



## 38 CFR Part 38

### RIN 2900-AR03

## Referral for VA Administrative Decision for Character of Discharge

### Determinations

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend title 38 of the Code of Federal Regulations (CFR) to clarify that, when determining eligibility for interment or memorialization benefits, the National Cemetery Administration (NCA) will refer cases involving other than honorable (OTH) discharges, certain other discharges, or potential statutory or regulatory bars to benefits, to the Veterans Benefits Administration (VBA) for character of discharge determinations. VA is merely updating its regulations to conform with statute and current practice.

**DATES:** Comments must be received by VA on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Written comments may be submitted through [www.regulations.gov](http://www.regulations.gov); or by mail to Director, Legislative and Regulatory Service (42E), Department of Veterans Affairs, 810 Vermont Ave., NW, Washington, DC 20420. Comments should indicate that they are submitted in response to “RIN 2900-AR03 - Referral for VA Administrative Decision for Character of Discharge Determinations.” Comments received will be available for public inspection at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Jerry Sowders, Division Chief, Eligibility Verification Division, National Cemetery Administration (NCA), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Telephone: (314) 416-6369 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

VA proposes to amend § 38.620 to clarify that, when determining eligibility for interment or memorialization benefits, NCA will refer cases involving other than honorable (OTH) discharges or other character of discharge issues to VBA for an administrative decision.

Eligibility for NCA-administered benefits, including interment in national cemeteries, is tied to an individual establishing veteran status or meeting other specified conditions. See, e.g., 38 U.S.C. 2402(a)(1) (stating any “veteran” may be buried in any open national cemetery); 112 (allowing VA to provide Presidential Memorial Certificates to those eligible for national cemetery burial); 2306(a) (authorizing VA to provide a government-furnished headstone or marker to those buried in a national cemetery or who meet other specified conditions); 2306(b)(2) (tying eligibility for memorial headstones or markers to “veteran” status); 2306(f) (authorizing caskets or urns for burial of deceased “veterans”). Congress has defined a veteran as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.” 38 U.S.C. 101(2).

Applying the “veteran” definition to the sections governing NCA-administered benefits, it is thus clear that, unless other specified conditions are met, a deceased individual must have been discharged or released from active service under conditions other than dishonorable; and an adjudication must sometimes be made as to an individual’s “veteran” status in order to determine eligibility for NCA-administered

benefits. Some characterizations of service on a DD-214 (such as honorable and general under honorable conditions) allow for relatively straightforward determinations that the character of discharge was other than dishonorable; however, other types of characterizations can be somewhat complex and require in-depth examination. For example, bad conduct discharges, OTH discharges, discharges upgraded from bad conduct or OTH, and uncharacterized administrative separations may require more extensive character of discharge determinations, including a review to determine whether any of the statutory bars to benefits contained in 38 U.S.C. 5303(a) apply.

In this rulemaking, NCA clarifies that cases involving potential character of discharge bars will be referred to VBA for an administrative decision under 38 CFR 3.12 (Character of discharge) or other applicable sections. NCA makes efficient use of VBA's existing expertise and established procedures to adjudicate character of discharge and other complex eligibility issues when needed. Coordination with VBA for adjudication on such issues helps to ensure consistency in benefits determinations and minimizes confusion for claimants and beneficiaries that would likely result from VBA and NCA having differing protocols. NCA provides funding resources, equivalent to the amount necessary for two full time employees, to VBA to offset the additional workload created by case referrals. NCA proposes this rule to solidify the continuation of this effective partnership and provide public information regarding adjudication of character of discharge determinations involving potential statutory and regulatory bars to benefits.

#### Paperwork Reduction Act

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521), no new or proposed revised collections of information are associated with this proposed rule.

## Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. There are no small entities involved with the process for determining eligibility for interment or memorialization benefits. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

## 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. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866.

VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its Regulatory Impact Analysis (RIA) are available on VA's website at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published from FY 2004 Through Fiscal Year to Date."

This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 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 an 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 proposed rule would 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 in 38 CFR part 38

Administrative practice and procedure, Cemeteries, Claims, 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. Brooks D. Tucker, Assistant Secretary for Congressional and Legislative Affairs, Performing the Delegable Duties of the Chief of Staff, Department of Veterans Affairs, approved this document on December 4, 2020, for publication.

**Luvenia Potts,**

Regulation Development Coordinator,  
Office of Regulation Policy & Management,  
Office of the Secretary,  
Department of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 38 as follows:

PART 38 – NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

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

AUTHORITY: 38 U.S.C. 101, 107, 112, 501, 512, 2306, 2402, 2403, 2404, 2407, 2408, 2411, 5303, 7105.

2. Amend § 38.620 by adding a Note following paragraph (i)(4) to read as follows:

\*\*\*\*\*

**Note to § 38.620:** A benefit request pertaining to a decedent whose character of discharge may potentially bar eligibility to that benefit may be referred to the Veterans Benefits Administration for review in accordance with 38 CFR 3.12 (Character of discharge) or other applicable sections.

[FR Doc. 2020-27106 Filed: 12/17/2020 8:45 am; Publication Date: 12/18/2020]