.S.C. 20901, et seq.); who, for such crime, is sentenced to a minimum of life imprisonment; and whose conviction is final (other than a person whose sentence was commuted by the President or Governor of a State).

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