



38 CFR Part 38

RIN 2900-AR88

Commemorative Plaques and Urns

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to revise its regulations to implement new statutory authority to furnish commemorative plaques and urns for certain veterans whose cremated remains are not interred. This proposed rule is necessary to administer the new benefits, which were authorized by the “Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020” (the Act).

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

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received:

<https://www.regulations.gov>. VA will not post on Regulations.gov public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment

received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Eric Powell, Director, Memorial Products Service, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Telephone: 202-632-8670 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Section 2306 of title 38, United States Code, authorizes VA's National Cemetery Administration (NCA) to furnish headstones, markers, medallions, and burial receptacles to eligible individuals. Section 2207 of the Act (Pub. L. 116-315) amended sec. 2306 by adding a new subsection (h), which created a new memorialization authority for NCA to furnish, upon request, an urn or commemorative plaque for a veteran whose cremated remains are not interred in a national cemetery, a State veterans' cemetery, a tribal cemetery, a county cemetery, or a private cemetery. Once the commemorative plaque or urn is furnished, VA is prohibited from interring that veteran in a VA national cemetery or providing a Government-furnished headstone or marker in any cemetery. 38 U.S.C. 2306(h)(2). VA proposes to add a new 38 CFR 38.634 to its regulations to implement the new statutory authority.

General Information About VA's Plaque and Urn Benefits

Proposed § 38.634(a) would provide general information about the commemorative plaque and urn benefits. Section 2207 of the Act refers to "urns and commemorative plaques." We note that, although sec. 2306 uses the word "commemorating" in relation to the memorial headstone or marker benefit when remains are unavailable, see 38 U.S.C. 2306(b)(1), (g)(2), (i)(2), the plain language of sec. 2306(h)(1)(B) does not limit the plaque benefit to only when remains are unavailable. Therefore, we interpret the statute as using the word "commemorative" merely to

describe the plaque as honoring the deceased veteran rather than require the unavailability of the cremated remains. Because both the urn and plaque benefit would similarly signify an individual's status as a veteran, we propose to refer to them as "commemorative plaques and commemorative urns" or "commemorative plaques and urns" in § 38.634.

Section 2306(h)(1) provides that VA will furnish a commemorative plaque or urn for an eligible veteran, upon request, "[i]n lieu of furnishing a headstone or marker" under subsection (d), and sec. 2306(h)(2) prohibits VA from providing a headstone or marker to an eligible veteran who receives a commemorative plaque or urn. Subsection (h), however, does not address medallions. We propose to clarify in § 38.634(a)(1) and (a)(3), respectively, that VA will furnish a commemorative plaque or urn for an eligible veteran, upon request, "[i]n lieu of furnishing a headstone, marker, or medallion" and that VA cannot furnish a headstone, marker, or medallion for an eligible veteran in addition to a commemorative plaque or urn.

"The Secretary shall furnish, when requested, an appropriate Government headstone or marker at the expense of the United States for the grave of an individual . . . who is buried in a private cemetery." 38 U.S.C. 2306(d)(1). "In lieu of furnishing a headstone or marker under this subsection to a deceased individual" who "is eligible for a headstone or marker furnished under [sec. 2306(d)(1)]," "the Secretary may furnish, upon request, a medallion . . . to be attached to a headstone or marker furnished at private expense." 38 U.S.C. 2306(d)(4). Given that an individual is only eligible for a medallion if the individual is "eligible for a headstone or marker furnished under [sec. 2306(d)(1)]" and an individual is only eligible for a headstone or marker under sec. 2306(d)(1) if the individual is "buried in a private cemetery," it follows that, to be eligible for a medallion, an individual must be "buried in a private cemetery." Conversely, to be eligible for a plaque or urn, an individual must be one whose remains were "cremated

and *not* interred in . . . a private cemetery.” 38 U.S.C. 2306(h)(3)(C) (emphasis added). Therefore, an individual cannot be eligible for a plaque or urn and a medallion simultaneously.

Section 2306(h)(2)(A) unequivocally states that, if VA provides a plaque or urn for an individual, VA “may not provide . . . a headstone or marker” for such individual. In other words, once VA has provided a commemorative plaque or urn for an individual, that individual is no longer “eligible for a headstone or marker,” and an individual who is not “eligible for a headstone or marker” is not eligible for a medallion. 38 U.S.C. 2306(d)(4). The reverse is also true because VA furnishes a medallion “in lieu of” a headstone or marker. In other words, once VA furnishes a medallion, VA cannot provide a headstone or marker. If VA is precluded from furnishing a headstone or marker, then the individual is prohibited from receiving it, and an individual who is not eligible to receive a headstone or marker cannot be provided with a plaque or urn.

VA notes an inconsistency in the statute, which does not change the above analysis. Section 2306(h)(3) describes an individual who is eligible for the urn or plaque benefit as an individual “who is eligible for a headstone or marker furnished under [sec. 2306(d)]” and “whose remains were cremated and not interred . . . in a private cemetery.” Section 2306(d) is VA’s supplemental headstone or marker authority for an eligible individual defined in sec. 2306(a)(2) or (5) who is interred in a private cemetery with a privately marked grave. A supplemental headstone or marker generally signifies an individual’s privately marked grave in a private cemetery as that of a veteran, which aligns with plaque and urn eligibility. For plaque and urn eligibility purposes, VA must consider the reference to sec. 2306(d) in sec. 2306(h)(3) as referring to eligible veterans defined in sec. 2306(a)(2) and (5) rather than simply considering whether an eligible veteran is interred in a private cemetery and is eligible for a Government-furnished headstone or marker under sec. 2306(d). Otherwise, sec. 2306(h)(3) would require an

individual to be both buried in a private cemetery and not to be interred in a private cemetery to be eligible for the urn or plaque. VA believes this was an inadvertent oversight and that Congress's overarching intent was to limit an eligible individual listed in 2306(a)(2) or (5) to one of the following—a headstone or marker, a medallion, or a plaque or urn—as discussed above.

VA proposes to provide in § 38.634(a)(2) definitions for a “commemorative urn” and “commemorative plaque.” For purposes of these new benefits, a “commemorative urn” would mean a container that signifies the deceased individual's status as a veteran, in which an individual's cremated remains may be placed at private expense. A “commemorative plaque” would mean a tablet that signifies the deceased individual's status as a veteran.

Consistent with sec. 2306(h)(4)(A) and as discussed further below, proposed § 38.634(a)(4) would state that any commemorative plaque or urn furnished by VA would be the personal property of the applicant for such benefit.

Section 2306(h)(4)(B) provides that the Federal Government shall not be liable for any damage that occurs after the date on which the commemorative plaque or urn is furnished. As such, we propose to clarify in § 38.634(a)(5) that VA would not replace a commemorative plaque or urn unless it was damaged during shipping or contains a manufacturing deficiency or inscription error. Limiting replacements or repairs to these circumstances ensures VA would only replace the plaque or urn for problems that occurred before VA furnished the urn or plaque.

Eligibility for a Commemorative Plaque or Urn

Proposed § 38.634(b) would implement statutory requirements for the decedent intended to be memorialized by a commemorative plaque or urn. Section 2306(h)(3) defines an eligible veteran for the plaque or urn benefit as a deceased individual who served in the Armed Forces on or after April 6, 1917, who is eligible for a headstone or

marker furnished under sec. 2306(d) (or would be so eligible but for the date of the death of the individual), and whose remains were cremated and not interred in a national cemetery, a State veterans' cemetery, a tribal cemetery, a county cemetery, or a private cemetery. Consistent with the discussion above, proposed § 38.634(b)(2) would add a clause to the eligibility criteria indicating that the deceased veteran must not have received a Government-furnished headstone, marker, or medallion. Again, we do not believe NCA would be authorized to provide a plaque or urn for an individual for whom NCA has previously provided a headstone, marker, or medallion.

VA proposes to revise its current definition of "interment" found in 38 CFR 38.600(a) to achieve the statutory intent of this new benefit. The current wording "placement... of cremated remains" may create a discrepancy as applied to the new plaque or urn benefit. We anticipate that many applicants desiring to commemorate a veteran loved one may have already "placed" the cremated remains on a shelf or in another location within their private residence, and we do not want to discourage them from applying. Therefore, we propose to clarify that "interment" includes "the placement of cremated remains in a columbarium niche." Additionally, we propose to clarify that "interment" includes entombment of cremated remains, which VA considers as a practical equivalent of burial of remains in an above-ground setting (e.g., mausoleum, columbarium). We also propose to remove the reference to "scattering of cremated remains" in the current definition of "interment" in § 38.600(a) because such language is inconsistent with the language in sec. 2306(b)(3)(D), which provides that "the remains of an individual shall be considered to be unavailable if the individual's remains . . . were cremated and the ashes scattered without interment of any portion of the ashes."

Section 2306(h)(3)(C) provides that the remains of an eligible individual must have been cremated and "not interred in a national cemetery, a State veterans' cemetery, a tribal cemetery, a county cemetery, or a private cemetery." VA proposes

that an interment in any cemetery would prevent VA from issuing a commemorative plaque or urn for that veteran. For purposes of implementing sec. 2306(h)(3)(C) in proposed § 38.634(b)(3), VA would consider interment in any Government cemetery at any level as precluding authorization for the benefit, in addition to those cemeteries explicitly listed in the statute. Without this clarification, application of this benefit would create absurd results. For example, VA would be authorized to furnish a plaque or urn for a veteran interred in a non-veteran State or non-“national” Federal cemetery (such as a State or Federal prison cemetery), or a city or village cemetery, but would be prohibited from furnishing a plaque or urn to a veteran interred in a national cemetery, a State veterans’ cemetery, or a county-owned cemetery.

For similar reasons, we would consider a “private cemetery,” as referenced in sec. 2306(h)(3)(C), to mean any private, non-Government property used for an interment. NCA’s current practice is to provide a headstone or marker to an eligible individual interred on any private property, including a backyard. This is consistent with sec. 2306(a)(2), which authorizes VA to furnish an appropriate headstone or marker to “any individual eligible for burial in a national cemetery (but not buried there)” with certain exclusions. Without the language proposed in § 38.634(b)(3), i.e., if “private cemetery” does not include any private, non-Government property used for an interment, VA would be required to furnish a commemorative plaque or commemorative urn to a veteran whose remains are interred in someone’s backyard, but we would be prohibited from furnishing a plaque or urn to a veteran whose remains are interred in a church “cemetery” with a single gravesite. NCA’s broader definition not only follows its current practice, but it aligns with an underlying intent of the statute that the plaque and urn is to be given “in lieu of” other benefits. These proposed standards eliminate possible absurd results and inconsistency with current practice and clarifies for potential

applicants and VA the extent of VA's authority to furnish a commemorative plaque or urn benefit before they apply.

Application Process

In § 38.634(c), VA proposes to define who may apply for a commemorative plaque or urn and to provide procedures for requesting them. VA proposes to utilize existing claims processes to promote consistency in application and processing.

Section 2306(h)(4)(A) provides that a commemorative plaque or urn furnished for an eligible veteran becomes the personal property of the veteran's next of kin or such other individual as the Secretary considers appropriate. Accordingly, for the reasons stated below, VA proposes to define "applicant" to mean a member of the decedent's family, which includes the decedent's spouse or individual who was in a legal union as defined in § 3.1702(b)(1)(ii) with the decedent; a child, parent, or sibling of the decedent, whether biological, adopted, or step relation; and any lineal or collateral descendant of the decedent.

VA is concerned about the finality of the decision to request these benefits which after benefit delivery would statutorily exclude the veteran from interment in a VA national cemetery and other memorialization. To minimize the potential for unintended forfeitures of benefits, family disputes and duplicate claims, we propose to require a commemorative plaque or urn applicant to be the family member who is authorized to make decisions about the disposition of the veteran's remains and is also knowledgeable about the other benefits that will be precluded before they submit a claim. On the claim form, we would require applicants to certify that the remains have been cremated as required by sec. 2306(h)(3)(C), that no portion of the cremated remains are interred, that they are the individual empowered to make decisions concerning disposition of the veteran and they are knowledgeable about the impacts of the claim on other VA benefits. We also propose to have applicants certify on the claim

form that they are in possession of the entirety of the veteran's cremated remains. These certifications are necessary to minimize the possibility of VA receiving duplicate claims for the same veteran, reduce family disputes, and lessen the potential for a family member to unintentionally forfeit entitlement to other VA benefits.

Other required claim information would include documentation of the decedent's eligibility and the applicant's contact information and mailing address.

Executive Orders 12866, 13563 and 14094

Executive Orders 12866 (Regulatory Planning and Review) directs 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 14094 (Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Orders 12866 and 13563. The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

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). The factual basis for this certification is based on the absence of small entities' involvement with the provisions of the rulemaking. 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.

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.

Paperwork Reduction Act

This proposed rule includes provisions constituting a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Proposed § 38.634 contains a collection of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collection of information as requested, VA will

immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the new collection of information contained in this rulemaking should be submitted through www.regulations.gov. Comments should indicate that they are submitted in response to “RIN 2900-AR88(P) Commemorative Plaques and Urns” and should be sent within 60 days of publication of this rulemaking. Collection of information associated with this rulemaking can be viewed at:

www.reginfo.gov/public/do/PRAMain.

OMB is required to make a decision concerning the collection of information contained in this rulemaking between 30 and 60 days after publication of this rulemaking in the *Federal Register* (FR). Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the provisions of this rulemaking.

The Department considers comments by the public on proposed collections of information in--

- Evaluating whether the new collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department’s estimate of the burden of the new collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The collection of information associated with this rulemaking contained in § 38.634 is described immediately following this paragraph.

- Title: Request for Commemorative Plaque or Urn
- OMB Control No: 2900-XXXX (New/TBD)
- CFR Provision: 38 CFR 38.634
- *Summary of collection of information*: The new collection of information in proposed § 38.634 would require information necessary to establish the identity of a deceased veteran to verify burial eligibility under 38 U.S.C. 2402 for purposes of furnishing a commemorative plaque or urn, as authorized under 38 U.S.C. 2306(h). It would also require information regarding the applicant's relationship to the deceased veteran, the applicant's certification as to certain factual matters, and the applicant's contact information.
- *Description of need for information and proposed use of information*: The information would be used by VA to verify an individual's service in the Armed Forces on or after April 6, 1917; eligibility for a headstone, marker, or medallion that VA has not yet furnished under sec. 2306(d); and that the individual's remains were cremated and not interred. Information regarding the applicant's relationship to the deceased veteran would be used to verify that the applicant is a family member empowered to make decisions regarding memorialization of the veteran and disposition of any remains.
- *Description of likely respondents*: Veterans' family members.
- *Estimated number of respondents per year*: 1,684.
- *Estimated frequency of responses per year*: This is a one-time collection
- *Estimated average burden per response*: 10 minutes.

- *Estimated total annual reporting and recordkeeping burden:* VA estimates the total annual reporting and recordkeeping burden to be 280.6667 hours (1,684 respondents × 10 minutes / 60 minutes).
- *Estimated cost to respondents per year:* VA estimates the annual cost to respondents to be \$8352.64. Using VA's average annual number of 1,684 respondents, VA estimates the total information collection burden cost to be \$8352.64 per year (280.6667 burden hours (1,684 respondents × 10 minutes / 60 minutes) × \$29.76 mean hourly wage).

* To estimate the respondents' total information collection burden cost, VA uses the Bureau of Labor Statistics (BLS) mean hourly wage for "All Occupations" of \$29.76. This information is available at https://www.bls.gov/oes/2022/may/oes_nat.htm#00-0000.

List of Subjects in 38 CFR part 38

Administrative practice and procedure, Cemeteries, Claims, Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on November 13, 2023, 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.

Luvenia Potts,

Regulation Development Coordinator

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR part 38 is proposed to be amended 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, 531, 2306, 2400, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

2. Amend § 38.600 by revising the definition of *Interment* to read as follows:

§ 38.600 Definitions.

(a) * * *

* * * * *

Interment means the burial or entombment of casketed or cremated remains, including the placement of cremated remains in a columbarium niche.

* * * * *

3. Add § 38.634 to read as follows:

§ 38.634 Commemorative urns and plaques.

(a) *General.* (1) In lieu of furnishing a headstone, marker, or medallion under this part, the Department of Veterans Affairs (VA) will furnish, when requested--

(i) A commemorative urn; or

(ii) A commemorative plaque.

(2) *Definitions.* For the purposes of this section:

(i) *Commemorative urn* means a container that signifies the deceased individual's status as a veteran, in which the individual's cremated remains may be placed at private expense.

(ii) *Commemorative plaque* means a tablet that signifies the deceased individual's status as a veteran.

(3) If VA furnishes a commemorative plaque or a commemorative urn for an individual under this section, VA may not provide for such individual—

(i) A headstone, marker, or medallion; or

(ii) Any burial benefit under 38 U.S.C. 2402.

(4) Any commemorative plaque or commemorative urn furnished under this section shall be the personal property of the applicant.

(5) The Federal Government shall not be liable for any damage to a commemorative plaque or urn furnished under this section that occurs after the date on which the commemorative plaque or urn is furnished. VA will not replace a commemorative plaque or urn unless it was damaged during shipping or contains a manufacturing deficiency or inscription error.

(b) *Eligible individuals to be commemorated.* An eligible individual for purposes of this section is a deceased individual:

(1) Who served in the Armed Forces on or after April 6, 1917;

(2) Who is eligible for, but has not received, a headstone, marker, or medallion under 38 U.S.C. 2306(d) (or would be so eligible but for the date of the death of the individual); and

(3) Whose remains were cremated and not interred (see § 38.600 for definition of interment).

(c) *Application process—(1) Applicant.* An applicant for a commemorative plaque or urn must be a member of the veteran's family, which includes the veteran's spouse or individual who was in a legal union as defined in § 3.1702(b)(1)(ii) of this chapter with the veteran; a child, parent, or sibling of the veteran, whether biological, adopted, or step relation; and any lineal or collateral descendant of the veteran.

(2) *Application.* An applicant must submit a completed VA Form 40-1330UP, Claim for Commemorative Urn or Commemorative Plaque for Veteran's Cremains Not

Interred in a Cemetery. The National Cemetery Administration will verify the decedent's eligibility for a commemorative plaque or urn. Applicants must certify that they have read a statement about other benefits to which the veteran will lose benefit rights, that the decedent's remains were cremated and are not interred at the time of application, that the applicant is a member of the decedent's family authorized to make decisions about the disposition of the decedent's remains, and that the applicant is in possession of the entirety of the cremains. Other required claim information will include documentation of the decedent's eligibility and the applicant's contact information and mailing address. VA's duty to notify claimants of necessary information or evidence under § 3.159(b) of this chapter and duty to assist claimants in obtaining evidence under § 3.159(c) of this chapter will apply.

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