



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Parts 38 and 39

RIN 2900-AQ28

Government-Furnished Headstones, Markers, and Medallions; Unmarked Graves

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations related to the provision of government-furnished headstones, markers, and medallions. These proposed revisions would clarify eligibility for headstones, markers, or medallions, would establish replacement criteria for such headstones, markers, and medallions consistent with VA policy, would define the term “unmarked grave” consistent with VA policy, and would generally reorganize and simplify current regulatory language for ease of understanding.

DATES: Written comments must be received 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; by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AQ28 - Government-Furnished Headstones, Markers, and Medallions;

Unmarked Graves.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Kimberly Wright, Director, Office of Field Programs, National Cemetery Administration (NCA), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Telephone: (202) 461-6748 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: In accordance with 38 U.S.C. 2306(a), VA must “furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the unmarked graves of” eligible individuals as further listed in sec. 2306(a)(1)-(5). The regulations governing the provision of Government headstones and markers are found in 38 CFR part 38, specifically 38 CFR 38.600 and §§ 38.630 through 38.632. We propose to revise these regulations to conform to statutory amendments made by Pub. L. 114-315, 130 Stat. 1536 (2016); Pub. L. 115-136, 132 Stat. 343 (2018); and Pub. L. 115-141, 132 Stat. 348 (2018). Additional proposed changes would clarify eligibility for burial and memorial headstones and markers, as well as medallions; would reorganize and simplify current regulatory language; and would define the term “unmarked grave” in a manner consistent with

current VA policy. Because this rulemaking would reorganize a large portion of current §§ 38.630 through 38.632, we offer the following chart to indicate where applicable provisions in the current regulations would be located (with revision in some cases) in the proposed new regulatory framework:

Current regulation	Location of applicable provisions in proposed regulation
§ 38.600(a)(1)	§ 38.630(c)(1)
§ 38.600(a)(2)	§ 38.631(c)(1)
§ 38.600(b)	§ 38.600(a)(1)-(9)
§ 38.630(a) and (b)	§§ 38.630(b)(2) and 38.631(b)(2)
§ 38.630(c)	§ 38.631(a) and (b)(2)(i)-(ii)
§ 38.630(c)(1)	§ 38.631(a)
§ 38.630(c)(1)(i)-(iii)	§ 38.631(a)(1)(i)-(iii)
§ 38.630(c)(2)	§ 38.631(c)(2)
§ 38.630(c)(3)(i)-(ii)	§ 38.631(a)(1)(i)-(ii)
§ 38.631(a)	§ 38.630(a)(2)(i) and (b)(1)(iii)(A)-(B)
§ 38.631(b)(1)	§ 38.630(a)(2)(ii)(A)
§ 38.631(b)(2)	§ 38.630(a)(2)(i)
§ 38.631(b)(3)	§ 38.630(a)(2)(i)(A)-(F)
§ 38.631(c) and (d)	§§ 38.630(b)(4)(i) and 38.631(b)(4)
§ 38.631(e)	§ 38.630(b)(1)(iii)(C)
§ 38.631(f)	§ 38.630(b)(2)(ii)
§ 38.632(a)	§§ 38.630(b)(1), 38.631(b)(1), and 38.632(a)
§ 38.632(b)	§ 38.632(b)
§ 38.632(c)	§§ 38.630(b)(1) and 38.631(b)(1)
§ 38.632(d)	§ 38.632(c)
§ 38.632(e)	§ 38.632(d)
§ 38.632(f)	§ 38.632(e)
§ 38.632(g)	§ 38.632(f)
§ 38.632(h)	§ 38.632(g)

§ 38.600 Definitions.

Current § 38.600 defines terms that apply throughout 38 CFR part 38, related to the provision of headstones, markers, and medallions as well as the provision of other burial or memorialization benefits. We would remove definitions of the term “applicant”

from current § 38.600(a)(1) and (2) and relocate them to proposed §§ 38.630(c)(1) and 38.631(c)(1), respectively. The definition of “applicant” in current § 38.600(a)(1) relates to burial headstones and markers, and its relocation to proposed § 38.630(c)(1) would be consistent with the proposed reorganization and revision of § 38.630 to address burial headstones and markers as explained later in this rulemaking. The definition of “applicant” in current § 38.600(a)(2) relates to memorial headstones and markers, and its relocation to proposed § 38.631(c)(1) would be consistent with the proposed reorganization and revision of § 38.631 to address memorial headstones and markers as explained later in this rulemaking.

With the proposed removal and relocation of the definitions of “applicant” in current § 38.600(a)(1) and (2), proposed § 38.600(a) would state that the definitions in proposed § 38.600 apply to 38 CFR part 38. The definitions in current § 38.600(b) would then be numbered in proposed § 38.600(a)(1)-(9) without any proposed revisions, and we would revise § 38.600(b) to clarify that other terms not defined in proposed § 38.600(a)(1)-(9) may be defined in and be applicable to other sections of 38 CFR part 38, as this is presently the case (*see, e.g.*, definitions of “outer burial receptacle” in § 38.629(a) and “emblem of belief” in § 38.632(b)(2)). The authority citation for § 38.600 would also be revised.

§ 38.620 Persons eligible for burial.

Section 2402 of title 38, U.S.C., establishes eligibility for burial in national cemeteries. Section 251 of Pub. L. 115-141, Div. J, enacted on March 23, 2018, amended 38 U.S.C. 2402(a) to establish such eligibility for individuals, or spouses of

individuals, naturalized pursuant to sec. 2(1) of the Hmong Veterans' Naturalization Act of 2000 (Pub. L. 106-207, 114 Stat. 316 (2000)) (i.e., certain refugees from Laos who served with a special guerilla unit, or irregular forces, operating from a base in Laos in support of the U.S. military from February 28, 1961, to September 18, 1978) and were residing in the United States at the time of the individual's death. Section 251 of Pub. L. 115-141 further limits this eligibility to those individuals whose deaths occurred on or after the date of the law's enactment on March 23, 2018. We propose to add a new paragraph (j) to current § 38.620 to reflect this expanded eligibility for interment in a national cemetery, consistent with 38 U.S.C. 2402(a)(10).

§ 38.630 Burial headstones and markers; medallions.

VA provides burial headstones and markers (headstones or markers provided for placement at the graves of eligible individuals) in accordance with applicable authority under 38 U.S.C. 2306(a). We propose to unite all pertinent information regarding such headstones or markers into proposed § 38.630, with the new title “Burial headstones and markers; medallions.”

New proposed § 38.630(a)(1) would articulate eligibility for burial headstones and markers for the unmarked graves of certain eligible individuals as provided under 38 U.S.C. 2306(a), and proposed § 38.630(a)(1)(i)-(iv) would list those eligible individuals in accordance with sec. 2306(a)(1)-(5).

Proposed § 38.630(a)(1)(i) would restate from sec. 2306(a)(1) the eligibility for a burial headstone or marker for an individual buried in a national cemetery or in a post cemetery, and would make a non-substantive clarification that a post cemetery is a

“military” post cemetery. Proposed paragraph (a)(1)(i) would additionally provide that when more than one individual is buried in a single gravesite in a national cemetery, VA will, if feasible, include inscription information for all such individuals on a single headstone or marker, rather than furnishing a separate headstone or marker for each buried individual. This additional language related to multiple interments would primarily account for VA’s practice (since assuming jurisdiction over most national cemeteries in 1973) to inter more than one eligible individual in a single gravesite, such as when a veteran is buried in the same gravesite as a spouse or dependent child. The use of a single headstone or marker to identify multiple interred individuals in a single gravesite is an administrative necessity for national cemeteries.

Proposed § 38.630(a)(1)(ii) would establish, consistent with sec. 2306(a)(2), the eligibility for a burial headstone or marker for certain individuals who are eligible for burial in a national cemetery, but who are buried elsewhere (e.g., are buried in a state, tribal, private, or local government cemetery). There are certain individuals that meet this criterion, but are nevertheless excluded by sec. 2306(a)(2): namely, persons or classes of persons enumerated in sec. 2402(a)(4), (5), and (6). Therefore, proposed § 38.630(a)(1)(ii)(A)-(F) would establish eligibility for a headstone or marker outside of a national cemetery in accordance with sec. 2306(a)(2), by only including the persons or classes of persons enumerated in sec. 2402(a)(1), (2), (3), (7), (8), and (10). (We note that eligibility for burial under sec. 2402(a)(9) is necessarily in a national cemetery, and therefore is not included in proposed § 38.630(a)(1)(ii).) Proposed § 38.630(a)(1)(ii)(A)-(F) would additionally reference relevant VA regulations related to eligibility for burial in a national cemetery in current § 38.620, as well as in proposed § 38.620(j). Finally,

proposed § 38.630(a)(1)(ii) would clarify that the unmarked graves for such burial headstones and markers may be located in any type of non-national cemetery (e.g., state, tribal, private, or local government cemetery), as there is no limiting language regarding location of graves for those individuals who are eligible under sec. 2306(a)(2).

Proposed § 38.630(a)(1)(iii) would restate from sec. 2306(a)(3) the eligibility for a burial headstone or marker for soldiers of the Union and Confederate Armies of the Civil War, and would additionally state that the unmarked graves for such headstones or markers may be located in any type of non-national cemetery (e.g., state, tribal, private, or local government cemetery), as there is no limiting language regarding location of graves for individuals who are eligible under sec. 2306(a)(3).

Proposed § 38.630(a)(1)(iv) would restate from sec. 2306(a)(4) the eligibility for a burial headstone or marker for certain spouses and dependents not buried in a national cemetery, but only to be placed in cemeteries owned by a State, as sec. 2304(a)(4) does have this specific limiting language regarding location of the unmarked graves. We note that these same spouses and dependents are eligible for burial in a national cemetery, and therefore such unmarked graves in a national cemetery may also receive upon request a headstone or marker under sec. 2306(a)(1) and proposed § 38.630(a)(1)(i).

Proposed § 38.630(a)(2) would address the provision of burial headstones, markers, or medallions for the graves of certain individuals, notwithstanding that such graves may already be marked by a headstone or marker furnished at private expense, in accordance with 38 U.S.C. 2306(d). Proposed § 38.630(a)(2) would move and revise information that is located in current § 38.631 related to the provision of headstones and

markers for marked graves located in private cemeteries. By moving language from current and standalone § 38.631, to proposed § 38.630(a)(2), we would clarify that headstones and markers provided for the marked graves of certain individuals are a type of burial headstone and marker and, by using the header “marked graves” for proposed § 38.630(a)(2), would distinguish it from the burial headstones and markers provided for “unmarked graves” in proposed § 38.630(a)(1). Proposed § 38.630(a)(2)(i)(A)-(F) would expressly list those individuals eligible for a headstone or marker for marked graves in accordance with 38 U.S.C. 2306(d).

We note that VA interprets the term “private cemetery,” in the context of headstones and markers provided for marked graves under sec. 2306(d), to mean any non-national cemetery in which a privately purchased marker has been placed. We reviewed the legislative history of sec. 2306(d) and we do not believe that Congress intended to limit the sec. 2306(d) benefit to only those cemeteries that are strictly privately owned. Moreover, the applicability date in proposed § 38.630(a)(2)(ii) (i.e., date of death on or after November 1, 1990) accords with the date prescribed by Congress in sec. 8041 of Pub. L. 101-508, 104 Stat. 1388 (1990), when it eliminated the option for families to request and receive a monetary allowance to purchase their own headstone or marker, in lieu of requesting and receiving a Government-furnished headstone or marker. This option to receive a monetary allowance in lieu of a Government-furnished headstone or marker had formerly been available from 1978-1990 (see sec. 203, Pub. L. 95-476, 92 Stat. 1497 (1978)). From November 1, 1990, through December 27, 2001, VA was not authorized to provide a Government-furnished headstone or marker for an already marked grave in a private cemetery. Section 502 of

Pub. L. 107-103, 115 Stat. 976 (2001), first authorized VA to provide Government-furnished headstones or markers for graves that were already marked with privately purchased headstones or markers, for Veterans who died on or after the date Pub. L. 107-103 was effective, which was December 27, 2001. VA colloquially refers to these Government-furnished headstones and markers for already marked graves as “second markers.” Section 203 of Pub. L. 107-330, 116 Stat. 2820 (2002), changed the applicability date for Government-furnished second markers for veterans who died on or after September 11, 2001, and sec. 203 of Pub. L. 110-157, 121 Stat. 1831 (2007), further changed the applicability date to include veterans who died on or after November 1, 1990. In changing the applicability date for the second marker to November 1, 1990, Congress intended to make the sec. 2306(d) authority “retroactive to cover the 11-year gap” so that veterans who died in the time period from November 1, 1990, to September 11, 2001, (who previously were only able to receive Government-furnished headstones or markers if their graves were unmarked) would receive the same benefits as veterans who died on or after September 11, 2001 (see 153 Cong. Rec. S13736 (daily ed. Nov. 2, 2007) (statement by Sen. Akaka). By making the general applicability date for the second marker authority in sec. 2306(d) retroactive to November 1, 1990, Congress intended to provide parity between groups of veterans. We do not believe that Congress intended to limit this spirit of parity by only authorizing the second marker for strictly privately owned cemeteries, versus any non-national cemetery where privately purchased markers may be placed. VA has been administering the second marker benefit in sec. 2306(d) under this broader interpretation and does not intend to apply a more restrictive interpretation in this

proposed rule. Proposed § 38.630(a)(2)(i) would therefore clarify that burial headstones and markers for marked graves may be provided for certain eligible individuals in non-national cemeteries and would parenthetically include examples of such cemeteries (e.g., state, tribal, private, or local government cemetery).

Proposed § 38.630(a)(2)(ii)(A) would restate from current § 38.631(b)(1) the eligibility criterion that the eligible individual's date of death must have been on or after November 1, 1990. Proposed § 38.630(a)(2)(ii)(B) would establish additional eligibility criteria for a Medal of Honor recipient. Proposed paragraph (a)(2)(iii) would establish eligibility for a medallion, in lieu of a headstone or marker, for a marked grave. These latter two provisions are consistent with Pub. L. 114-315, sec. 301. See *also* 38 U.S.C. 2306(d)(4) and (5). We note that VA has been providing these memorial benefits as applicable under Pub. L. 114-315 since its enactment and that proposed § 38.630(a)(2)(ii)(B) and (iii) would merely conform VA regulation to VA authority and practice.

Proposed § 38.630(b) would create a “general” paragraph to move, combine, or newly establish regulatory language related to administrative aspects of VA's provision of burial headstones and markers, to include the ordering or application process, styles and types, and criteria for replacement. Proposed § 38.630(b)(1)(i) and (ii) would move and revise language that is currently located in § 38.632(c) related to the ordering and application process for Government-furnished headstones and markers, as 38 U.S.C. 2306(a) (burial headstones and markers for unmarked graves) and sec. 2306(d) (burial headstones and markers for marked graves) both provide that such headstones and markers are only furnished “when requested.” Proposed § 38.630(b)(1)(i) would

relocate the process in current § 38.632(c)(1) related to ordering headstones and markers, as part of the burial or memorialization arrangements, to be placed in those cemeteries that use NCA's electronic ordering system. Proposed § 38.630(b)(1) would make non-substantive language changes from current § 38.632(c)(1) to improve readability, and would parenthetically note for clarity those types of cemeteries other than national cemeteries that are known to use NCA's electronic ordering system (e.g., a State veterans cemetery or military post cemetery). Proposed § 38.630(b)(1)(ii) would relocate the process in current § 38.632(c)(2) related to individuals applying for headstones and markers to be placed in those cemeteries that do not use NCA's electronic ordering system. Proposed § 38.630(b)(1)(ii)(A) would restate the requirement from current § 38.632(c)(2) that applicants must complete and submit VA Form 40-1330, Claim for Standard Government Headstone or Marker, to order a headstone or marker for placement in a cemetery that does not use NCA's electronic ordering system.

Proposed § 38.630(b)(1)(ii)(B) would newly state in regulation the requirement to complete and submit VA Form 40-1330M, Claim for Government Medallion for Placement in a Private Cemetery, for an applicant to order a medallion to be affixed to a privately purchased headstone or marker, in accordance with VA's authority under 38 U.S.C. 2306(d)(4) to furnish, upon request, a medallion to signify the deceased individual's status as a veteran. Because a medallion must also be requested under sec. 2306(d)(4) (as with a second marker), the same application process applies for a medallion as for a second marker, albeit a different form (VA Form 40-1330M) is used to apply for a medallion.

Proposed § 38.630(b)(1)(iii) would relocate and simplify language in current § 38.632(c)(2) regarding where to locate and how to complete VA Form 40-1330, and would newly provide the same information for VA Form 40-1330M.

Proposed § 38.630(b)(1)(iii)(A) would newly establish in regulation the VA practice that a Government-furnished headstone and marker that is requested for an unmarked grave is only to be provided for placement on or at that grave. This is a reasonable current practice, as 38 U.S.C. 2306(a) provides that a headstone or marker shall be furnished upon request “for the unmarked graves of” eligible individuals, which indicates Congressional intent that such headstones or markers be furnished for placement on or at such graves (versus, for instance, statutory language that would provide the headstone or marker “for” the eligible individuals themselves). We believe this current practice is well known to the public, as VA Form 40-1330 currently states, under the submission instructions, that “[h]eadstones and markers furnished remain the property of the United States Government and may not be used for any purpose other than to be placed at an eligible individual's grave or in a memorial section within a cemetery.” Proposed § 38.630(b)(1)(iii)(A) would conform regulations to this known practice, by requiring an applicant for a burial headstone or marker provided for an unmarked grave to certify on VA Form 40-1330 that such headstone or marker will be placed on or at the grave for which it is requested.

Proposed § 38.630(b)(1)(iii)(B) would move and revise language from current § 38.631(a), which requires that individuals requesting a burial headstone or marker for a marked grave in a private cemetery must certify on VA Form 40-1330 that it will be placed on the grave for which it is requested or, if placement on the grave is impossible

or impracticable, as close to the grave as possible within the grounds of the private cemetery where the grave is located. We note that current § 38.631(a) is essentially a restatement of the statutory certification requirement in 38 U.S.C. 2306(d)(1).

Both proposed paragraphs (b)(1)(iii)(A) and (B) would further require these certifications when placement would occur in a local government cemetery (the definition of “local government” is discussed later in this rulemaking) as well as private cemeteries. Additionally, applying these certification requirements to local government cemeteries is reasonable, because VA does not know with certainty whether or how such cemeteries’ administrative procedures might dictate the placement of burial headstones or markers. For instance, these certification requirements for placement of burial headstones and markers need not apply to national cemeteries, because national cemeteries must mark every grave in accordance with 38 U.S.C. 2404(c). Similarly, VA knows from experience that State and tribal cemeteries (particularly those that are established and improved through VA State cemetery grants) do not accept Government-furnished burial headstones and markers for purposes other than to place on or at a grave. Therefore, the applicant’s certifications regarding placement of the burial headstone or marker in proposed paragraph (b)(1)(iii)(A) and (B) would apply to private and local government cemeteries only. Proposed paragraphs (b)(1)(iii)(A) and (B) would require revisions to VA Form 40-1330, which is explained in the section of this rulemaking related to the Paperwork Reduction Act.

Proposed § 38.630(b)(1)(iii)(C) would move and revise language from current § 38.631(e), which requires that applicants requesting a burial headstone or marker for a marked grave in a private cemetery must obtain certification on VA Form 40-1330,

from a cemetery representative, that the type and placement of the headstone or marker requested adheres to the policies and guidelines of the selected private cemetery. This is not a statutory requirement, but an administrative requirement in current VA regulation to ensure that VA does not provide a headstone or marker that is of a type or style that a private cemetery would not accept (for instance, if a private cemetery only accepts flat markers, VA would not approve an application for an upright marble headstone to be placed in such a cemetery). Proposed paragraph (b)(1)(iii)(C) would essentially restate current § 38.631(e), except that the proposed language would apply to burial markers for unmarked graves as well as marked graves. We do not see a logical reason to apply this requirement to marked graves (as is the case in current § 38.631(e)) but not unmarked graves, and we believe the public is aware that this requirement applies to unmarked graves because there is a requirement on current VA Form 40-1330 for a cemetery representative to certify that the Government-furnished headstone or marker is the correct type for the designated cemetery, without distinguishing between marked versus unmarked graves. Proposed paragraph (b)(1)(iii)(C) would also require revisions to VA Form 40-1330, which is explained in the section of this rulemaking related to the Paperwork Reduction Act.

Proposed § 38.630(b)(2) would establish a paragraph related to the styles and types of Government-furnished headstones and markers, as well as their inscriptions, and would move and revise language from current § 38.630(a) and (b). Current § 38.630(a) and (b) are somewhat duplicative and confusing regarding the scope of current VA policies concerning headstone and marker styles, types, and inscriptions, and confusing regarding which VA official is responsible for establishing that policy. For

instance, current § 38.630(a) relates to the Secretary of Veterans Affairs establishing policy for headstone and marker materials as well as inscriptions, whereas current § 38.630(b) relates to the Under Secretary for Memorial Affairs establishing policy only for inscriptions and further seems to apply VA's inscription policies to private monuments. To reduce this duplication and confusion, proposed § 38.630(b)(2) would state that the styles and types of headstones and markers, as well as the inscriptions thereon to include an emblem of belief, will be provided in accordance with VA policy as well as in a manner consistent with 38 U.S.C. 2306(c) and 2404(c). We note that NCA has established policy related to the styles, types, and inscriptions available for Government-furnished headstones and markers, to include emblems of belief (examples of styles, types, inscriptions, and available emblems of belief can be found on VA Forms 40-1330 and 40-1330M). Proposed § 38.630(b)(2) would further newly reference applicable VA statutes related to allowable materials for Government headstones and markers under 38 U.S.C. 2306(c), and related to certain inscription and style criteria for headstones and markers in national cemeteries under 38 U.S.C. 2404(c). These statutory criteria would not be newly implemented, but merely newly referenced in regulation.

Proposed § 38.630(b)(2)(i) would newly establish in regulation that the styles and types of burial headstones and markers, as well as the inscriptions thereon, may be limited in accordance with certain requirements including aesthetic and administrative requirements of the cemetery in which the headstone or marker will be placed. This provision is new in regulation but is not a new criterion or restriction concerning VA's provision of headstones and markers, as the style of headstone and marker is presently

determined by a veteran's era of service (e.g., Civil War era versus current era), and the types of headstones and markers can be further determined by size, space, or other restrictions of a cemetery prior to installation (such as when a flat bronze marker must be placed instead of an upright marble headstone).

Proposed § 38.630(b)(2)(ii) would move and revise language from current § 38.631(f), to implement the requirement in 38 U.S.C. 2306(d)(3) that headstones and markers provided for marked graves in private cemeteries (for certain eligible individuals under sec. 2306(d)) be among those that VA makes available for selection generally. We interpret sec. 2306(d)(3) to require VA to make available the same types of headstones and markers for both unmarked and marked graves under sec. 2306(a) and 2306(d), respectively, and proposed § 38.630(b)(2)(ii) would clarify this interpretation.

Proposed § 38.630(b)(2)(iii) would establish in regulation the current VA practice of providing a headstone or marker that indicates a deceased's status as a Medal of Honor recipient as applicable. Proposed § 38.630(b)(2)(iii) would expressly apply to headstones and markers for both unmarked graves and marked graves. We interpret 38 U.S.C. 2306(d)(5)(A), which requires VA to provide, upon request, a headstone or marker for a marked grave (for certain eligible individuals) that signifies the deceased's status as a Medal of Honor recipient, applies similarly to unmarked graves. Proposed § 38.630(b)(2)(iii) would clarify this interpretation.

Proposed § 38.630(b)(2)(iv) would restate the portion of current § 38.632(c)(2) related to requirements for requesting an emblem of belief that is not offered in VA's inventory of images for emblems of belief (a "new" emblem of belief) to be inscribed on a headstone or marker, and would cross reference current § 38.632 that describes the

process for requesting a new emblem of belief. VA's current inventory of images for emblems of belief can be found on VA Form 40-1330.

Proposed § 38.630(b)(3) would newly establish in regulation the criteria that exist in current VA policy, more specifically NCA Notice 2004-06 (Dec. 21, 2004), regarding replacement of Government-furnished headstones, markers, and medallions because they warrant replacement. Although the governing statutes do not clearly provide that VA's authority to furnish headstones, markers, or medallions includes authority to furnish replacements as needed, the function of these benefits is to memorialize veterans and other eligible individuals in perpetuity, and therefore we believe it is reasonable and necessary to interpret a general replacement authority. To ensure that these benefits continue to fulfill their intended function of marking a veteran's grave, VA interprets that it may replace Government-furnished headstones, markers, or medallions if they cease to be serviceable (i.e., they no longer reasonably function to identify the decedent), or for other administrative reasons related to ensuring that the correct style and type of headstone or marker has been provided or related to changing or adding inscription information if required.

Proposed § 38.630(b)(3)(i) would establish that replacements would occur upon request, as for any headstone, marker, or medallion that may be provided under 38 U.S.C. 2306, if one of the specified bases for replacement is satisfied. Proposed paragraphs (b)(3)(i)(A)-(E) would state the primary reasons currently found in NCA Notice 2004-06 that VA considers a Government-furnished headstone or marker to warrant replacement. Proposed paragraphs (b)(3)(i)(A)-(C) are self-explanatory as listed and relate to the serviceability of a headstone or marker, where VA would replace

a Government-furnished headstone or marker if: it is damaged beyond repair; it has deteriorated to the extent it no longer serves to identify the buried decedent (e.g., identifying elements of an inscription are not legible, such as a decedent's name or a grave number for an unknown decedent), or, in the case of a medallion, no longer serves to identify the buried decedent as a veteran or as a Medal of Honor recipient if applicable; or it has been stolen or vandalized.

Proposed paragraph (b)(3)(i)(D) relates to ensuring the correct headstone or marker style or type is provided, where VA would provide a replacement if the incorrect style or type for the veteran's era of service was initially provided.

Proposed paragraph (b)(3)(i)(E) relates to ensuring that the Government-furnished headstone or marker conveys accurate and requested inscription information, where VA would provide a replacement to correct or add inscription information for the reasons in proposed paragraphs (b)(3)(i)(E)(1)-(5), all of which are current VA practice unless otherwise noted below. We note that these reasons apply to inscription information for headstones and markers but not necessarily medallions, as medallions are only inscribed with the word "Veteran" in accordance with the purpose of a medallion to identify the deceased's status as a veteran under 38 U.S.C. 2306(d)(4)(A). Therefore, we will only refer to headstones and markers in explaining the proposed replacement reasons related to adding or correcting inscription information.

Proposed paragraph (b)(3)(i)(E)(1) would provide for a replacement headstone or marker to correct errors in factual information that was provided to VA as part of the initial application process. The most common types of factual errors for which VA receives replacement requests relate to a decedent's name or dates of birth or death,

so proposed paragraph (b)(3)(i)(E)(1) would include a non-exhaustive parenthetical example to that effect.

We note that proposed paragraph (b)(3)(i)(E)(1) is written to capture factual errors in information provided to VA, meaning VA was a party to the initial provision of the Government-furnished headstone or marker. Because VA took control of Government-furnished headstones or markers when it assumed jurisdiction over a majority of national cemeteries in 1973 (see Pub. L. 93-43, sec. 2, 87 Stat. 75 (1973)), proposed paragraph (b)(3)(i)(E)(1) would not apply to those Government-furnished headstones or markers provided prior to 1973. VA is currently examining how to best address possible replacement of Government-furnished headstones or markers that were provided prior to 1973, when the reason for replacement is the assertion of a factual inscription error. Present NCA Notice 2015-01 (July 23, 2015) provides some guidance for replacement of older Government-furnished headstones or markers (those 50 years or older as of the date of the replacement request) due to assertions of factual inscription errors, where NCA examines primary source documentation from the requestor, as well as other available information, to determine whether it is more likely than not that the existing inscription has factual errors (and if so, to provide a replacement). However, a 50-year time frame to apply this “more likely than not” standard does not fully coincide with when VA took control of the headstone and marker program. Further, NCA has received requests to replace historic headstones and markers (primarily from the Civil War era) based on a desire to correct inscriptions (or inscription practices) from the 19th century or add new information found through modern research, where such corrections or additions might make an inscription more

accurate but would not necessarily correct critical inaccuracies related to identifying the buried individual. With Government-furnished headstones or markers provided prior to 1973, particularly those that are approaching or are older than 100 years, VA must weigh requests to correct inscriptions for factual errors against considerations that such inscriptions were based on information that was then available, and that such headstones and markers may be part of a larger, collective historic landscape. VA therefore invites comments on this proposed rule on whether or how VA should establish distinct replacement criteria to correct factual errors for Government-furnished headstones and markers provided prior to 1973.

Proposed paragraph (b)(3)(i)(E)(2) would provide for a replacement headstone or marker to indicate information related to the deceased's military service that is provided to VA after the initial application. Changes to an inscription for this reason are most often requested when additional information becomes available regarding the deceased's posthumous receipt of a military award, so proposed paragraph (b)(3)(i)(E)(2) would include a non-exhaustive parenthetical example to that effect.

Proposed paragraph (b)(3)(i)(E)(3) would provide for a replacement headstone or marker to identify on a single headstone or marker multiple decedents who are each eligible for a Government-furnished headstone or marker and are buried in the same gravesite in a cemetery. Proposed paragraph (b)(3)(i)(E)(3) would primarily account for VA's longstanding practice (since assuming jurisdiction over most national cemeteries in 1973) to inter more than one eligible individual in a single gravesite, such as when a veteran is buried in the same gravesite as a spouse or dependent child. Replacement of a headstone or marker to identify multiple interments in a gravesite is an

administrative necessity for national cemeteries. Proposed paragraph (b)(3)(i)(E)(3) would not be limited to only national cemeteries, however, to ensure parity if this same practice of multiple interments might occur in non-national cemeteries. Proposed paragraph (b)(3)(i)(E)(3) would specifically indicate that this type of replacement may occur only if the multiple decedents are each eligible for a Government-furnished headstone or marker, to ensure it is clear that we would not be expanding eligibility for headstones and markers for non-national cemeteries in a manner that is not consistent with 38 U.S.C. 2306. Proposed paragraph (b)(3)(i)(E)(3) would include replacing a Government-furnished burial headstone and marker to add a memorial inscription for that individual's surviving spouse or eligible dependent child, rather than furnishing a separate burial headstone or marker for that individual's surviving spouse or eligible dependent child, in accordance with sec. 2306(g)(1).

Proposed paragraph (b)(3)(i)(E)(4) would provide for a replacement headstone or marker to indicate the deceased's status as a Medal of Honor recipient if applicable, for a headstone or marker provided for a marked grave in accordance with 38 U.S.C. 2306(d)(5)(B). This is a relatively new authority that was added to sec. 2306 by sec. 301 of Pub. L. 114-315, and would be included in this proposed rule to implement a specific replacement reason under statute.

Proposed paragraph (b)(3)(i)(E)(5) would allow the decedent's next of kin as indicated in NCA's records systems to request that VA replace a headstone or marker to add or correct inscription information for any reason not listed in proposed paragraphs (b)(3)(i)(E)(1)-(4), if the request is received by VA within six months after the initial headstone or marker was provided. We would establish this broad authority for

replacement, with a time-limited duration to make the request, primarily because family members may not visit a gravesite for an extended period of time after a burial or after a headstone or marker is installed (most often due to travel difficulties or grief-related reasons). In such cases, we want to ensure that family members get the memorialization benefit that they consider satisfactory to memorialize the decedent, within the bounds of what VA provides generally for all those eligible for the headstone or marker benefit. In general, VA has received requests from family members to add or change inscription information that does not affect the factual accuracy of a headstone or marker (such as adding a decedent's middle initial, or adding terms of endearment, to the inscription). Although VA would want to provide a headstone or marker that a decedent's family ultimately finds satisfactory, we must balance the family's interest in that regard with VA's interest of not unnecessarily replacing a Government-furnished headstone or marker that is serviceable to reasonably identify the decedent. Therefore, we would impose a time limit of six months in which replacement could be requested under this proposed provision. In addition, proposed paragraph (b)(3)(i)(E)(5) would require that such a replacement request must come from the deceased's next of kin as indicated in NCA's records systems, to prevent multiple and possibly contradictory family requests for inscription changes. Proposed paragraph (b)(3)(i)(E)(5) would implement in regulation a replacement reason similar to that contained in current NCA policy, although NCA Directive 2004-06 does not impose the six-month limitation or the next of kin of record requirement. We interpret these additional criteria in proposed paragraph (b)(3)(i)(E)(5) to be reasonable and necessary to assist VA in properly managing the headstone and marker benefit.

In keeping with current NCA policy, proposed § 38.630(b)(3)(ii) would state that replacement headstones and markers to be provided will be of the same style and type, to include inscription information, as those being replaced—NCA refers to this practice as “in-kind” replacement. Proposed § 38.630(b)(3)(ii) would provide for exceptions to this “in-kind” replacement to permit replacements to be of a different style or type, or have different inscription information, if the reason for replacement is related to type, style, or inscription under proposed paragraph (b)(3)(i)(D) or (E), and the replacement would necessarily have to differ in style, type, or inscription information.

Proposed § 38.630(b)(3)(iii) would establish in regulation the process for requesting replacement headstones, markers, or medallions, which is essentially the same as the process of requesting Government-furnished headstones, markers, or medallions initially. As in proposed § 38.630(b)(1)—related to application for Government-furnished headstones, markers, and medallions—proposed paragraph (b)(3)(iii)(A) would restate the process of ordering a replacement through NCA’s electronic ordering systems (where the replacement will be installed in a cemetery that uses such systems), and proposed paragraph (b)(3)(iii)(B) would restate the process of completing and submitting VA Form 40-1330 or 40-1330M (where the replacement will be installed in a cemetery that does not use NCA’s electronic ordering systems).

We reiterate that the reasons for replacement in proposed paragraphs (b)(3)(i)(A)-(E), the “in-kind” replacement policy in proposed paragraph (b)(3)(ii), and the process of requesting replacements in proposed paragraph (b)(3)(iii), are all based on NCA Notice 2004-06, and reflect current practice except where otherwise indicated.

Proposed § 38.630(b)(4) would newly establish a “limitations” paragraph in regulation, and proposed paragraph (b)(4)(i) would relocate language from current § 38.631(c) and (d), which state that VA does not pay for the cost of installing a headstone or marker in a non-national cemetery, although VA does deliver the headstone or marker directly to such cemetery or to a receiving agency for delivery to the cemetery. Although current § 38.631(c) and (d) apply to only burial headstones and markers for marked graves under 38 U.S.C. 2306(d) (specifically, see limiting language in sec. 2306(d)(2)), and only “private” cemeteries are technically referenced in sec. 2306(d) and in current § 38.631, proposed § 38.630(b)(4) would apply the same cost limitation and delivery procedure to headstones and markers for unmarked graves, and for all non-national cemeteries and not just those that are privately owned. We would establish these requirements in regulations for burial headstones and markers for unmarked graves consistent with current practice. The cost limitation for both unmarked and marked graves is already established through a VA Form 40-1330 certification that the headstone or marker “will be installed in the cemetery listed in block 27 at no expense to the Government.” Proposed § 38.630(b)(4)(ii) would newly establish for Government-furnished medallions the same cost limitation as for burial headstones and markers in proposed paragraph (b)(4)(i), but proposed paragraph (b)(4)(ii) would provide for delivery directly to the applicant for the medallion as opposed to the cemetery where the privately purchased marker is located (and upon which the medallion is to be affixed), as this is current VA practice.

Proposed § 38.630(b)(5) would newly establish in regulation the existing NCA policy related to ownership, alteration, and disposition of Government-furnished

headstones, markers, and medallions, in accordance with NCA Notice 2011-05 and applicable Federal statutes. Proposed § 38.630(b)(5) would provide that all Government-furnished headstones, markers, and medallions remain the property of the Government in perpetuity and should not be defaced or altered in any way, and that knowingly converting Government property to private use (such as using whole or partial headstones or markers in structures or landscaping, or offering such items for sale) is a violation of Federal law under 18 U.S.C. 641. These would not be new requirements, but would merely make VA regulations consistent with VA policy in NCA Notice 2011-05 and would cross reference otherwise applicable Federal statute. Proposed § 38.630(b)(5)(ii) would provide that, under 38 CFR 1.218(b)(5), the destruction, mutilation, defacement, injury, or removal of any monument, gravestone, or other structure within the limits of any national cemetery is prohibited (with an associated fine of \$500) and that, under 18 U.S.C. 1361, willful depredation of any property of the United States (e.g., a headstone or marker in a non-national cemetery) shall be punishable by a fine or imprisonment under title 18, U.S.C. This would also not be a new policy requirement, and further would not be a new regulatory requirement (as it is already enforceable under § 1.218(b)(5)), but we find it appropriate to include it as part of the general reorganization of these regulations in this proposed rule. Proposed § 38.630(b)(5)(iii) would establish that when a Government-furnished burial headstone, marker, or medallion is removed from a gravesite area in any cemetery (due to it warranting replacement under paragraph (b)(3) of this section, or in cases of disinterment where the headstone or marker will not be placed at a new gravesite), it should be properly disposed. Proposed § 38.630(b)(5)(iii) would further establish that

unless such a headstone or marker would be maintained by NCA for historic purposes, if the headstone or marker was stone, it must be physically broken into small enough pieces to ensure no portion of the inscription is legible and to ensure no part is available for any private, personal, or commercial use, and if it was bronze must be returned to VA for recycling. These would not be new requirements, but would merely make VA regulations consistent with VA policy in NCA Notice 2011-05 (May 19, 2011).

Proposed § 38.630(c) would establish a definitions paragraph to relocate and revise current regulatory definitions, and newly define terms related to burial headstones and markers. As stated previously in this rulemaking, the definition of the term “applicant” in current § 38.600(a)(1) would be moved to proposed § 38.630(c)(1). We would also propose a minor revision to the current definition of “applicant” in § 38.600(a)(1) to remove the phrase “that will mark the gravesite or burial site of” an eligible individual, to account for the provision of burial headstones and markers for marked graves under proposed § 38.630(a)(2) (as the provision of a headstone or marker for an already marked grave under 38 U.S.C. 2306(d) does not, in effect, mark the grave again). Proposed § 38.630(c)(1) would read that “[a]n applicant for a burial headstone or marker for an eligible deceased individual, or an applicant for a medallion to be affixed to a privately purchased headstone or marker, may be” certain eligible individuals, and proposed paragraph (c)(1)(i)-(vi) would restate the eligible individuals listed in current § 38.600(a)(1)(i)-(vi).

Proposed § 38.630(c)(2) would newly define in regulation the term “ascertainable,” to clarify how that term would be interpreted in the newly proposed definition of “unmarked grave” that will be explained in proposed § 38.630(c)(6); the

proposed definition of “ascertainable” will be explained in the portion of this rulemaking devoted to the proposed definition of “unmarked grave.”

Proposed § 38.630(c)(3) would newly define “local government” to mean the administrative body of a local geographic area that is not a state, such as a county, city, or town. This definition would be relevant in the few places that “local government” is used in proposed § 38.630(a) and (b), and proposed § 38.631(a), related to where headstones and markers might be placed, as well as related to administrative components of the application process for headstones and markers.

Proposed § 38.630(c)(4) would newly define in regulation the term “Medal of Honor recipient” in a manner consistent with 38 U.S.C. 2306(d)(5)(D), where this definition is relevant for eligibility for headstones and markers under proposed § 38.630(a)(2).

Proposed § 38.630(c)(5) newly would define “privately purchased and durable headstone or marker” to mean a headstone or marker that was not purchased or provided by the Government, and that is made of material (such as but not limited to stone) that is lasting and not anticipated to unduly degrade under exposure to the environment in which it is placed. We believe this proposed definition of “privately purchased and durable headstone or marker” is self-explanatory and would capture those types of headstones and markers that are not purchased by the Government, and that are placed by families or others in non-national cemeteries with the intent of lasting memorialization of decedents. This proposed definition of “privately purchased and durable headstone or marker” would be relevant to the proposed definition of “unmarked grave” in proposed 38.360(c)(6).

Because the definition of “unmarked grave” in proposed § 38.630(c)(6) would affect whether VA could provide a burial headstone or marker under proposed § 38.630(a), we explain the proposed definition of “unmarked grave” more fully below.

The proposed definition of “unmarked grave”

In accordance with 38 U.S.C. 2306(a), VA must “furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the unmarked graves of” certain individuals listed in sec. 2306(a)(1)-(5). The term “unmarked grave” is not defined in sec. 2306 or elsewhere in VA statute. The term “unmarked grave” was similarly not defined in Federal statutes pertaining to national cemeteries prior to VA assuming control over such cemeteries through the National Cemeteries Act of 1973 (Pub. L. 93-43). Although not defined in Federal statute, the term “unmarked grave” was interpreted in relevant regulations of the Department of the Army, which applied to national cemeteries prior to 1973 (see former Army regulation 32 CFR 536.57(b)(3) (1961); § 536.57 was last updated in 1964, 29 FR 16986). The definition of “unmarked grave” in Army regulations was adopted by VA in 1982, in an NCA policy (see VA Department of Memorial Affairs Headstone and Marker Manual M40-3 (Dec. 1, 1982), para. 2.04) (hereinafter referred to as the “policy” or as “Manual M40-3”), although VA did not, until now, seek to revise its regulations to be consistent with this policy. Proposed § 38.630(c)(6) would define “unmarked grave” consistent with NCA’s policy definition of “unmarked grave” in its Manual M40-3, as well as in a manner consistent with former Army regulation and consistent with VA’s current statutory authorities, as further explained below.

Former Army regulation at 32 CFR 536.57(b)(3) established that a grave in a private cemetery is considered unmarked if: (1) a Government headstone or Government marker has not been furnished, or a private monument has not been erected; or (2) the condition of a previously furnished Government or private headstone or marker is such as to warrant replacement. This regulation was first promulgated in 1959 (24 FR 4595, June 5, 1959), and remained substantively unchanged from 1959-1972 (see 26 FR 2643, Mar. 29, 1961; 29 FR 16986, Dec. 11, 1964). In 1982, VA adopted the definition of “unmarked grave” from that regulation in Manual M40-3, paragraph 2.04.b. VA’s policy definition of “unmarked grave” provides that “the grave of a deceased military member or veteran in other than a Federal cemetery is considered unmarked if: (1) A Government headstone or marker has not been furnished or a privately purchased monument has not been erected at the grave. (2) The condition of a previously furnished Government or private headstone or marker is such as to warrant replacement.” See Manual M40-3, para. 2.04.b.

Under former 32 CFR 536.57(b)(3)(i) and current paragraph 2.04.b.(1) of Manual M40-3, the first criterion for considering whether a grave is “unmarked” is whether a Government headstone or marker or privately purchased monument has been erected on a grave, without consideration of specific characteristics such as style, type, or inscription information. A plain reading of this criterion means that, if a grave in a non-national cemetery has any existing monument, headstone or marker, then such a grave could not be considered “unmarked” and a Government-furnished headstone or marker could not be provided. This criterion is straight-forward in its assessment of whether a

grave is considered “unmarked”—either there is, or is not, a headstone, monument, or marker erected at the grave.

Under former 32 CFR 536.57(b)(3)(ii) and current paragraph 2.04.b.(2) of Manual M40-3, the second criterion for considering whether a grave is “unmarked” is whether the condition of a Government or privately purchased headstone or marker is such as to warrant replacement. This criterion is not as straight-forward. In terms of a Government-furnished headstone or marker, we reiterate from previous discussion in this rulemaking that VA has established in policy (and would seek to establish in regulation) the reasons that Government-furnished headstones and markers might warrant replacement. In terms of a private headstone or marker, we similarly interpret former 32 CFR 536.57(b)(3)(ii) and paragraph 2.04.b.(2) of Manual M40-3 to mean that, if a privately purchased headstone or marker erected or installed on a grave ceases to be serviceable (i.e., it no longer reasonably functions to identify the decedent), the grave would be considered unmarked; and, if the decedent is otherwise eligible for a Government-furnished headstone or marker, the Government may then for the first time provide, upon request, a Government-furnished headstone or marker for that unmarked grave. (We do not technically consider this a “replacement” of a privately purchased headstone or marker because the Government did not originally furnish such a headstone or marker.)

Based on this interpretation of former regulation 32 CFR 536.57(b)(3)(ii) and paragraph 2.04.b.(2) of Manual M40-3 that the Government would newly provide a headstone or marker if the existing privately purchased headstone or marker no longer functioned to reasonably identify a decedent (such that the grave would be considered

unmarked), we would seek to establish in regulation two primary criteria by which to assess whether the privately purchased marker functioned to reasonably identify the decedent. First, we would assess whether the headstone or marker was durable, or made of a material (such as but not limited to stone) that is lasting and not anticipated to unduly degrade under exposure to the environment in which it is placed (in accord with the definition of “privately purchased and durable headstone or marker” in proposed § 38.630(c)(5), which would characterize “durable” in this manner). The assessment of only the durability of a privately purchased headstone or marker, without further considering the specific styles, types, or specific inscription information, would establish a clear criterion that would permit VA to consistently evaluate a myriad of privately purchased markers. Second, we would assess whether a decedent’s name, if known, was ascertainable from the headstone or marker. Whether a decedent’s name was ascertainable would similarly provide a clear criterion for evaluating a myriad of privately purchased headstones and markers, as we believe that a name is adequate information to identify a buried decedent. Particularly, the assessment of whether a decedent’s name was “ascertainable” from a privately purchased headstone or marker would mean that the headstone or marker could be considered as marking a grave, even if the name was not inscribed on the headstone or marker itself (for instance, if instead a numerical or other indicator is inscribed on the marker, where that indicator then corresponds to a burial ledger). To ensure this interpretation of the term “ascertainable” is clear, we would further define “ascertainable” in proposed § 38.630(c)(2) to mean that a decedent’s name is “inscribed on the headstone or marker or discoverable from some inscription on the headstone or marker that corresponds to information that is

reasonably accessible by the public (e.g., a corresponding burial ledger at the cemetery, or publicly available burial information accessible on the internet).” We clarify that both criteria would need to be met for a grave not to be considered “unmarked”—the privately purchased headstone or marker would have to be durable and the decedent’s name would have to be ascertainable from the headstone or marker. If either of these criteria were not met, the grave could be considered “unmarked.”

Based on the rationale stated above, the current policy definition of “unmarked grave” in paragraph 2.04.b. of Manual M40-3 would accordingly be revised by proposed § 38.630(c)(6), and proposed § 38.630(c)(6) would read as set out in the regulatory text below. The portion of the definition of “unmarked grave” in proposed § 38.630(c)(6)(i), related to a Government-furnished headstone or marker, is substantively the same as paragraphs 2.04.b.(1) and b.(2) in Manual M40-3, and proposed § 38.630(c)(6)(i) would additionally cross reference proposed § 38.360(b)(3) for ease in locating the applicable proposed replacement criteria for Government-furnished headstones and markers that were discussed earlier in this rulemaking. The portion of the definition of “unmarked grave” in proposed § 38.630(c)(6)(ii), to include paragraphs (c)(6)(ii)(A)-(D) related to assessing the condition of a privately purchased marker to determine whether a grave could be considered “unmarked,” would provide more detail than paragraph 2.04.b. in Manual M40-3. Because proposed § 38.630(c)(6)(ii) would clarify and modify current VA policy, we invite comments on those proposed provisions particularly, and offer commenters the following two alternatives to proposed § 38.630(c)(6)(ii) that VA considered but ultimately did not propose.

One alternative to proposed § 38.630(c)(6)(ii) is that VA would assess whether a grave is unmarked by applying the minimal inscription criteria for headstones and markers in national cemeteries under 38 U.S.C. 2404(c)(1) to privately purchased headstones or markers, where the absence of such minimal inscription information on a privately purchased marker would mean a grave could be considered unmarked. Section 2404(c)(1) requires that each marker placed in a national cemetery “shall bear the name of the person buried, the number of the grave, and such other information as the Secretary shall by regulation prescribe.” We considered whether we could infer that the existence of these statutory criteria for national cemeteries meant that Congress intended for all graves of individuals who are eligible for Government-furnished headstones and markers should be marked with the same inscription information, regardless of the location of such graves.

VA rejected this alternative for two reasons. First, Congress has only legislated inscription requirements for headstones and markers in VA national cemeteries. The lack of similar inscription requirements for the graves of individuals eligible for a Government-furnished headstone or marker that are located outside national cemeteries tends to indicate that Congress did not intend to apply these standards regardless of the location of such graves. See *Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002) (en banc) (the expression of one thing in statute implies the exclusion of others). Indeed, the Government does not have jurisdiction over any non-national cemeteries.

Second, Congress has consistently limited the provision of headstones and markers to only “unmarked graves,” first in appropriations language from 1887 through

1925, and then in statutory language beginning in 1925 that has remained consistent through the present day. (See, e.g., appropriations language that has applied the “unmarked grave” limitation at 24 Stat. 534, 25 Stat. 538, 26 Stat. 400, 27 Stat. 377, 28 Stat. 405, 29 Stat. 443, 30 Stat. 634, 31 Stat. 630, 32 Stat. 463, 33 Stat. 495; see, e.g., statutory language that applied the “unmarked grave” limitation at 38 Stat. 630, 39 Stat. 286, 40 Stat. 130, 41 Stat. 183, 42 Stat. 756, 43 Stat. 511, 43 Stat. 926.) If Congress intended for the provision of Government headstones or markers for the graves of eligible individuals with private headstones or markers that lacked certain inscription information, it could have expressly stated as much, for instance by defining the term “unmarked grave” to include a grave whose headstone or marker does not convey certain identifying information about the buried decedent. Instead, VA interprets that Congress has consistently intended for the term “unmarked grave” to be an administrative limitation of the Government headstones and marker benefit, as this term was used in appropriations language prior to statute, as stated above. See *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 101 (2011) (presuming that Congress chose language that accurately express its legislative purpose). As an administrative limitation on a Government benefit, the term “unmarked grave” would have no practical effect if it permitted the provision of a Government headstone or marker for a grave where a privately purchased headstone or marker already existed, merely because such a headstone or marker fails to convey the same inscription information as a Government headstone or marker. Because it would undermine Congress’s selected language to interpret the term “unmarked grave” in a manner that would negate its function as a limitation on the headstone and marker benefit, VA does not believe that the term

“unmarked grave” may be interpreted to encompass graves with privately purchased headstones or markers that merely do not convey the same inscription information as Government headstones and markers.

For the reasons expressed above, VA does not believe that the existence of inscription requirements for national cemeteries under 38 U.S.C. 2404(c) creates the inference that such requirements should apply to graves located outside of national cemeteries, and we therefore believe that the definition of “unmarked grave” in proposed § 38.630(c)(6) would be more appropriate than this first alternative. We reiterate that the definition of “unmarked grave” in proposed § 38.630(c)(6) would require an assessment of whether a privately purchased headstone or marker reasonably serves to identify the buried decedent, such that VA would not find the mere existence of any privately purchased headstone or marker to mean that a grave could not be considered unmarked.

A second alternative to proposed § 38.630(c)(6)(ii) that VA considered was that VA would assess whether a grave is unmarked by examining the past efforts surrounding the placement of privately purchased headstones and markers, and determining if those efforts evidenced an intent to permanently memorialize decedents. If there was such evidence of intent to permanently memorialize decedents, VA would not consider the grave to be unmarked because VA would not seek to disturb those past efforts through the provision of Government-furnished headstone or markers. Under this alternative, VA would examine historical or other information that would tend to indicate whether the existing privately purchased headstones or markers were placed to serve as lasting memorials to decedents. VA has not chosen to propose this

alternative for multiple reasons. First, we do not interpret that there is a basis in applicable statute that a third party's intent to permanently memorialize a decedent can extinguish that decedent's eligibility for a headstone or marker under 38 U.S.C. 2306. Next, such intent would seem to be too subjective of a standard to evaluate, and therefore would not support consistent administration of benefits. For instance, would intent be evaluated based on consideration of all past memorialization efforts, or just the most recent efforts? Would the past memorialization efforts of certain groups of individuals (such as family members) be given deference over the efforts of other individuals? Even if such intent were to be a consideration, it would seem that VA would have to, in any case, assess whether an existing privately purchased headstone or marker was actually durable to serve as a lasting memorialization of the decedent. Because the durability of an existing privately purchased marker would be considered in any assessment of whether a grave was "unmarked," we believe that the definition of "unmarked grave" in proposed § 38.630(c)(6)(ii) (in conjunction with the definition of "privately purchased and durable marker" in proposed § 38.630(c)(5)) is more appropriate than this second alternative.

We would lastly revise the statutory authority citation for proposed § 38.630. This revision would include sec. 203(b) of Pub. L. 110-157, which establishes the general applicability date (i.e., date of death on or after November 1, 1990) for the second marker authorized under 38 U.S.C. 2306(d).

§ 38.631 Memorial headstones and markers.

Proposed § 38.631 would address the provision of memorial headstones and markers for certain individuals whose remains are unavailable for burial, in accordance with 38 U.S.C. 2306(b). Proposed § 38.631 would move and revise information that is located in current § 38.630(c) to ensure that memorial headstones and markers are in a distinct section from burial headstones and markers, because eligibility differs for these two types of benefits. The title would be revised to “Memorial headstones and markers.”

Proposed § 38.631(a) would restate from current § 38.630(c)(1) that VA will provide upon request a memorial headstone or marker for certain eligible individuals, and proposed § 38.631(a)(1)(i)-(iii) would list those eligible individuals in accordance with 38 U.S.C. 2306(b)(2)(A)-(C). Section 2306(b)(2) was recently amended by Pub. L. 115-136, 132 Stat. 343 (2018) to establish a consistent eligibility date for the provision of memorial headstones and markers to spouses, surviving spouses, and dependent children of veterans, where such spouses and children must have died on or after November 11, 1998. We note that VA has been providing these memorial benefits as applicable under Pub. L. 115-136 since its enactment, and that proposed § 38.631(a)(1)(ii)-(iii) would merely conform VA regulation to VA authority and practice.

Proposed § 38.631(a)(2) would newly establish in regulation that when VA has furnished a burial headstone or marker (under proposed 38 CFR 38.630(a)(1)), VA would, if feasible, add a memorial inscription to that burial headstone or marker (or provide a replacement headstone or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C.

2306(g)(1). Proposed § 38.631(a)(3) would newly establish in regulation that when VA has furnished a memorial headstone or marker (under proposed § 38.631(a)(1)), VA would, if feasible, add a memorial inscription to that headstone or marker (or provide a replacement headstones or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C. 2306(g)(2). Both proposed § 38.631(a)(2) and (3) would be added in this eligibility section because they would be exceptions to providing a new and separate memorial headstone or marker for a veteran's spouse or dependent child, consistent with sec. 2306(g)(1) and (2). We note that the "if feasible" language in both proposed § 38.631(a)(2) and (3), consistent with sec. 2306(g)(1) and (2), respectively, would allow but not mandate VA to follow this practice.

As with proposed § 38.630(b) for burial headstones and markers, proposed § 38.631(b) would create a "general" paragraph for memorial headstones and markers to move, combine, or newly establish regulatory language related to administrative aspects of providing Government-furnished memorial headstones and markers, to include the application process, styles and types, and criteria for replacement. The structure of proposed § 38.631(b)(1)-(5) generally mirrors that of proposed § 38.630(b)(1)-(5). Rather than reiterating here all of the rationale provided to explain proposed § 38.630(b)(1)-(5), we affirm instead that, where the criteria in proposed § 38.631(b)(1)-(5) are substantively identical to those in proposed § 38.630(b)(1)-(5), even if they do not share the exact same numbering, the same rationale provided for proposed § 38.360(b)(1)-(5) applies to § 38.631(b)(1)-(5).

The differences between the criteria in proposed §§ 38.360(b)(1)-(5) and 38.361(b)(1)-(5) are the result of the key differences between burial and memorial headstones and markers, as memorial headstones and markers may only be provided when remains are unavailable for burial (resulting in no grave where a burial headstone or marker may be placed) in accordance with 38 U.S.C. 2306(b)(1). For instance, the application process in proposed § 38.631(b)(1) has only one option for requesting headstones and markers through VA Form 40-1330, unlike in proposed § 38.630(b)(1) where the application can be made either as part of burial arrangements or by request through VA Form 40-1330 or VA Form 40-1330M. Similarly, the certification requirement in proposed § 38.630(b)(1)(iii)(A)-(B) (regarding headstone or marker placement on or near a veteran's grave in private or local government cemeteries) is not established in proposed § 38.631(b)(1), as there is no grave in the context of a Government-furnished memorial headstone or marker. Additionally, there are no criteria related to medallions in proposed § 38.631 generally, including paragraph (b)(1)-(5), as medallions are only related to the provision of burial headstones and markers under 38 U.S.C. 2306(d)(4). The differences between proposed §§ 38.631(b)(1)-(5) and 38.630(b)(1)-(5) also reflect any particular statutory or regulatory requirements that exist for memorial but not for burial headstones and markers. For instance, proposed § 38.631(b)(2)(ii) and (b)(3)(i)(E)(1) would move and restate the requirement in current § 38.630(c) related to the mandatory inscription of "In Memory Of," which applies only to memorial headstones and markers.

Similar to proposed § 38.630(c) for burial headstones and markers, proposed § 38.631(c) would establish a definitions paragraph to relocate from current regulations,

as well as newly define, those terms related to memorial headstones and markers. The definition of the term “applicant” for memorial headstones and markers in current § 38.600(a)(2) would be moved to proposed § 38.631(c)(1) without substantive change. Proposed § 38.631(c)(2) would move the definition of “unavailable remains” from current § 38.630(c)(2) without substantive change.

Finally, the authority citation for proposed § 38.631 would be revised in accordance with the changes noted above.

§ 38.632 Emblems of belief.

As stated previously in this rulemaking, information related to the application process for a Government-furnished headstone or marker would be removed from current § 38.632(a) and (c), and placed in proposed § 38.630 (related to burial headstones and markers) and in proposed § 38.631 (related to memorial headstones and markers). With the proposed removal from current § 38.632 of information related to the application process for a Government-furnished headstone or marker, we would further propose to rename the § 38.632 header to read “Emblems of belief,” as the remainder of § 38.632 after the proposed removal of application information would only relate to the process for requesting the approval of an emblem of belief to be inscribed on a Government-furnished headstone or marker.

Proposed § 38.632(a) would remain a “general” paragraph, but—with the proposed removal of the application information for Government-furnished headstones and markers—would read, “This section contains procedures for requesting the

inscription of new emblems of belief on Government-furnished headstones and markers.”

Proposed § 38.632(b) would remain a “definitions” paragraph with no changes.

With the proposed removal of all language in current § 38.632(c) pertaining to application for Government-furnished headstones and markers, and relocation of that language to proposed §§ 38.630 and 38.631, current § 38.632(c) would be removed and § 38.632(d)-(h) would be redesignated as § 38.632(c)-(g), respectively, with some conforming amendments that update cross-references, but no substantive changes. We note a non-substantive change to add a paragraph designation for language that immediately follows current § 38.632(h)(2)(ii) (see language immediately following § 38.632(h)(2)(ii), related to a 60-day timeframe in the emblem of belief process). This language related to the 60-day timeframe would be designated as proposed § 38.632(g)(3), and current § 38.632(h)(3) and (4) would be redesignated to proposed § 38.632(g)(4) and (5), respectively. No other substantive changes are proposed for current § 38.632.

Conforming Amendments

To conform to the above changes, we would remove the last sentence of current § 38.633(a)(2), which states that group memorial monuments “will be selected in accordance with policies established under 38 CFR 38.630,” as proposed § 38.630 would not relate to the selection of group memorial monuments. We would delete this

sentence instead of proposing to update the cross reference to § 38.630, as none of the proposed regulatory changes in this rulemaking would relate to the selection of group memorial monuments (although VA does plan to propose such criteria in a separate future rulemaking). Additionally, cross-references in § 39.10 will be updated accordingly to reflect the proposed changes to § 38.600 in this rulemaking.

Lastly, 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 definition is established under 38 U.S.C. 3765, which is among the other statutes cited in this authority citation, making the additional 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).

Effect of Rulemaking

The Code of Federal Regulations, as proposed to be revised by this proposed rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures are authorized. All VA guidance would be read to conform with this proposed rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

Paperwork Reduction Act

This proposed rule includes provisions that would amend a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) that is currently approved by the Office of Management and Budget (OMB) under OMB control number 2900-0222. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking to OMB for review.

Proposed § 38.630(b)(1)(iii)(A)-(C) would require revision of two existing certification statements on VA Form 40-1330, titled “Claim for Standard Government Headstone or Marker,” related to placement of a headstone or marker and related to following the receiving cemetery’s guidelines and procedures. The existing certifications on VA Form 40-1330 are broad enough to encompass proposed § 38.630(b)(1)(iii)(A)-(C), but are not fully consistent. We note that the language in proposed § 38.630(b)(1)(iii)(A)-(C) would merely move language from current § 38.631(a) and (e) without substantive change. The current certifications on VA Form 40-1330 are in a check-box format, which would not be changed—only the language in the certifications would be revised to be more consistent with the corresponding certification requirements in current and proposed regulations. The proposed revisions to the certifications further do not affect eligibility for a headstone, marker, or medallion, and would not increase or decrease the number of applicants using VA Form 40-1330. Therefore, these proposed revisions would not result in any increase or decrease in respondents, respondent burden hours, or respondent burden costs.

Comments on the revisions to the approved collection of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and

Regulatory Affairs, Washington, DC 20503, or by e-mail to oir_submission@omb.eop.gov, with copies sent by mail or hand delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1063B, Washington, DC 20420; fax to (202) 273-9026; or through www.Regulations.gov. Comments should indicate that they are submitted in response to “RIN 2900-AQ28 – Government-Furnished Headstones, Markers, and Medallions; Unmarked Graves.”

OMB is required to make a decision concerning the revision of the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the *Federal Register*. 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 proposed rule. Notice of OMB approval for this revised information collection will be published in a future *Federal Register* document. Until VA receives approval from OMB to revise the information collection, only the version of VA Form 40-1330 as a currently approved collection under OMB control number 2900-0222 will be used.

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. Therefore, pursuant to 5

U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of Secs. 603 and 604.

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,” requiring review by the OMB, unless OMB waives such review, 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.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been reviewed, and it has been determined not to be a significant regulatory action under E.O. 12866.

This proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed 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 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

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: January 11, 2019.

Jeffrey M. Martin,
Assistant Director,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons set forth in the preamble, 38 CFR parts 38 and 39 are 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, 2306, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

2. Revise § 38.600 to read as follows:

§ 38.600 Definitions.

- (a) The following definitions apply to this part:

- (1) *Appropriate State official* means a State attorney general or other official with statewide responsibility for law enforcement or penal functions.

- (2) *Clear and convincing evidence* means that degree of proof which produces in the mind of the fact-finder a firm belief regarding the question at issue.

- (3) *Convicted* means a finding of guilt by a judgment or verdict or based on a plea of guilty, by a Federal or State criminal court.

- (4) *Federal capital crime* means an offense under Federal law for which a sentence of imprisonment for life or the death penalty may be imposed.

- (5) *Interment* means the burial of casketed remains or the placement or scattering of cremated remains.

(6) *Life imprisonment* means a sentence of a Federal or State criminal court directing confinement in a penal institution for life.

(7) *Memorialization* means any action taken to honor the memory of a deceased individual.

(8) *Personal representative* means a family member or other individual who has identified himself or herself to the National Cemetery Administration as the person responsible for making decisions concerning the interment of the remains of or memorialization of a deceased individual

(9) *State capital crime* means, under State law, the willful, deliberate, or premeditated unlawful killing of another human being for which a sentence of imprisonment for life or the death penalty may be imposed.

(b) Other terms not defined in paragraphs (a)(1) through (9) of this section may be defined within and be applicable to other sections throughout this part.

(Authority: 38 U.S.C. 2404, 2411).

3. Amend § 38.620 by adding paragraph (j) to read as follows:

§ 38.620 Persons eligible for burial.

* * * * *

(j) Any individual who:

- (1) Was naturalized pursuant to section 2(1) of the Hmong Veterans' Nationalization Act of 2000 (Pub. L. 106-207, 114 Stat. 316; 8 U.S.C. 1423 note); and
- (2) At the time of the individual's death resided in the United States; and
- (3) Died on or after March 23, 2018.

* * * * *

4. Revise § 38.630 to read as follows:

§ 38.630 Burial headstones and markers; medallions.

(a) *Eligibility--(1) Unmarked graves.* VA will furnish, when requested under paragraph (b)(1)(i) or (ii) of this section, a burial headstone or marker for the unmarked grave of the following individuals:

(i) Any individual buried in a national cemetery or in a military post cemetery. When more than one individual is buried in a single gravesite in a national cemetery, VA will, if feasible, include inscription information for all such individuals on a single headstone or marker, rather than furnishing a separate headstone or marker for each buried individual.

(ii) The following individuals eligible for burial in a national cemetery but who are buried elsewhere, where such graves may be located in any type of non-national cemetery (e.g., state, tribal, private, or local government such as town or city cemetery):

(A) Veterans as described in § 38.620(a).

(B) Members of a Reserve component of the Armed Forces, or members of the Army National Guard or the Air National Guard, whose deaths occurred under the conditions described in § 38.620(b).

(C) Members of the Reserve Officers' Training Corps of the Army, Navy, or Air Force, whose deaths occurred under the conditions described in § 38.620(c).

(D) Individuals who separated from military service and were entitled to retired pay under chapter 1223 of title 10 [10 U.S.C. 12731 et seq.], as described in and subject to § 38.620(g).

(E) Individuals who served in the organized military forces of the Government of the Commonwealth of the Philippines, or who served in the New Philippine Scouts, as described in and subject to § 38.620(h).

(F) Individuals, or spouses of such individuals, who were naturalized pursuant to sec. 2(1) of the Hmong Veterans' Nationalization Act of 2000, as described in and subject to § 38.620(j).

(iii) Soldiers of the Union and Confederate Armies of the Civil War, whose graves may be located in any type of non-national cemetery (e.g., state, tribal, private, or local government cemetery).

(iv) Spouses, surviving spouses, and dependent children, as described in and subject to § 38.620(e), whose graves are located in a veterans' cemetery owned by a State.

(2) *Marked graves.* (i) Subject to paragraphs (a)(2)(ii) and (iii) of this section, VA will furnish, when requested under paragraph (b)(1)(ii) of this section, a burial headstone or marker for the graves of the following individuals who are buried in a non-national cemetery (e.g., state, tribal, private, or local government cemetery), notwithstanding that such graves are already marked by a privately purchased headstone or marker.

(A) Veterans as described in § 38.620(a).

(B) Members of a Reserve component of the Armed Forces, or members of the Army National Guard or the Air National Guard, whose deaths occurred under the conditions described in § 38.620(b).

(C) Members of the Reserve Officers' Training Corps of the Army, Navy, or Air Force whose deaths occurred under the conditions described in § 38.620(c).

(D) Individuals who separated from military service and were entitled to retired pay under chapter 1223 of title 10 [10 U.S.C. 12731 et seq.], as described in and subject to § 38.620(g).

(E) Individuals who served in the organized military forces of the Government of the Commonwealth of the Philippines, or who served in the New Philippine Scouts, as described in and subject to § 38.620(h).

(F) Individuals, or spouses of such individuals, who were naturalized pursuant to sec. 2(1) of the Hmong Veterans' Nationalization Act of 2000, as described in and subject to § 38.620(j).

(ii) An individual described in paragraph (a)(2)(i) of this section is eligible for a headstone or marker provided under paragraph (a)(2) of this section if:

(A) The individual died on or after November 1, 1990; or

(B) They were a Medal of Honor recipient and served in the Armed Forces on or after April 6, 1917.

(iii) In lieu of a headstone or marker provided under paragraph (a)(2) of this section, veterans described in paragraph (a)(2)(i)(A) of this section are eligible for a

medallion to be affixed to their privately purchased headstone or marker if they served in the Armed Forces on or after April 6, 1917.

(b) *General--(1) Application.* (i) When burial occurs in a cemetery that uses the National Cemetery Administration (NCA) electronic ordering system (e.g., national cemetery, State veterans' cemetery, or military post cemetery), the headstone or marker provided under paragraph (a)(1) or (a)(2) of this section will be ordered by the applicable cemetery as part of the process of arranging burial.

(ii) When burial occurs in a cemetery that does not use NCA's electronic ordering system (e.g., private or local government cemetery), an applicant, as defined in paragraph (c)(1) of this section, may either:

(A) Request a burial headstone or marker provided under paragraph (a)(1) or (2) of this section by completing and submitting VA Form 40-1330, Claim for Standard Government Headstone or Marker; or

(B) Request a medallion provided under paragraph (a)(2)(iii) of this section to be affixed to a privately purchased headstone or marker, by completing and submitting VA Form 40-1330M, Claim for Government Medallion for Placement in a Private Cemetery.

(iii) VA Forms 40-1330 and 40-1330M include application and submission instructions as well as additional information related to emblems of belief, and are accessible through the following links: <https://www.va.gov/vaforms/va/pdf/VA40-1330.pdf>, and <https://www.va.gov/vaforms/va/pdf/VA40-1330M.pdf>.

(A) An applicant for a burial headstone or marker for an unmarked grave provided under paragraph (a)(1) of this section, for placement in a private cemetery or a

local government cemetery, must certify on VA Form 40-1330 that such headstone or marker will be placed on or at the grave for which it is requested.

(B) An applicant for a burial headstone or marker for a marked grave provided under paragraph (a)(2) of this section, for placement in a private cemetery or a local government cemetery, must certify on VA Form 40-1330 that such headstone or marker will be placed on the grave for which it is requested, or if such placement is not possible or practicable, as close as possible to the grave within the grounds of the cemetery in which the grave is located.

(C) A representative of a private cemetery or local government cemetery that accepts delivery of a burial headstone or marker provided under paragraph (a)(1) or (2) of this section must certify on VA Form 40-1330 that placement of the headstone or marker adheres to the policies or guidelines of the cemetery in which the grave is located.

(2) *Styles, types, and inscriptions.* The styles and types of burial headstones and markers provided under paragraphs (a)(1) and (2) of this section, as well as the inscriptions thereon to include an emblem of belief, will be provided in accordance with VA policy as well as in a manner consistent with 38 U.S.C. 2306(c) and 2404(c).

(i) The styles and types of burial headstones and markers made available for selection, as well as the inscriptions thereon, may be limited in accordance with certain requirements, including but not limited to aesthetic or administrative requirements of the cemetery in which the headstone or marker will be placed.

(ii) The same styles and types of headstones and markers made available for selection by requestors of headstones and markers provided for unmarked graves

under paragraph (a)(1) of this section shall be made available for requestors of headstones or markers for marked graves provided under paragraph (a)(2) of this section.

(iii) Upon request under paragraph (b)(1)(i) or (ii) of this section, a headstone, marker, or medallion provided under paragraph (a)(1) or (2) of this section shall signify the deceased's status as a Medal of Honor recipient as applicable.

(iv) If an emblem of belief is requested that is not offered in VA's inventory of images for emblems of belief, additional requirements apply under § 38.632.

(3) *Replacement.* (i) Upon request, VA will replace a Government-furnished burial headstone, marker, or medallion, if the previously furnished headstone, marker, or medallion:

(A) Is damaged beyond repair; or

(B) Has deteriorated to the extent it no longer serves to identify the buried decedent (e.g., identifying elements of an inscription are not legible, such as a decedent's name or a grave number for an unknown decedent) or, in the case of a medallion, no longer serves to identify the buried decedent as a veteran or as a Medal of Honor recipient if applicable; or

(C) Has been stolen or vandalized; or

(D) Is the incorrect style or type for the veteran's era of service; or

(E) Requires changing or adding inscription information for the following reasons:

(1) To correct errors in factual information (such as name or dates of birth or death) provided to VA as part of the initial application process;

(2) To indicate information related to the deceased's military service that is provided to VA after the initial application process (such as the deceased's posthumous receipt of military awards);

(3) To identify on a single headstone or marker multiple decedents who are each eligible for a headstone or marker and who are buried in the same gravesite in a cemetery, to include identification of a spouse or dependent in accordance with 38 U.S.C. 2306(g)(1); or

(4) To indicate the deceased's status as a Medal of Honor recipient if applicable, for a headstone or marker provided for a marked grave under paragraph (a)(2) of this section, in accordance with 38 U.S.C. 2306(d)(5)(B).

(5) For any reason not listed in paragraphs (b)(3)(i)(E)(1) through (4) of this section, if the request to change or add inscription information is received from the decedent's next of kin as indicated in NCA's records systems, within six months of the initial headstone or marker being provided.

(ii) To the extent practicable, replacement burial headstones and markers will be of the same style and type (to include inscription information) as those headstones or markers being replaced, except that style, type, or inscription information may differ for replacements if the reason for replacement is correction of the style, type, or inscription under one of the criteria in paragraphs (b)(3)(i)(D) and (E) of this section.

(iii) Requests to replace Government-furnished burial headstones, markers, or medallions are made as follows:

(A) Through NCA's electronic ordering systems, when the headstone, marker, or medallion to be replaced is located in a cemetery that uses NCA electronic ordering systems; or

(B) By completing and submitting VA Form 40-1330 or VA Form 40-1330M, when the headstone, marker, or medallion to be replaced is located in a cemetery that does not use NCA's electronic ordering systems.

(4) *Limitations.* (i) VA will not pay costs associated with installing a burial headstone or marker provided under this section for placement in a non-national cemetery, but VA will deliver such headstone or marker directly to the non-national cemetery where the grave is located or to a receiving agent for delivery to the cemetery.

(ii) VA will not pay costs associated with affixing a medallion provided under paragraph (a)(2) of this section to a privately purchased headstone or marker in a non-national cemetery, but VA will deliver such medallion directly to the applicant.

(5) *Ownership, alteration, and disposition.* (i) All Government-furnished headstones, markers, and medallions remain the property of the United States Government in perpetuity and should not be defaced or altered in any way. Knowingly converting Government property to private use (such as using whole or partial headstones or markers in structures or landscaping, or offering such items for sale) is a violation of Federal law under 18 U.S.C. 641.

(ii) Under 38 CFR 1.218(b)(5), the destruction, mutilation, defacement, injury, or removal of any monument, gravestone, or other structure within the limits of any national cemetery is prohibited, with an associated fine of \$500. Under 18 U.S.C. 1361, willful depredation of any property of the United States (i.e., a headstone or marker in a

non-national cemetery) shall be punishable by a fine or imprisonment under title 18, U.S.C.

(iii) When a Government-furnished burial headstone, marker, or medallion is removed from any cemetery it should be properly disposed. Unless a headstone or marker that has been removed from a cemetery would be maintained by NCA for historic purposes, or in cases of disinterment would be relocated to a different gravesite, such headstones or markers made of stone must be physically broken into small enough pieces to ensure no portion of the inscription is legible and to ensure no part is available for any private, personal, or commercial use, and those made of bronze must be returned to VA for recycling.

(c) *Definitions--(1) Applicant.* An applicant for a burial headstone or marker for an eligible deceased individual, or an applicant for a medallion to be affixed to a privately purchased headstone or marker, may be:

(i) A decedent's family member, which includes the decedent's spouse or individual who was in a legal union as defined in 38 CFR 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;

(ii) A personal representative, as defined in § 38.600(a)(8);

(iii) A representative of a congressionally chartered Veterans Service Organization;

(iv) An individual employed by the relevant state or local government whose official responsibilities include serving veterans and families of veterans, such as a state or county veterans service officer;

(v) Any individual who is responsible, under the laws of the relevant state or locality, for the disposition of the unclaimed remains of the decedent or for other matters relating to the interment or memorialization of the decedent; or

(vi) Any individual, if the dates of service of the veteran to be memorialized, or on whose service the eligibility of another individual for memorialization is based, ended prior to April 6, 1917.

(2) *Ascertainable*. Ascertainable means inscribed on the headstone or marker or discoverable from some inscription on the headstone or marker that corresponds to information that is reasonably accessible by the public (e.g., a corresponding burial ledger at the cemetery, or publicly available burial information accessible on the internet).

(3) *Local government*. Local government means the administrative body of a geographic area that is not a state, such as a county, city, or town.

(4) *Medal of Honor recipient*. Medal of Honor recipient means an individual who is awarded the Medal of Honor under sec. 3741, 6241, or 8741 of title 10 or sec. 491 of title 14, United States Code.

(5) *Privately purchased and durable headstone or marker*. Privately purchased and durable headstone or marker means a headstone or marker that was not purchased or provided by the Government, and that is made of a material (such as but not limited to stone) that is lasting and not anticipated to unduly degrade under exposure to the environment in which it is placed.

(6) *Unmarked grave*. Unmarked grave means a grave in a cemetery where:

(i) A Government-furnished headstone or marker has not been erected or installed at the grave, or the condition of a Government-furnished headstone or marker erected or installed at the grave warrants replacement under paragraph (b)(3) of this section; and

(ii) A privately purchased and durable headstone or marker, from which the buried individual's name (if known) is ascertainable:

(A) Has not been erected or installed at the grave; or

(B) Is damaged beyond repair; or

(C) Has deteriorated to the extent it no longer serves to identify the buried decedent (e.g., identifying elements of an inscription are not legible); or

(D) Has been stolen or vandalized.

(Authority: 38 U.S.C. 2306, 2402, 2404; sec. 203(b), Pub. L. 110-157, 121 Stat. 1831).

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0222.)

5. Revise § 38.361 to read as follows:

§ 38.631 Memorial headstones and markers.

(a) *Eligibility.* (1) VA will furnish, when requested under paragraph (b)(1) of this section, a memorial headstone or marker to commemorate the following individuals whose remains are unavailable:

(i) A veteran (which includes an individual who dies in the active military, naval, or air service), where the headstone or marker may be provided for a national cemetery, State veterans cemetery, a private cemetery, or local government cemetery;

(ii) A veteran's spouse or surviving spouse (which includes a surviving spouse who had a subsequent remarriage) who died on or after November 11, 1998, where the headstone or marker may be provided for a national cemetery or a State veterans cemetery;

(iii) A veteran's dependent child who died on or after November 11, 1998, where that headstone or marker may be provided for a national cemetery or a State veterans cemetery, if that dependent child is:

(A) Under the age of 21 years;

(B) Under the age of 23 years if pursuing a course of instruction at an approved educational institution; or

(C) Unmarried and became permanently physically or mentally disabled and incapable of self-support before reaching the age of 21 years, or before reaching the age of 23 years if pursuing a course of instruction at an approved educational institution.

(2) When VA has furnished a burial headstone or marker under § 38.630(a)(1), VA will, if feasible, add a memorial inscription to that headstone or marker (or provide a replacement headstone or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C. 2306(g)(1).

(3) When VA has furnished a memorial headstone or marker under paragraph (a)(1) of this section for purposes of commemorating a veteran or an individual who died

in the active military, naval, or air service, VA will, if feasible, add a memorial inscription to that headstone or marker (or provide a replacement headstone or marker to newly include a memorial inscription) rather than furnishing a separate memorial headstone or marker for the surviving spouse or eligible dependent child of such individual, in accordance with 38 U.S.C. 2306(g)(2).

(b) *General--(1) Application.* (i) An applicant, as defined in paragraph (c)(1) of this section, may request a memorial headstone or marker by completing and submitting VA Form 40-1330, Claim for Standard Government Headstone or Marker. VA Form 40-1330 includes application and submission instructions and is accessible through the following link: <https://www.va.gov/vaforms/va/pdf/VA40-1330.pdf>.

(ii) A representative of a private cemetery or local government cemetery that accepts delivery of a memorial headstone or marker must certify on VA Form 40-1330 that placement of the headstone or marker adheres to the policies or guidelines of the cemetery in which the grave is located.

(2) *Styles, types, and inscriptions.* The styles and types of memorial headstones and markers provided under this section, as well as the inscriptions thereon to include emblems of belief, will be provided in accordance with VA policy as well as in a manner consistent with 38 U.S.C. 2306(c).

(i) The styles and types of memorial headstones and markers made available for selection, as well as the inscriptions thereon, may be limited in accordance with certain requirements, including but not limited to aesthetic or administrative requirements of a cemetery.

(ii) All inscriptions for memorial headstones and markers must be preceded by the phrase "In Memory Of".

(iii) If an emblem of belief is requested that is not offered in VA's inventory of images for emblems of belief, additional requirements apply under § 38.632.

(3) *Replacement.* (i) Upon request, VA will replace a Government-furnished memorial headstone or marker, if the previously furnished headstone or marker:

(A) Is damaged beyond repair; or

(B) Has deteriorated to the extent it no longer serves to identify the decedent (e.g., identifying elements of an inscription are not legible, such as a decedent's name); or

(C) Has been stolen or vandalized; or

(D) Is the incorrect style or type for the veteran's era of service; or

(E) Requires changing or adding inscription information for the following reasons:

(1) The inscription is not preceded by the phrase "In Memory Of"; or

(2) To correct errors in factual information (such as name or dates of birth or death) provided to VA as part of the initial application process; or

(3) To indicate information related to the deceased's military service that is provided to VA after the initial application process (such as the deceased's posthumous receipt of military awards); or

(4) To identify a spouse or dependent in accordance with 38 U.S.C. 2306(g)(2); or

(5) For any reason not listed in paragraphs (b)(3)(i)(E)(1) through (4) of this section, if the request to add or change inscription information is received from the decedent's next of kin as indicated in NCA's records systems, within six months of the headstone or marker initially being provided.

(ii) To the extent practicable, replacement memorial headstones and markers will be of the same style and type (to include inscription information) as those being replaced, except that style, type, or inscription content may differ for replacement headstones and markers if one of the criteria under paragraphs (b)(3)(i)(D) and (E) of this section is the reason for replacement.

(iii) Requests to replace Government-furnished memorial headstones and markers are made as follows:

(A) Through NCA's electronic ordering systems, when the headstone or marker to be replaced is located in a cemetery that uses NCA electronic ordering systems; or

(B) By completing and submitting VA Form 40-1330, when the headstone or marker to be replaced is located in a cemetery that does not use NCA's electronic ordering systems.

(4) *Limitations.* VA will not pay the cost of installing a memorial headstone or marker provided under this section for placement in any cemetery that is not a national cemetery, but will deliver the headstone or marker directly to such cemetery or to a receiving agent for delivery to the cemetery.

(5) *Ownership, alteration, and disposition.* (i) All Government-furnished memorial headstones and markers remain the property of the United States Government in perpetuity, and should not be defaced or altered in any way. Knowingly

converting Government property to private use (such as using whole or partial headstones or markers in structures or landscaping, or offering such items for sale) is a violation of Federal law under 18 U.S.C. 641.

(ii) Under 38 CFR 1.218(b)(5), the destruction, mutilation, defacement, injury, or removal of any monument, gravestone, or other structure within the limits of any national cemetery is prohibited, with an associated fine of \$500. Under 18 U.S.C. 1361, willful depredation of any property of the United States (i.e. a headstone or marker in a non-national cemetery) shall be punishable by a fine or imprisonment under title 18, U.S.C.

(iii) When a Government-furnished memorial headstone or marker is removed from any cemetery (due to it warranting replacement under paragraph (b)(3) of this section), it should be properly disposed. Unless a memorial headstone or marker that has been removed from a cemetery would be maintained by NCA for historic purposes, such headstones and markers made of stone must be physically broken into small enough pieces to ensure no portion of the inscription is legible and to ensure no part is available for any private, personal, or commercial use, and those made of bronze must be returned to VA for recycling.

(c) *Definitions--(1) Applicant.* An applicant for a memorial headstone or marker, to commemorate an eligible individual under paragraph (a)(1) of this section, must be a member of the decedent's family, which includes: the decedent's spouse or individual who was in a legal union as defined in 38 CFR 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.

(2) *Unavailable remains.* An individual's remains are considered unavailable if they:

- (i) Have not been recovered or identified; or
- (ii) Were buried at sea, whether by the individual's own choice or otherwise; or
- (iii) Were donated to science; or
- (iv) Were cremated and the ashes scattered without interment of any portion of the ashes.

(Authority: 38 U.S.C. 2306, 2402, 2404).

6. Amend § 38.632 by:

- a. Revising the section heading and paragraph (a).
- b. Removing paragraph (c).
- c. Redesignating paragraphs (d) through (h) as paragraphs (c) through (g), respectively.
- d. In newly redesignated paragraph (c), revising the table.
- e. In newly redesignated paragraph (f), revising paragraphs (f)(2) and (5).
- f. In newly redesignated paragraph (g):
 - i. Revising paragraphs (g)(1) and (2).
 - ii. Redesignating paragraphs (g)(3) and (4) as paragraphs (g)(4) and (5), respectively.
 - iii. Adding new paragraph (g)(3).

The revisions and addition read as follows:

§ 38.632 Emblems of belief.

(a) *General.* This section contains procedures for requesting the inscription of new emblems of belief on Government-furnished headstones and markers.

* * * * *

(c) * * *

If the burial or memorialization of an eligible individual is in a:	The applicant must:
(1) Federally-administered cemetery or a State veterans cemetery that uses the NCA electronic ordering system	(i) Submit a written request to the director of the cemetery where burial is requested indicating that a new emblem of belief is desired for inscription on a Government-furnished headstone or marker; and (ii) Provide the information specified in paragraph (d) of this section to the NCA Director of Memorial Programs Service.
(2) Private cemetery (deceased eligible veterans only), Federally-administered cemetery, or a State veterans cemetery that does not use the NCA electronic ordering system	(i) Submit a completed VA Form 40-1330 to the NCA Director of Memorial Programs Service, indicating in the REMARKS section of the form that a new emblem of belief is desired; and (ii) Provide the information specified in paragraph (d) of this section to the NCA Director of Memorial Programs Service.

* * * * *

(f) * * *

(2) The applicant has submitted a certification concerning the emblem that meets the requirements of paragraph (d)(1) of this section.

(i) In the absence of evidence to the contrary, VA will accept as genuine an applicant's statement regarding the sincerity of the religious or functionally equivalent belief system of a deceased eligible individual. If a factual dispute arises concerning whether the requested emblem represents the sincerely held religious or functionally equivalent belief of the decedent, the Director will evaluate whether the decedent gave specific instructions regarding the appropriate emblem during his or her life and the Under Secretary will resolve the dispute on that basis.

(ii) In the absence of such instructions, the Under Secretary will resolve the dispute in accordance with the instructions of the decedent's surviving spouse. If the decedent is not survived by a spouse, the Under Secretary will resolve the dispute in accordance with the agreement and written consent of the decedent's living next-of-kin. For purposes of resolving such disputes under this section, next-of-kin means the living person(s) first listed as follows:

(A) The decedent's children 18 years of age or older, or if the decedent does not have children; then

(B) The decedent's parents, or if the decedent has no surviving parents; then

(C) The decedent's siblings.

* * * * *

(5) The emblem meets the technical requirements for inscription specified in paragraph (d)(2) of this section.

(g) * * * (1) A decision will be made on all complete applications. A request to inscribe a new emblem on a Government-furnished headstone or marker shall be granted if the Under Secretary for Memorial Affairs finds that the request meets each of the applicable criteria in paragraph (f) of this section. In making that determination, if there is an approximate balance between the positive and negative evidence concerning any fact material to making that determination, the Under Secretary shall give the benefit of the doubt to the applicant. The Under Secretary shall consider the recommendation of the Director of NCA's Office of Field Programs and may consider information from any source.

(2) If the Under Secretary for Memorial Affairs determines that allowing the inscription of a particular proposed emblem would adversely affect the dignity and solemnity of the cemetery environment or that the emblem does not meet the technical requirements for inscription, the Under Secretary shall notify the applicant in writing and offer to the applicant the option of either:

(i) Omitting the part of the emblem that is problematic while retaining the remainder of the emblem, if this is feasible; or

(ii) Choosing a different emblem to represent the religious or functionally equivalent belief that does not have such an adverse impact.

(3) Applicants will have 60 days from the date of the notice to cure any adverse impact or technical defect identified by the Under Secretary. Only if neither option is acceptable to the applicant, the applicant's requested alternative is also unacceptable,

or the applicant does not respond within the 60-day period, will the Under Secretary ultimately deny the application.

* * * * *

§ 38.633 [Amended]

7. Amend § 38.633 by removing the last sentence in paragraph (a)(2).

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

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

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

SUBPART A – GENERAL PROVISIONS

§39.10 [Amended]

9. Amend § 39.10 by removing “38 CFR 38.600(b)” every place it currently appears and adding “38 CFR 38.600(a)” in its place.

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