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Federal Regulations**

Title 38, Parts 0, 1, 2, 12, 14-16,
18-20, 25-26, 38-45, 48-49, 74-75

General

Veterans Benefits Administration

Supplement No. 90

Covering period of *Federal Register* issues
through June 2, 2009

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GENERAL INSTRUCTIONS

Custom Federal Regulations Service™

Supplemental Materials for *Book A*

Code of Federal Regulations

Title 38, Parts 0, 1, 2, 12, 14-16, 18-20, 25-26, 38-45, 48-49, 74-75

General

Veterans Benefits Administration

Supplement No. 90

5 June 2009

Covering the period of Federal Register issues
through June 2, 2009

When **Book A** was originally prepared, it was current through final regulations published in the *Federal Register* of 21 April 1992. These supplemental materials are designed to keep your regulations up to date. You should file the attached pages immediately, and record the fact that you did so on the *Supplement Filing Record* which begins on page A-8 of Book A, *General*.

**To ensure accuracy and timeliness of your materials,
it is important that you follow these simple procedures:**

1. Always file your supplemental materials immediately upon receipt.
2. Before filing, always check the Supplement Filing Record (page A-8) to be sure that all prior supplements have been filed. If you are missing any supplements, contact the Veterans Benefits Administration at the address listed on page A-2.
3. After filing, enter the relevant information on the Supplement Filing Record sheet (page A-8)—the date filed, name/initials of filer, and date through which the *Federal Register* is covered.
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To execute the filing instructions, simply remove *and throw away* the pages listed under *Remove These Old Pages*, and replace them in each case with the corresponding pages from this supplement listed under *Add These New Pages*. Occasionally new pages will be added without removal of any old material (reflecting new regulations), and occasionally old pages will be removed without addition of any new material (reflecting rescinded regulations)—in these cases the word *None* will appear in the appropriate column.

FILING INSTRUCTIONS

**Book A, Supplement No. 90
June 5, 2009**

*Remove these
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*Section(s)
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38.INDEX-1 to 38. INDEX -2	38.INDEX-1 to 38. INDEX -2	Index to Part 38
38.631-1 to 38.632-1	38.631-1 to <u>38.632-5</u>	§638.632

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HIGHLIGHTS

**Book A, Supplement No. 90
June 5, 2009**

Supplement Highlights references: Where substantive changes are made in the text of regulations, the paragraphs of *Highlights* sections are cited at the end of the relevant section of text. Thus, if you are reading §3.263, you will see a note at the end of that section which reads: “Supplement *Highlights* references—6(2).” This means that paragraph 2 of the *Highlights* section in Supplement No. 6 contains information about the changes made in §3.263. By keeping and filing the *Highlights* sections, you will have a reference source explaining all substantive changes in the text of the regulations.

Supplement frequency: This Book A (*General*) was originally supplemented twice a year, in April and October. Beginning 1 August 1995, supplements will be issued *every month* during which a final rule addition or modification is made to the parts of Title 38 covered by this book. Supplements will be numbered consecutively as issued.

Modifications in this supplement include the following:

1. On 1 June 2009, the VA published a final rule, effective 1 July 2009, to amend VA regulations concerning headstones and markers furnished by the Government through the VA headstone and marker program by updating ordering procedures for headstones and markers, providing instructions for requesting the addition of a new emblem of belief to the VA’s list of emblems available for inscription on Government-furnished headstones and markers, and establishing criteria to guide the VA’s decisions on requests to add new emblems of belief to the list.
Change:

- Revised §38.632.



Part 38

**National Cemeteries of the
Department of Veterans Affairs**

Authority: 38 U.S.C. 107, 501, 512, chapter 24, 7105, and as noted in specific sections.

Source: 70 FR 4769, January 31, 2005, unless otherwise indicated.

— Section Title Index —

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Reserved

§38.631 Graves marked with a private headstone or marker.

(a) VA will furnish an appropriate Government headstone or marker for the grave of a decedent described in paragraph (b) of this section, but only if the individual requesting the headstone or marker certifies 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.

(b) The decedent referred to in paragraph (a) of this section is one who:

(1) Died on or after November 1, 1990;

(2) Is buried in a private cemetery; and

(3) Was eligible for burial in a national cemetery, but is not an individual described in 38 U.S.C. 2402(4), (5), or (6).

(c) VA will deliver the headstone or marker directly to the cemetery where the grave is located or to a receiving agent for delivery to the cemetery.

(d) VA will not pay the cost of installing a Government headstone or marker in a private cemetery.

(e) The applicant 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.

(f) VA will furnish its full product line of Government headstones or markers for private cemeteries.

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

[70 FR 4769, Jan. 31, 2005, as amended at 72 FR 53432, Sept. 19, 2007; 73 FR 27463, May 13, 2008]

Supplement *Highlights* reference: 83(1)

§38.632 Headstone or marker application process.

(a) *General.* This section contains procedures for ordering a Government-furnished headstone or marker through the National Cemetery Administration (NCA) headstone and marker application process for burial or memorialization of deceased eligible veterans and eligible family members. It also contains procedures for requesting the inscription of new emblems of belief on Government-furnished headstones and markers.

(b) *Definitions.* For purposes of this section:

(1) *Applicant* means the decedent's next-of-kin (NOK), a person authorized in writing by the NOK, or a personal representative authorized in writing by the decedent to apply for a Government-furnished headstone or marker and, in appropriate instances, a new emblem of belief for inscription on a Government-furnished headstone or marker.

(2) *Emblem of Belief* means an emblem that represents the decedent's religious affiliation or sincerely held religious belief system, or a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent. 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. The religion or belief system represented by an emblem need not be associated with or endorsed by a church, group or organized denomination. Emblems of belief do not include social, cultural, ethnic, civic, fraternal, trade, commercial, political, professional or military emblems. VA will not accept any emblem that would have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation, including (but not limited to) emblems that contain explicit or graphic depictions or descriptions of sexual organs or sexual activities that are shocking, titillating, or pandering in nature; and emblems that display coarse or abusive language or images.

(3) *Federally-administered cemetery* means a VA National Cemetery, Arlington National Cemetery, the Soldiers' and Airmen's Home National Cemetery, a military post or base cemetery of the Armed Forces, a service department academy cemetery, and a Department of the Interior National Cemetery.

(4) *Headstones or markers* means headstones or markers that are furnished by the Government to mark the grave or memorialize a deceased eligible veteran or eligible family member.

(5) *State veterans cemetery* means a cemetery operated and maintained by a State or territory for the benefit of deceased eligible veterans or eligible family members.

(c) *Headstone or Marker Application Process.*

(1) Headstones or markers will be ordered automatically during the process of arranging burial or memorialization for a deceased eligible veteran or eligible family member in a national cemetery or a State veterans cemetery that uses the NCA electronic ordering system. Cemetery staff will order a Government-furnished headstone or marker by entering information

received from the applicant directly into the NCA electronic ordering system. Unless a new emblem of belief is requested (see paragraph (d)(1) of this section), no further application is required to order a Government-furnished headstone or marker when the national or state cemetery uses the NCA electronic ordering system.

(2) Submission of a completed VA Form 40-1330 (Application for Standard Government Headstone or Marker) is required when a request for a Government-furnished headstone or marker is not made using the NCA electronic ordering system. VA Form 40-1330 requires the applicant to provide information about the decedent, inscription preferences, and placement of headstone or marker. There is a space in the Remarks section of VA Form 40-1330 for applicants to clarify information or make special requests, to include an emblem of belief that is not currently available. To access VA Form 40-1330 use the following link: <http://www.va.gov/vaforms/va/pdf/40-1330.pdf>.

(d) *Application Process for New Emblems of Belief.* When there is an immediate need, and the applicant requests a new emblem of belief for inscription on a new, first Government-furnished headstone or marker for a deceased eligible individual, the following procedures will apply:

If the burial or memorialization of an eligible individual is in a:

(1) Federally-administered cemetery or a State veterans cemetery that uses the NCA electronic ordering system.

The applicant must:

(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 (e) of §38.632 to the NCA Director of Memorial Programs Service.

If the burial or memorialization of an eligible individual is in a:

(2) Private cemetery (deceased eligible veterans only), Federally-administered cemetery or a State veterans cemetery that does not use the NCA electronic ordering system.

The applicant must:

(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 (e) of §38.632 to the NCA Director of Memorial Programs Service.

(e) *Application.* The applicant must identify the deceased eligible individual for whom a request has been made to add a new emblem of belief to those emblems of belief available for inscription on Government-furnished headstones and markers. The application must include the following:

(1) Certification by the applicant that the proposed new emblem of belief represents the decedent's religious affiliation or sincerely held religious belief system, or a sincerely held belief system that was functionally equivalent to a religious belief system in the life of the decedent.

(2) A three-inch diameter digitized black and white representation of the requested emblem that is free of copyright or trademark restrictions or authorized by the owner for inscription on Government-furnished headstones and markers and can be reproduced in a production-line environment in stone or bronze without loss of graphic quality.

(f) *Incomplete application.* If VA determines that an application for a new emblem of belief is incomplete, VA will notify the applicant in writing of any missing information and that he or she has 60 days to submit such information or no further action will be taken. If the applicant does not submit all required information or demonstrate that he or she has good cause for failing to provide the information within 60 days of the notice, then the applicant will be notified in writing that no further action will be taken on the request for a new emblem.

(g) *Evaluation criteria.* The Director of NCA's Office of Field Programs shall forward to the Under Secretary for Memorial Affairs all complete applications, any pertinent records or information, and the Director's recommendation after evaluating whether:

(1) The applicant has demonstrated that there is an immediate need to inscribe the emblem on a new, first, Government-furnished headstone or marker for a deceased eligible individual, unless good cause is shown for an exception;

(2) The applicant has submitted a certification concerning the emblem that meets the requirements of paragraph (e)(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, 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.

(3) The emblem meets the definition of an emblem of belief in paragraph (b)(2);

(4) The emblem would not have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation—for example, the emblem cannot contain explicit or graphic depictions or descriptions of sexual organs or sexual activities that are shocking, titillating, or pandering in nature, or display coarse or abusive language or images. A determination that an emblem would have an adverse impact on the dignity and solemnity of cemeteries honoring those who served the Nation may not be made based on the content of the religious or functionally equivalent belief that the emblem represents.

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

(h) *Decision by the Under Secretary for Memorial Affairs.*

(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 (g) 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 Director of NCA's Office of Field Programs' recommendation 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.

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.

(3) If the Under Secretary determines that the request should be denied and that decision is based wholly or partly on information received from a source other than the applicant, then the following procedure will be followed:

(i) A tentative decision denying the request will be prepared;

(ii) Written notice of the tentative decision accompanied by a copy of any information on which the Under Secretary intends to rely will be provided to the applicant;

(iii) The applicant will have 60 days from the date of the written notice specified in subparagraph (ii) to present evidence and/or argument challenging the evidence and/or tentative decision; and

(iv) The Under Secretary will consider the applicant's submission under subparagraph (iii) and will issue a final decision on the request.

(4) The Director, Office of Field Programs, will provide the individual who made the request written notice of the Under Secretary's decision. Authority: (38 U.S.C. 501, 2404).

[70 FR 4769, Jan. 31, 2005, as amended at 74 FR 26096, June 1, 2009]

Supplement *Highlights* reference: 90(1)