DEPARTMENT OF VETERANS AFFAIRS 8320-01

38 CFR Part 9

RIN 2900-AN40

Servicemembers' Group Life Insurance and Veterans' Group Life Insurance—Slayer's Rule Exclusion

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs adopts as final, without change, the final rule seeking comments published on October 3, 2012, amending its regulations governing Servicemembers' Group Life Insurance (SGLI) and Veterans' Group Life Insurance (VGLI). Specifically, this rule prohibits paying insurance proceeds because of the death of a person (decedent) whose life was insured under SGLI or VGLI , or paying a SGLI Traumatic Injury Protection (TSGLI) benefit to a person (slayer) convicted of intentionally and wrongfully killing the decedent or determined in a civil proceeding to intentionally and wrongfully killing the decedent. This prohibition of payment also applies to any family member of the slayer who is not related to the decedent and to any person who assisted the slayer in causing the death of the decedent. Additionally, the term "domestic partner" is removed from the definition of "member of the family".

DATES: Effective Date: This final rule is effective [insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Monica Keitt, Attorney/Advisor, Department of Veterans Affairs, Insurance Center, 5000 Wissahickon Avenue, Philadelphia, PA 19144, (215) 842-2000, ext. 2905. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On October 3, 2012, VA published in the Federal Register (77 FR 60304) a final rule seeking comments that amended 38 CFR 9.1 and 9.5 to prevent certain persons from receiving insurance proceeds through the SGLI, VGLI, or TSGLI program as beneficiaries. The rule prevents payment of proceeds to any persons (slayer) found criminally or civilly liable for intentionally and wrongfully killing a person (decedent) insured under SGLI or VGLI or who is eligible for a TSGLI benefit. It also prevents payment to any persons found criminally or civilly liable for assisting or aiding such a slayer and any member of the slayer's family who is not related to the decedent by blood, legal adoption, or marriage. In a proposed rule published on December 13, 2011, (76 FR 77455), "domestic partner" was added to the definition of "member of the family" in 38 CFR 9.1(l) for the purposes of 38 CFR 9.5(e) to prevent unjust enrichment of persons who are domestic partners of the slayer based on the rationale that these persons are often in relationships with the slayer equivalent to being "relatives" of the slayer. Then, in the final rule published on October 3, 2012, VA removed the term "domestic partner" from the definition of "member of the family" for the purposes of § 9.5(e) "due to the unsettled legal landscape surrounding the recognition of such partnerships". 77 FR at 60305. VA explained that because recognition of the legality of such relationships varies from state to state, VA determined that including such partnerships in this part would cause an undue administrative

burden. Interested persons were invited to submit, on or before December 3, 2012, written comments regarding removing the term "domestic partner" from the definition. VA received comments from three individuals objecting to removing the term.

Public Comments Regarding Removal of the Term "Domestic Partner"

Two commenters noted that some federal agencies, including VA, have expanded their program definitions of family members to include domestic partners. One commenter noted that a Presidential Memorandum directed Federal agencies to extend certain benefits currently available to Federal employees' spouses and their children to Federal employees' same-sex domestic partners and their children. See Presidential Memorandum—Extension of Benefits to Same-Sex Domestic Partners of Federal Employees (June 2, 2010). One commenter noted that other Federal agencies, such as the General Services Administration, have established through regulations definitions of family members that include domestic partners.

One commenter also stated that failure to include domestic partners in the definition of "member of the family" would allow a same-sex domestic partner of a slayer to circumvent the regulation, while prohibiting heterosexual spouses of a slayer from receiving insurance benefits. This commenter also stated that "…[i]ncluding domestic partners is important to prevent an aberration in the rule…" and to "…prevent[ ] the unjust collection of life insurance benefits."

Two commenters noted that the Department of Defense changed its military policies regarding openly gay and lesbian servicemembers, thus VA should change its policy here, since VA is a related agency that serves servicemembers and their families.

Two commenters also noted that VA has recognized domestic partnerships in other VA related matters. Specifically, the commenters pointed to VA's hospital visitation policy allowing persons designated as domestic partners to be beneficiaries for SGLI and VGLI benefits.

Lastly, one commenter noted that removal of the term domestic partner "sends a message that VA may not be willing to recognize domestic partners as family in any context." However, recent Supreme Court cases and the United States Attorney General help to clarify legally accepted definitions. On June 26, 2013, the Supreme Court in United States v. Windsor, 133 S. Ct. 2675 (2013), held that the Defense of Marriage Act (DOMA), Sec. 3, Pub. L. 104-199, 110 Stat. 2419, defining "marriage" and "spouse" for purposes of federal law to preclude recognition of marriages of same-sex couples, is unconstitutional because it violates Fifth Amendment principles by discriminating against same-sex couples who are legally married under state law. VA administers federal benefits and programs that require defining "spouse" and "surviving spouse." For purposes of VA benefits, 38 U.S.C. 101(3) and 101(31) define "surviving spouse" and "spouse" as persons "of the opposite sex." However these definitions (codified separately from DOMA) were not specifically addressed in the Supreme Court's Windsor decision. Then on September 4, 2013, the United States Attorney General announced that the President had directed the Executive Branch to cease enforcement of 38 U.S.C. 101(3) and 101(31), to the extent they preclude provision of veterans' benefits to same-sex married couples, but was silent as to "domestic partners". Accordingly, VA ceased to enforce the definitional provisions in title 38 to the extent they preclude provision of veterans' benefits, including SGLI, VGLI, and TSGLI

benefits, to same-sex married couples. As a result, VA administers spousal and survivors' benefits to same-sex married couples, provided the marriages meet the requirements of 38 U.S.C. 103(c). Section 103(c) provides that, for purposes of all laws administered by VA, a veteran's marriage is to be recognized according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.

On June 26, 2015, the Supreme Court in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), held that the Fourteenth Amendment of the U.S. Constitution requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state, but again did not include "domestic partners". Accordingly, VA now recognizes all lawful same-sex marriages for VA purposes.

In light of Windsor and Obergefell, VA no longer enforces the title 38 definitions of "spouse" and "surviving spouse" to the extent that they exclude the recognition of same-sex married couples. However, In other words, VA provides benefits to all same-sex "spouses" and "surviving spouses" of veterans or, in the case of insurance benefits, of servicemembers or former servicemembers, to the extent they are otherwise eligible, based on a State's recognition of the validity of the marriage. However, VA does not currently provide all the same spousal benefits to either same-sex or opposite-sex domestic partners of veterans or, in the case of insurance benefits, of servicemembers or former servicemembers.

The comments we received essentially concern equal treatment of same-sex couples and opposite-sex couples. The Supreme Court in Windsor and Obergefell

accomplished that with regard to marriages but did not address other relationships, such as domestic partnerships or legal unions. Thus, those decisions do not affect VA's decision to remove "domestic partner" from the § 9.1(l) definition of "member of the family." Windsor and Obergefell have not changed the unsettled legal landscape surrounding the recognition of both same-sex and opposite-sex domestic partnerships. For instance, recognition of the legality of domestic partnerships continues to vary from state to state and, because the term is not used consistently from state to state, there remains inter-jurisdictional confusion regarding use of that term. Therefore, including domestic partnerships, of both same-sex couples and opposite-sex couples, in the definition of "member of the family" in § 9.1(l) would cause an undue administrative burden in applying 38 CFR 9.5(e).

Two commenters suggested that VA could establish its own uniform definition of "domestic partnership" rather than relying upon varying state laws. The commenters pointed to regulations of other federal agencies establishing definitions of "domestic partnerships." We decline that suggestion for the following reasons. First, it would create inconsistency between VA's recognition of marriages, which, under 38 U.S.C. 103(c), is expressly based on state laws recognizing marriages, and VA's recognition of domestic partnerships or civil unions, which, under the commenters' suggestion, could be inconsistent with state laws governing recognition of such relationships. Second, defining the term "domestic partner" without regard to state law would require VA to undertake difficult and burdensome fact-finding actions under imprecise standards. We note that the other agency regulations cited by the commenters are varied and often employ vague and subjective standards, such as requiring a finding that the individuals

are in a “committed relationship” or “agree to be responsible for each other’s common welfare,” which may lead to inconsistency in application. Third, VA likely would face difficulty in developing evidence to establish that such standards are satisfied. The primary evidence of whether individuals were in a “committed relationship” often may be the testimony of the individuals in that relationship. Such evidence may be difficult to obtain or may be unreliable in relation to this rule, which, unlike the examples cited by the commenters, would preclude, rather than extend, benefits based upon the relationship.

Regarding a comment that excluding domestic partnerships from the definition of “family members” may result in unjust enrichment to certain domestic partners of persons causing the death of an insured individual, we acknowledge that this is a potential consequence of the rule. However, the alternative standards we have considered, including following varied state laws governing domestic partnerships or establishing our own definition of “domestic partnership” based in part on subjective standards, would also pose a risk of yielding inconsistent results and possibly allowing unjust enrichment to certain individuals in specific cases. We believe we have appropriately balanced those risks with the interests of clarity, consistency, and administrative efficiency in determinations made under this rule. Accordingly, VA declines to make any changes to this rulemaking based on the above comments.

Justification for the Final Rule Seeking Comments

One commenter noted that VA failed to provide good cause for dispensing with advance public notice and the opportunity for public comment. Specifically, the

commenter stated that VA failed to provide a sufficient justification for citing "public interest" and "impracticability" as reasons for proceeding without providing an opportunity for advance notice and comment. We correctly identified public interest as grounds for proceeding with final rule seeking comments, but could have been clearer in explaining that it would have been against the public's interest to delay implementation of the slayer provisions for the purpose of receiving comments on the definition of "member of the family." We designed the rule to prevent slayers from benefiting from their wrongdoing, and any delay in finalizing the rule would have potentially permitted slayers to receive benefits in violation of public policy and ethical concerns. Nonetheless, on October 3, 2012, VA provided the public formal notice and an opportunity to comment on the exclusion of the term "domestic partner" through publication of the final rule seeking comments. VA received comments on the exclusion, and we considered those comments in issuing this final rule. Additionally, we note that, since the publication of the October 3, 2012, rule, no case has been affected by the exclusion of "domestic partner" from the definition of "member of the family."

Based on the rationale set forth above and the preamble in the final rule seeking comments, VA adopts, without change, the rule published on October 3, 2012, at 77 FR 60304.

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 final rule will have no such effect on State, local, and tribal governments or on the private sector.

Paperwork Reduction Act

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

Executive Orders 12866 and 13563

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 Office of Management and Budget (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 this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at http://www.regulations.gov, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at http://www.va.gov/orpm/, by following the link for "VA Regulations Published from FY 2004 Through Fiscal Year to Date."

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this final rule will 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. This final rule will directly affect only individuals and will not directly affect any small entities. Therefore, this rulemaking is also exempt pursuant to 5 U.S.C. 605(b), from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.103, Life Insurance for 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. On April 6, 2016, Robert D. Snyder**,** Chief of Staff, Department of Veterans Affairs, approved this document for publication

List of Subjects in 38 CFR Part 9

Life insurance, Military personnel, Veterans.

Dated: April 7, 2016

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William F. Russo
Director,
Office of Regulation Policy & Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons set forth out in the preamble, VA adopts the final rule seeking comments published in the Federal Register at 77 FR 60304 on October 3, 2012, as final without change.

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