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**DEPARTMENT OF JUSTICE**

**28 CFR Part 104**

**[Docket No. CIV 151]**

**RIN 1105-AB49**

**James Zadroga 9/11 Victim Compensation Fund Reauthorization Act.**

**AGENCY:** Department of Justice.

**ACTION:** Interim final rule.

**SUMMARY:** On December 18, 2015, President Obama signed into law the James Zadroga 9/11 Victim Compensation Fund Reauthorization Act (the “Reauthorized Zadroga Act”). The Act extends the September 11th Victim Compensation Fund of 2001 which provides compensation to any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the rescue and recovery efforts during the immediate aftermath of such crashes or the debris removal efforts that took place in the immediate aftermath of those crashes. Special Master Sheila L. Birnbaum, appointed by the Attorney General to administer the Fund, is issuing this Interim Final Rule to address changes required by the Reauthorized Zadroga Act. Specifically, the statute extends the time period during which eligible claimants may submit claims for compensation until December 18, 2020, increases the Victim Compensation Fund’s total funding available to pay claims, creates different categories of claims, directs the Victim Compensation Fund to issue full compensation to eligible claimants and imposes limitations on certain components of future loss calculations.

**DATES:** *Effective date:* This rule is effective June 15, 2016. *Comment date:* Written comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight Eastern Time at the end of that day.

**ADDRESSES:** Please address all comments regarding this rule by U.S. mail to: Jordana Feldman, September 11th Victim Compensation Fund, Civil Division, U.S. Department of Justice, 290 Broadway, Suite 1300, New York, New York 10007. To ensure proper handling, please reference CIV Docket No. 151 on your correspondence. Comments may also be sent electronically through <http://regulations.gov> using the electronic comment form provided on that site. An electronic copy of this document is also available at the <http://regulations.gov> website. The Civil Division will accept attachments to electronic comments in Microsoft Word, WordPerfect, or Adobe PDF formats only.

**FOR FURTHER INFORMATION CONTACT:** Catherine V. Emerson, Director, Office of Management Programs, Civil Division, U.S. Department of Justice, Main Building, Room 3140, 950 Pennsylvania Avenue, NW, Washington, DC 20530, telephone 855-885-1555 (TTY 855-885-1558).

**SUPPLEMENTARY INFORMATION:**

**Public Comments**

The Department is publishing this interim final rule, effective on June 15, 2016, the statutory deadline for updating the existing regulations in light of the statutory changes made by the Reauthorized Zadroga Act.

The Department is providing a 30-day period for public comment. The regulatory text of this rule is restating all of the provisions of 28 CFR 104, as revised, for ease of reference and application for the filing of claims. Commenters should be aware, though, that only certain portions of the existing regulations are being revised at this time, and the Department is only soliciting public comments on the changes being made from the existing text of the regulations in 28 CFR part 104. These changes are clearly indicated in a redlined/strikeout version of the regulatory text that is included at [www.regulations.gov](http://www.regulations.gov) and is available at [www.vcf.gov](http://www.vcf.gov) or by calling 855-885-1555 (TTY 855-885-1558). Accordingly, public comments will be considered only with respect to the revisions made by the interim final rule and not as to provisions of the regulations that were already in effect prior to enactment of the Reauthorized Zadroga Act.

### **Posting of Public Comments**

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Information made available for public inspection includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you wish to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not wish it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information that you do not want posted online in the first paragraph of your comment and identify what information you want the agency to redact. Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online.

If you wish to submit confidential business information as part of your comment but do not

wish it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, the agency may choose not to post that comment (or to only partially post that comment) on <http://www.regulations.gov>. Confidential business information identified and located as set forth above will not be placed in the public docket file, nor will it be posted online.

If you wish to inspect the agency's public docket file in person by appointment, please see the "For Further Information Contact" paragraph.

### **Background**

Pursuant to Title IV of Public Law 107–42 (“Air Transportation Safety and System Stabilization Act”) (2001 Act), the September 11th Victim Compensation Fund of 2001 was open for claims from December 21, 2001, through December 22, 2003. The Fund provided compensation to eligible individuals who were physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001, and to personal representatives of those who died as a result of the crashes.

Special Master Kenneth R. Feinberg was appointed by the Attorney General to administer the Fund. The Fund was governed by Interim Final Regulations issued on December 21, 2001, *see* 66 FR 66274, and by Final Regulations issued on March 13, 2002, *see* 67 FR 11233. During its two years of operation, the Fund distributed over \$7.049 billion to survivors of 2,880 persons killed in the September 11th attacks and to 2,680 individuals who were injured in the attacks or in the rescue efforts conducted thereafter. In 2004, Special Master Feinberg issued a report describing how the fund was administered. *See* Final Report of the Special

Master for the September 11th Victim Compensation Fund of 2001.

On January 2, 2011, President Obama signed Public Law No. 111-347, the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act) Public Law No. 114-113, Div. O, Title IV, into law. Title I of the Zadroga Act established a program within the Department of Health and Human Services to provide medical monitoring and treatment benefits to eligible individuals. Title II amended the 2001 Act and reopened the Fund. Among other changes, Title II added new categories of beneficiaries for the Fund and set new filing deadlines. It also imposed a cap on the total awards that can be paid by the Fund and limited the fees that an attorney may receive for awards made under the Fund.

The Zadroga Act did not appropriate administrative funds for the Fund to begin taking and processing claims. On April 15, 2011, President Obama signed into law Public Law 112-10, the continuing budget resolution for 2011, which permits the Fund to draw on the money originally allocated in the Zadroga Act in order to pay for its administrative expenses, beginning on October 1, 2011.

The Attorney General appointed Sheila L. Birnbaum to serve as Special Master and to administer the Fund. On June 21, 2011, the Special Master issued the Notice of Proposed Rulemaking, which provided for a 45-day public comment period. On August 26, 2011, after evaluating the comments received, the Special Master signed the Final Rule, and on August 31, 2011, the Final Rule was published in the Federal Register. *See* 76 FR 54112.

On December 18, 2015, President Obama signed into law Public Law 114-113, providing for the reauthorization of the Zadroga Act. The Reauthorized Zadroga Act extends the time period during which eligible claimants may submit claims, increases the Victim Compensation Fund's total funding available to pay claims, creates different categories of claims, directs the

Victim Compensation Fund to issue full compensation to eligible claimants and instructs the Victim Compensation Fund to implement certain changes to the policies and procedures used to evaluate and process claims.

This Interim Final Rule addresses those changes mandated by the statute. In accordance with the rulemaking process, this Interim Final Rule is effective on June 15, 2016. Once the rule is published in the Federal Register, there will be a 30-day public comment period. After that period, the Special Master will review and evaluate any comments and will publish a final rule with any clarifications or amendments deemed appropriate.

#### **A. Summary of Key Statutory Changes**

The Reauthorized Zadroga Act makes several changes to the Zadroga Act, including the following: the statute extends the deadline for filing claims; adds or changes certain eligibility definitions; establishes different categories of claims based on timing of the issuance of a letter setting forth the total amount of compensation to which a claimant is entitled; changes certain policies and procedures for evaluating claims and computing losses; removes a category of losses previously compensable by the Fund; requires that the amount of compensation to which a claimant is entitled not exceed the collateral source compensation that the claimant has received or is entitled to receive; increases the amount of funding available to pay claims and administrative costs and accelerates of the availability of funding; and directs the Fund to perform an annual reassessment of policies and procedures.

Specifically, the statute:

- Extends the deadline for filing a claim from the original deadline of October 3, 2016 to the new deadline of December 18, 2020;
- Codifies the definition of “9/11 crash site” to reflect the definition of the New

York City exposure zone provided in the 2011 regulations;

- Adds new definitions regarding the types of conditions covered by referencing WTC-related health conditions as defined by Section 3312(a) and 3322(b) of the Public Health Service Act (42 U.S.C. 300mm-22 and 300mm-32) and specifically excluding mental health conditions;
- Establishes two categories of claims – Group A and Group B – based on the date the Special Master “postmarks and transmits” a final award determination to the claimant;
- Imposes caps on the amount of non-economic loss that can be computed for different types of conditions (categorized as cancer and non-cancer);
- Imposes a \$200,000 cap on the annual gross income, as defined in Section 61 of the Internal Revenue Code, used to determine economic loss;
- Directs the Victim Compensation Fund to prioritize the compensation of claims that present the most debilitating physical conditions;
- Eliminates “future medical expense loss” as a compensable economic loss;
- Eliminates any minimum award to the extent that collateral source offsets exceed the amount of compensation;
- Makes the original \$2,775,000,000 appropriation available immediately to pay claims. Previously, only \$875,000,000 of this amount was available through October 3, 2016. It also provides an additional \$4,600,000,000 in funding that becomes available in October 2016; and
- Directs the Special Master to conduct an annual reassessment of policies and procedures.

## **B. Revisions to the Rule Conforming to Statutory Changes**

These interim final regulations amend the Department of Justice's August 2011 final regulations in order to reflect changes required by the Reauthorized Zadroga Act. Specifically:

- Section 104.2 Eligibility definitions and requirements is revised to include the definition of "Group A claims" and "Group B claims." It also includes the definition of a "WTC-Related Physical Health Condition", and makes clear that mental health conditions are not covered. This section also reflects the codification of the prior regulations in terms of one of the definitions of the "9/11 crash site" – the definition of the New York City exposure zone.
- Section 104.41 Amount of compensation is revised to reflect the statutory mandate that no Group B claim shall receive compensation greater than the amount of loss determined less the amount of any collateral source compensation that the claimant has received or is entitled to receive, thus eliminating the \$10,000 minimum award that the Fund issued for Group A claims in the event that collateral offsets exceeded losses.
- Section 104.43 Determination of presumed economic loss for decedents is revised to account for the \$200,000 annual gross income cap and the elimination of future medical expenses loss as a compensable loss.
- Section 104.44 Determination of presumed economic loss for injured claimants is revised to account for the \$200,000 annual gross income cap and the elimination of future medical expenses loss as a compensable loss.
- Section 104.46 Determination of presumed noneconomic losses for injured claimants is revised to reflect the noneconomic loss cap of \$250,000 for any single

type of cancer and a noneconomic loss cap of \$90,000 for any single type of non-cancer condition

- Section 104.51 Payments to eligible individuals is revised to reflect the amount and timing of availability of funding to pay claims and administrative costs: the \$2,755,000,000 previously appropriated over time to be made immediately available and paid as soon as practicable and an additional \$4,600,000,000 to be available in October 2016. The section also reflects the directive to the Special Master to prioritize the compensation of claims that present the most debilitating physical conditions. The section further addresses the statutory mandate to conduct an annual reassessment of policies and procedures and make adjustments as necessary to ensure that total expenditures do not exceed available funds.
- Section 104.62 Time limit on filing claims is revised to reflect the extended statutory deadline for filing claims, from October 3, 2016 to December 18, 2020.

### **C. Additional Regulatory Changes to Reduce Burdens for Claimants**

This rule includes four additional regulatory changes, not required by the statute. All of these changes are designed to benefit claimants or reduce claimant burden.

First, in section 104.3(c)(3), the definition of “spouse” has been expanded. Under the previous definition, the Special Master was required to identify the spouse of the deceased victim as the person who was reported or who legally could have been identified as the spouse on the victim’s Federal tax return for the year prior to the year of the victim’s death. The previous definition included two exceptions: (1) If the victim was married or divorced in accordance with applicable state law on or after January 1 of the year of the victim’s death; or (2) If the victim was not required by law to file a Federal tax return for the year prior to the year of the victim’s

death. The updated regulations expand this definition to include a third exception: If the victim had a same-sex spouse who was lawfully married to the victim under applicable state law. The 2011 regulations were published when Section 3 of the Defense of Marriage Act was in effect, prohibiting the Federal government from recognizing same-sex marriages. As such, same-sex married couples could not identify themselves as married on their tax returns. Since that time, that section was held to be unconstitutional. These updated regulations reflect the changed law. They also reflect the Fund's policy to treat a same-sex spouse who was legally married to the victim under applicable state law as a spouse for purposes of this program.

Second, section 104.22(c)(1) has been revised to remove the requirement that all claimants shall, at a minimum, submit all tax returns that were filed for the period beginning three years prior to the year of death or discovery of the injury and ending with the year the claim was filed or the year of death. Over the course of the program, the Special Master has found that this requirement can be burdensome in some cases where the tax returns are not necessary for determination. The Special Master retains the discretion to require the submission of tax returns where necessary for evaluation of the claim. For example, the Special Master may require the submission of tax returns where a claimant is seeking loss of self-employment income or loss of partnership income, or in order to evaluate whether an individual was identified on a deceased victim's Federal tax return for the year prior to the year of the victim's death. Accordingly, the updated regulations allow the Special Master discretion to determine whether and to what extent tax returns should be submitted for a particular claimant.

Third, section 104.45(e) has been added as a new paragraph to address the determination of noneconomic losses for claimants who have a WTC-Related Physical Condition and who are found eligible for economic loss. The Reauthorized Zadroga Act imposes caps on the amount of

noneconomic loss for an eligible cancer (\$250,000) and an eligible non-cancer condition (\$90,000). The revised regulations clarify that the Special Master shall determine the appropriate noneconomic loss for economic loss claims in the same manner that she determines noneconomic loss only claims, *see* section 104.46, taking into account the extent of disability and the fact that different eligible conditions may contribute to the disability.

The regulations further make clear in section 104.46 that the Reauthorized Zadroga Act does not place an aggregate cap on noneconomic loss but merely states that the loss for any type of cancer shall not exceed \$250,000 and the loss for any type of non-cancer shall not exceed \$90,000. A noneconomic loss may result from both a cancer and non-cancer condition and/or may result from more than one type of cancer. The revised regulations provide that the Special Master has discretion to consider the effect of multiple cancer conditions or multiple cancer and non-cancer conditions in computing the total noneconomic loss in such claims.

Fourth, section 104.52 has been revised to remove the requirement that, for a claim filed by a Personal Representative on behalf of a deceased victim, the Personal Representative shall submit a plan of distribution for any award received from the Fund before the payment is authorized. Because the Personal Representative has an independent fiduciary obligation to distribute the award in accordance with applicable state law or court order, this documentation may not be needed in every case. Therefore, the revised regulations allow the Special Master discretion to determine whether a distribution plan is required prior to authorizing the payment authorization on a particular claim.

### **Regulatory Certifications**

#### *Administrative Procedure Act*

The Department's implementation of this rule as an interim final rule, with provision for

post-promulgation public comment, is based on Sections 553(b)(A), 553(b)(B) and 553(d) of the Administrative Procedure Act. 5 U.S.C. 553. Under Section 553(b), an agency may issue a rule without notice of proposed rulemaking and the pre-promulgation opportunity for public comment where “good cause” exists or for “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.”

The revisions made by this interim final rule fit within the exceptions to the requirement for pre-promulgation opportunity for notice and comment set out in Section 553. *See* 5 U.S.C. 553(b)(A). All of the revisions identified in Part B above, “Revisions to the Rule Conforming to Statutory Changes” are interpretive rules issued by the Department to advise the public of the Department’s construction of the new statute. These revisions to the rule merely explain or clarify the application of the substantive law set forth in the Reauthorized Zadroga Act; they do not create new rights or impose obligations independent of the statute. As noted, the Reauthorized Zadroga Act requires revisions to the implementing regulations including extending the deadline for filing claims, defining different categories of claims (Group A and Group B), changing certain policies and procedures for evaluating claims and computing compensable losses and increasing the funding available to pay claims, among other things. The interim final rule merely incorporates those changes and explains certain provisions in more detail, such as those relating to the filing and evaluation of claims and computation of losses for claims defined as Group B under the statute.

The four additional changes, described in Part C, “Additional Regulatory Changes to Reduce Burdens for Claimants,” similarly are not subject to formal notice-and-comment requirements. The first change, to section 104.3(c)(3) is interpretive and clarifies the meaning of the term “spouse” consistent with law and pre-existing Department policy. The second and

fourth changes, which eliminate certain documentation requirements, see sections 104.22(c)(1) and 104.52, are procedural in nature; they eliminate a required component of the documentation submitted with a claim and instead advise that the Special Master retains the discretion to ask for these documents if needed. Finally, the addition of section 104.45(e) and the revisions of section 104.46 reflect general statements of policy; they serve only to advise the public that the Special Master may exercise her discretionary power in certain ways. For these reasons, the interim final rule is not subject to the formal notice-and-comment requirements under Section 553 of the APA.

Furthermore, an agency may find good cause to exempt a rule from provisions of the APA if it is determined that those procedures are impracticable, unnecessary, or contrary to the public interest. (5 U.S.C. 553(b)(B)). The Department finds that it is unnecessary and contrary to the public interest to seek public comment prior to promulgating this interim final rule for several reasons. First, delaying the implementation of the rule would delay the determination and payment of appropriate compensation for eligible Group B claims. Compensation determinations and corresponding payments will not be issued until the rule is effective. Thus, eligible claimants, particularly those suffering from terminal illness or extreme financial hardship, would be harmed by any delay. Second, the regulations that the interim final rule modifies were enacted pursuant to notice and comment rulemaking and to a large extent reflect changes recently mandated by statute. As previously discussed, the changes made by this interim final rule that are not mandated by the Reauthorized Zadroga Act reduce certain regulatory burdens on claimants or otherwise benefit the claimant by alleviating unnecessary document submission requirements and asserting the Special Master's discretion to prioritize the compensation of claims based on indicators that demonstrate severity of the claimant's eligible

conditions. Third, the interim rule will be subject to public comment before its final implementation. The Department will consider any public comments made following publication of this interim final rule and make any appropriate adjustments or clarifications in the final rule. Finally, the deadline imposed by Congress to implement the regulations is exceedingly strict and therefore the Department has a limited period of time within which to update the regulations.

The APA also permits an agency to make a rule effective upon date of publication in the Federal Register where “good cause” exists or for “interpretive rules and statements of policy.” 5 U.S.C. 553(d). As stated, the Department has determined that it would be unnecessary and contrary to the public interest to engage in full notice and comment rulemaking before putting these interim final regulations into effect, and that it is in the public interest to promulgate interim final regulations. For the same reasons, the Department has determined that there is good cause to make these interim final regulations effective immediately upon publication in the Federal Register, in accordance with Section 553(d) of the APA (5 U.S.C. 553(d)). Therefore, waiver of the 30-day period prior to the rule’s effective date is appropriate here. The Department welcomes public comments on the changes being made by this interim final rule, and will carefully review any comments to ensure that any substantive concerns or issues regarding these changes are addressed in the final rule.

### **Paperwork Reduction Act of 1995**

This rule implements Public Law 114-113 which reauthorizes the September 11th Victim Compensation Fund of 2001. In order to be able to evaluate claims and provide compensation, the Fund will need to collect information from an individual (or a personal representatives of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001 or the debris removal efforts that took place in the

immediate aftermath of those crashes. Accordingly, the Department of Justice, Civil Division will submit an information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the emergency review procedures of the Paperwork Reduction Act of 1995. This request will seek reinstatement of the prior information collection authorized under Public Law 111-347. The Department has also published a Notice in the Federal Register soliciting public comment on the information collection associated with this rulemaking. 81 FR 20674 (April 8, 2016).

### **Regulatory Flexibility Act**

These regulations set forth procedures by which the Federal government will award compensation benefits to eligible victims of the September 11, 2001 terrorist attacks. Under 5 U.S.C. 601(6), the term “small entity” does not include the Federal government, the party charged with incurring the costs attendant to the implementation and administration of the Victim Compensation Fund. Because this rule is being adopted as an interim final rule, a Regulatory Flexibility analysis is not required. This rule provides compensation to individuals, not to entities.

### **Executive Orders 12866 and 13563— Regulatory Review**

This regulation has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review” section 1(b), Principles of Regulation and in accordance with Executive Order 13563 “Improving Regulation and Regulatory Review” section 1(b) General Principles of Regulation. The Department of Justice has determined that this rule is an “economically significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review, and accordingly this rule has been reviewed by the Office of Management and Budget. Further, both Executive Orders 12866 and 13563 direct agencies to

assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has assessed the costs and benefits of this regulation and believes that the regulatory approach selected maximizes net benefits. As is described more fully in the next paragraph, the economic impact of the rule is a transfer of the funds that are being allocated by the Federal government to any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001, or the rescue and recovery efforts during the immediate aftermath of such crashes or the debris removal efforts that took place in the immediate aftermath of those crashes.

*Assessment of Benefits, Costs, and Alternatives.*

As required by Executive Order 13563 and Executive Order 12866 for economically significant regulatory actions, the Department has assessed the benefits and costs anticipated from this rulemaking and considered whether there are reasonably feasible alternatives to this rulemaking, including considering whether there are reasonably viable non-regulatory actions that could be taken in lieu of this rulemaking. The purpose of this rulemaking is to provide the legal and administrative framework necessary to provide compensation to any individual (or a personal representative of a deceased individual) who suffered physical harm or was killed as a result of the terrorist-related aircraft crashes of September 11, 2001 or the debris removal efforts that took place in the immediate aftermath of those crashes, as provided by Title II of the Zadroga Act and the Reauthorized Zadroga Act. The primary benefits and costs of this rulemaking are both set by

statute as Congress has appropriated a capped amount for this program — an initial \$2.775 billion payable under the Zadroga Act and an additional \$4.6 billion under the Reauthorized Zadroga Act. Because the \$7.375 billion appropriated by Congress for the Fund must pay for claimant awards as well as the Fund’s administrative expenses, it is important for the Fund to establish procedures to screen out ineligible or inappropriate claims while keeping administrative expenses as low as possible consistent with the goal of ensuring that funds are not diverted to processing ineligible claims in order to maximize the amount of funds available for claimants. Finally, based on past practice with the operation of the original Fund and the reopened Fund and the necessity to establish the legal and administrative framework for the reauthorized Fund, the Department concludes that there are no viable non-regulatory actions that it could take to implement the Reauthorized Zadroga Act in a fair and efficient manner.

*Time Period for Public Comment*

This interim final rule provides for a 30-day public comment period after publication. The rule is an interpretive rule that merely clarifies or explains the statute or that sets out procedural rules or general statements of policy. Therefore, an extended period of public comment is not necessary. A 30-day comment period will afford the public a meaningful opportunity to comment on the interim final rule.

**Executive Order 13132—Federalism**

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. However, the Department of Justice has worked

cooperatively with state and local officials in the affected communities in the preparation of this rule. Also, the Department individually notified national associations representing elected officials regarding this rulemaking.

#### **Executive Order 12988—Civil Justice Reform**

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **List of Subjects in 28 CFR Part 104**

Disaster assistance, Disability benefits, Terrorism.

Accordingly, for the reasons set forth in the preamble, chapter I of Title 28 of the Code of Federal Regulations is amended by revising part 104 to read as follows:

#### **PART 104—SEPTEMBER 11TH VICTIM COMPENSATION FUND**

## **Subpart A—General; Eligibility**

Sec.

- 104.1 Purpose.
- 104.2 Eligibility definitions and requirements.
- 104.3 Other definitions.
- 104.4 Personal Representative.
- 104.5 Foreign claims.
- 104.6 Amendments to this part.

## **Subpart B—Filing for Compensation**

- 104.21 Presumptively covered conditions.
- 104.22 Filing for compensation.

## **Subpart C—Claim Intake, Assistance, and Review Procedures**

- 104.31 Procedure for claims evaluation.
- 104.32 Eligibility review.
- 104.33 Hearing.
- 104.34 Publication of awards.
- 104.35 Claims deemed abandoned by claimants.

## **Subpart D—Amount of Compensation for Eligible Claimants**

- 104.41 Amount of compensation.
- 104.42 Applicable state law.
- 104.43 Determination of presumed economic loss for decedents.
- 104.44 Determination of presumed noneconomic losses for claims on behalf of decedents.
- 104.45 Determination of presumed economic loss for injured claimants.
- 104.46 Determination of presumed noneconomic losses for injured claimants.
- 104.47 Collateral sources.

## **Subpart E—Payment of Claims**

- 104.51 Payments to eligible individuals.
- 104.52 Distribution of award to decedent's beneficiaries.

## **Subpart F—Limitations**

- 104.61 Limitation on civil actions.
- 104.62 Time limit on filing claims.
- 104.63 Subrogation.

## **Subpart G—Measures To Protect the Integrity of the Compensation Program**

104.71 Procedures to prevent and detect fraud.

### **Subpart H—Attorney Fees**

104.81 Limitation on attorney fees.

**Authority:** Title IV of Pub. L. 107–42, 115 Stat. 230, 49 U.S.C. 40101 note; Title II of Pub. L. 111–347, 124 Stat. 3623; Title IV of Pub. L. 114-113, 129 Stat. 2242.

### **Subpart A—General; Eligibility**

#### **§ 104.1 Purpose.**

This part implements the provisions of the September 11th Victim Compensation Fund of 2001, Title IV of Public Law 107–42, 115 Stat. 230 (Air Transportation Safety and System Stabilization Act), as amended by the James Zadroga 9/11 Health and Compensation Act of 2010, Title II of Public Law 111–347, and as amended by the James Zadroga 9/11 Victim Compensation Fund Reauthorization Act, Division O, Title IV of Public Law 114-113 (the “Act”) to provide full compensation to eligible individuals who were physically injured (as defined herein) as a result of the terrorist-related aircraft crashes of September 11, 2001, or the rescue and recovery efforts during the immediate aftermath of such crashes or debris removal during the immediate aftermath of those crashes, and to the “personal representatives” of those who were killed as a result of the crashes or the rescue and recovery efforts during the immediate aftermath of such crashes or debris removal during the immediate aftermath of such crashes. All compensation provided through the Victim Compensation Fund will be on account of personal physical conditions, physical injuries or death. The provisions of these regulations that relate to filing and evaluation of claims, determination of eligibility, and determination of compensable loss shall apply to all claims that are defined as Group B claims in the Act and in these

regulations. Eligibility and compensation for Group A claims has been determined prior to the effective date of these regulations, pursuant to the regulations previously in effect.

**§ 104.2 Eligibility definitions and requirements.**

(a) *Categories of claims*—(1) *Group A claims*. A claim is a Group A claim if the Special Master has transmitted a final award determination by sending a letter postmarked and transmitted on or before December 17, 2015 indicating the total amount of compensation to which the claimant is entitled for that claim, pursuant to the regulations and methodology in effect on December 17, 2015.

(2) *Group B claims*. A claim is a Group B claim if it is not a Group A claim. An individual can have both Group A claims and Group B claims.

(b) *Eligible claimants*. The term eligible claimants means:

(1) Individuals present at a 9/11 crash site at the time of or in the immediate aftermath of the terrorist-related aircraft crashes and who suffered physical harm, as defined herein, as a direct result of the crashes or the rescue and recovery efforts or debris removal;

(2) The Personal Representatives of deceased individuals aboard American Airlines flights 11 or 77 and United Airlines flights 93 or 175; and

(3) The Personal Representatives of individuals who were present at a 9/11 crash site at the time of or in the immediate aftermath of the crashes and who died as a direct result of the terrorist-related aircraft crash or the rescue and recovery efforts during the immediate aftermath of such crashes or the debris removal during the immediate aftermath of such crashes.

(4) The term eligible claimants does not include any individual or representative of an individual who is identified to have been a participant or conspirator in the terrorist-related crashes of September 11.

- (c) *Immediate aftermath.* The term immediate aftermath means any period beginning with the terrorist-related aircraft crashes of September 11, 2001, and ending on May 30, 2002.
- (d) *Physical harm.* The term physical harm shall mean:
- (1) A WTC-Related Physical Health Condition; or
  - (2) A physical injury to the body resulting from the 9/11 attacks that was treated by a medical professional within a reasonable time from the date of discovering such harm and is verifiable by medical records created by or at the direction of the medical professional who provided the medical care contemporaneously with the care; but
  - (3) Not including any Mental Health Condition.
- (e) *Mental Health Condition.* The term Mental Health Condition shall mean a mental health condition described in paragraph (1)(A)(ii) or (3)(B) of section 3312(a) of the Public Health Service Act (42 U.S.C. 300 mm-22(a)), or any mental health condition certified under section 3312(b)(2)(B)(iii) of such Act (including such certification as applied under section 3322(a) (42 U.S.C. 300mm-32(a) of such Act), or a mental health condition described in section 3322(b)(2) (42 U.S.C. 300mm-32(b)(2)) of such Act, or any other mental health condition.
- (f) *Personal Representative.* The term Personal Representative shall mean the person determined to be the Personal Representative under § 104.4 of this part.
- (g) *WTC Health Program.* The term WTC Health Program means the World Trade Center Health Program established by Title I of Public Law 111–347 (codified at Title XXXIII of the Public Health Service Act, 42 U.S.C. 300mm through 300mm–61).
- (h) *WTC Program Administrator.* The WTC Program Administrator shall mean the WTC Program Administrator as defined in section 3306 of the Public Health Service Act (42 U.S.C. 300mm-5).

(i) *WTC-Related Physical Health Condition.* The term WTC-Related Physical Health Condition means a WTC-related health condition listed in Section 3312(a) of the Public Health Service Act (42 U.S.C. 300mm-22(a)), including the conditions listed in section 3322(b) of such Act (42 U.S.C. 300 mm-32(b)), and including those health conditions added by the WTC Program Administrator through rulemaking pursuant to the Public Health Service Act, 42 C.F.R. Part 88, except that such term shall not include any Mental Health Condition.

(j) *9/11 crash site.* The term 9/11 crash site means:

- (1) The World Trade Center site, Pentagon site, and Shanksville, Pennsylvania site; or
- (2) The buildings or portions of buildings that were destroyed as a result of the terrorist-related airplane crashes of September 11, 2001; or
- (3) The area in Manhattan that is south of the line that runs along Canal Street from the Hudson River to the intersection of Canal Street and East Broadway, north on East Broadway to Clinton Street, and east on Clinton Street to the East River; and
- (4) Any area related to, or along, routes of debris removal, such as barges and Fresh Kills.

**§ 104.3 Other definitions.**

- (a) *Beneficiary.* The term beneficiary shall mean a person to whom the Personal Representative shall distribute all or part of the award under § 104.52 of this part.
- (b) *Dependents.* The Special Master shall identify as dependents those persons so identified by the victim on his or her Federal tax return for the year prior to the year of the victim's death (or those persons who legally could have been identified by the victim on his or her Federal tax return for the year prior to the year of the victim's death) unless:
  - (1) The claimant demonstrates that a minor child of the victim was born or adopted on or after

January 1 of the year of the victim's death;

- (2) Another person became a dependent in accordance with then- applicable law on or after January 1 of the year of the victim's death; or
  - (3) The victim was not required by law to file a Federal income tax return for the year prior to the year of the victim's death.
- (c) *Spouse*. The Special Master shall identify as the spouse of a victim the person reported as spouse on the victim's Federal tax return for the year prior to the year of the victim's death (or the person who legally could have been identified by the victim on his or her Federal tax return for the year prior to the year of the victim's death) unless:
- (1) The victim was married or divorced in accordance with applicable state law on or after January 1 of the year of the victim's death; or
  - (2) The victim was not required by law to file a Federal income tax return for the year prior to the year of the victim's death.
  - (3) The Special Master shall identify as the spouse of a victim any same-sex spouse who was lawfully married to the victim under applicable state law.
- (d) *The Act*. The Act, as used in this part, shall mean Public Law 107-42, 115 Stat. 230 ("Air Transportation Safety and System Stabilization Act"), 49 U.S.C. 40101 note, as amended by the James Zadroga 9/11 Health and Compensation Act of 2010, Title II of Public Law 111-347 and as further amended by the James Zadroga 9/11 Victim Compensation Fund Reauthorization Act, Division O, Title IV of Public Law 114-113.
- (e) *Victim*. The term victim shall mean an eligible injured claimant or a decedent on whose behalf a claim is brought by an eligible Personal Representative.
- (f) *Substantially Complete*. A claim becomes substantially complete when, in the opinion of

the Special Master or her designee, the claim contains sufficient information and documentation to determine both the claimant's eligibility and, if the claimant is eligible, an appropriate award.

**§ 104.4 Personal Representative.**

(a) *In general.* The Personal Representative shall be:

- (1) An individual appointed by a court of competent jurisdiction as the Personal Representative of the decedent or as the executor or administrator of the decedent's will or estate.
  - (2) In the event that no Personal Representative or executor or administrator has been appointed by any court of competent jurisdiction, and such issue is not the subject of pending litigation or other dispute, the Special Master may, in her discretion, determine that the Personal Representative for purposes of compensation by the Fund is the person named by the decedent in the decedent's will as the executor or administrator of the decedent's estate. In the event no will exists, the Special Master may, in her discretion, determine that the Personal Representative for purposes of compensation by the Fund is the first person in the line of succession established by the laws of the decedent's domicile governing intestacy.
- (b) *Notice to beneficiaries.* (1) Any purported Personal Representative must, before filing an Eligibility Form, provide written notice of the claim (including a designated portion of the Eligibility Form) to the immediate family of the decedent (including, but not limited to, the decedent's spouse, former spouses, children, other dependents, and parents), to the executor, administrator, and beneficiaries of the decedent's will, and to any other persons who may reasonably be expected to assert an interest in an award or to have a cause of action to recover damages relating to the wrongful death of the decedent.
- (2) Personal delivery or transmission by certified mail, return receipt requested, shall be deemed

sufficient notice under this provision. The claim forms shall require that the purported Personal Representative certify that such notice (or other notice that the Special Master deems appropriate) has been given. In addition, as provided in § 104.21(b)(5) of this part, the Special Master may publish a list of individuals who have filed Eligibility Forms and the names of the victims for whom compensation is sought, but shall not publish the content of any such form.

(c) *Objections to Personal Representatives.* Objections to the authority of an individual to file as the Personal Representative of a decedent may be filed with the Special Master by parties who assert a financial interest in the award up to 30 days following the filing by the Personal Representative. If timely filed, such objections shall be treated as evidence of a “dispute” pursuant to paragraph (d) of this section.

(d) *Disputes as to identity.* The Special Master shall not be required to arbitrate, litigate, or otherwise resolve any dispute as to the identity of the Personal Representative. In the event of a dispute over the appropriate Personal Representative, the Special Master may suspend adjudication of the claim or, if sufficient information is provided, calculate the appropriate award and authorize payment, but place in escrow any payment until the dispute is resolved either by agreement of the disputing parties or by a court of competent jurisdiction.

Alternatively, the disputing parties may agree in writing to the identity of a Personal Representative to act on their behalf, who may seek and accept payment from the Fund while the disputing parties work to settle their dispute.

#### **§ 104.5 Foreign claims.**

In the case of claims brought by or on behalf of foreign citizens, the Special Master may alter the requirements for documentation set forth herein to the extent such materials are

unavailable to such foreign claimants.

**§ 104.6 Amendments to this part.**

All claims will be processed in accordance with the current provisions of this part.

**Subpart B—Filing for Compensation**

**§ 104.21 Presumptively covered conditions.**

- (a) *In general.* The Special Master shall maintain and publish on the Fund’s web site a list of presumptively covered conditions that resulted from the terrorist-related air crashes of September 11, 2001, or rescue and recovery or debris removal efforts during the immediate aftermath of such crashes. The list shall consist of the WTC-Related Physical Health Conditions that resulted from the terrorist-related air crashes of September 11, 2001 or rescue and recovery or debris removal efforts during the immediate aftermath of such crashes. Group B claims shall be eligible for compensation only if the Special Master determines based on the evidence presented that a claimant who seeks compensation for physical harm has at least one WTC-Related Physical Health Condition, with respect to a deceased individual, the cause of such individual’s death is determined at least in part to be attributable to a WTC-Related Physical Health Condition.
- (b) *Updates.* The Special Master shall update the list of presumptively covered conditions to conform to any changes in the WTC-Related Physical Health Conditions. Claims may then be amended pursuant to § 104.22(e)(ii).
- (c) *Conditions other than presumptively covered conditions.* A claimant may also be eligible for payment under § 104.51 where the claimant has at least one WTC-Related Physical Health Condition and the Special Master determines that the claimant —
- (1) Has a physical injury to the body that resulted from the terrorist-related air crashes of

September 11, 2001 or rescue and recovery or debris removal efforts during the immediate aftermath of such crashes or presents extraordinary circumstances; and

(2) Is otherwise eligible for payment.

**§ 104.22 Filing for compensation.**

(a) *Compensation form; “filing.”* A compensation claim shall be deemed “filed” for purposes of section 405(b)(3) of the Act (providing that the Special Master shall issue a determination regarding the matters that were the subject of the claim not later than 120 calendar days after the date on which a claim is filed), and for any time periods in this part, when it is substantially complete.

(b) *Eligibility Form.* The Special Master shall develop an Eligibility Form, which may be a portion of a complete claim form, that will require the claimant to provide information necessary for determining the claimant’s eligibility to recover from the Fund.

(1) The Eligibility Form may require that the claimant certify that he or she has dismissed any pending lawsuit seeking damages as a result of the terrorist-related airplane crashes of September 11, 2001, or for damages arising from or related to debris removal (except for actions seeking collateral source benefits) no later than January 2, 2011 and that there is no pending lawsuit brought by a dependent, spouse, or beneficiary of the victim.

(2) The Special Master may require as part of the notice requirement pursuant to § 104.4(b) that the Personal Representative of the deceased individual provide copies of a designated portion of the Eligibility Form to the immediate family of the decedent (including, but not limited to, the spouse, former spouses, children, other dependents, and parents), to the executor, administrator, and beneficiaries of the decedent’s will, and to any other persons who may reasonably be expected to assert an interest in an award or to have a cause of action to

recover damages relating to the wrongful death of the decedent.

(3) The Eligibility Form may require claimants to provide the following proof:

- (i) Proof of death: Death certificate or similar official documentation;
- (ii) Proof of presence at site: Documentation sufficient to establish presence at a 9/11 crash site, which may include, without limitation, a death certificate, proof of residence, such as a lease or utility bill, records of employment or school attendance, contemporaneous medical records, contemporaneous records of federal, state, city or local government, a pay stub, official personnel roster, site credentials, an affidavit or declaration of the decedent's or injured claimant's employer, or other sworn statement (or unsworn statement complying with 28 U.S.C. 1746) regarding the presence of the victim;
- (iii) Proof of physical harm: Certification of a conclusion by the WTC Health Program that the claimant suffers from a WTC-Related Physical Health Condition and is eligible for treatment under the WTC Health Program, or verification by the WTC Program Administrator that the claimant suffers from a WTC-Related Physical Health Condition, or other credible medical records from a licensed medical professional.
- (iv) Personal Representative: Copies of relevant legal documentation, including court orders; letters testamentary or similar documentation; proof of the purported Personal Representative's relationship to the decedent; copies of wills, trusts, or other testamentary documents; and information regarding other possible beneficiaries as requested by the Eligibility Form;
- (v) Any other information that the Special Master deems necessary to determine the claimant's eligibility.
- (vi) The Special Master may also require waivers, consents, or authorizations from claimants to

obtain directly from third parties tax returns, medical information, employment information, or other information that the Special Master deems relevant in determining the claimant's eligibility or award, and may request an opportunity to review originals of documents submitted in connection with the Fund.

(vii) The Special Master may publish a list of individuals who have filed Eligibility Forms on behalf of a deceased victim and the names of the deceased victims for whom compensation is sought, but shall not publish the content of any such form.

(c) *Personal Injury Compensation Form and Death Compensation Form.* The Special Master shall develop a Personal Injury Compensation Form, which may be a portion of a complete claim form, that each injured claimant must submit. The Special Master shall also develop a Death Compensation Form, which may be a portion of a complete claim form, that each Personal Representative must submit. These forms shall require the claimant to provide certain information that the Special Master deems necessary to determining the amount of any award, including information concerning income, collateral sources, benefits, settlements and attorneys' fees relating to civil actions described in section 405(c)(3)(C)(iii) of the Act, and other financial information, and shall require the claimant to state the factual basis for the amount of compensation sought. It shall also allow the claimant to submit certain other information that may be relevant, but not necessary, to the determination of the amount of any award.

(1) The Special Master may ask claimants to submit certain tax returns or tax transcripts for returns that the Special Master deems appropriate for determination of an award. The Special Master may also require waivers, consents, or authorizations from claimants to obtain directly from third parties medical information, employment information, or other information that the

Special Master deems relevant to determining the amount of any award.

- (2) Claimants may attach to the ‘Personal Injury Compensation Form’ or ‘Death Compensation Form’ any additional statements, documents or analyses by physicians, experts, advisors, or any other person or entity that the claimant believes may be relevant to a determination of compensation.
- (d) *Submission of a claim.* Section 405(c)(3)(C) of the Act provides that upon the submission of a claim under the Fund, the claimant waives the right to file a civil action (or to be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001, or debris removal, except for civil actions to recover collateral source obligations and civil actions against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act. A claim shall be deemed submitted for purposes of section 405(c)(3)(C) of the Act when the Eligibility Form is deemed filed, regardless of whether any time limits are stayed or tolled.
- (e) *Amendment of claims.* A claimant who has previously submitted a claim may amend such claim to include:
  - (1) An injury or loss that the claimant had not suffered (or did not reasonably know the claimant suffered) at the time the claimant filed the previous claim;
  - (2) A condition that the Special Master has identified and published in accordance with 104.21(a), since the time the claimant filed the previous claim, as a presumptively covered condition;
  - (3) An injury for which the claimant was previously compensated by the Fund, but only if that injury has substantially worsened, resulting in damages or loss that was not previously compensated.

(f) *Provisions of information by third parties.* Any third party having an interest in a claim brought by a Personal Representative may provide written statements or information regarding the Personal Representative's claim. The Claims Evaluator or the Special Master or the Special Master's designee may, at his or her discretion, include the written statements or information as part of the claim.

### **Subpart C—Claim Intake, Assistance, and Review Procedures**

#### **§ 104.31 Procedure for claims evaluation.**

- (a) *Initial review.* Claims Evaluators shall review the forms filed by the claimant and either deem the claim “filed” or notify the claimant of any deficiency in the forms or any required documents.
- (b) *Procedure.* The Claims Evaluator shall determine eligibility and the claimant's presumed award pursuant to §§ 104.43 to 104.46 of this part and notify the claimant in writing of the eligibility determination, or the amount of the presumed award as applicable, and the right to request a hearing before the Special Master or her designee under § 104.33 of this part. After an eligible claimant has been notified of the presumed award, within 30 days the claimant may either accept the presumed compensation determination as the final determination and request payment, or may instead request a review before the Special Master or her designee pursuant to § 104.33. Claimants found to be ineligible may appeal pursuant to § 104.32.
- (c) *Multiple claims from the same family.* The Special Master may treat claims brought by or on behalf of two or more members of the same immediate family as related or consolidated claims for purposes of determining the amount of any award.

#### **§ 104.32 Eligibility review.**

Any claimant deemed ineligible by the Claims Evaluator may appeal that decision to the

Special Master or her designee by filing an eligibility appeal within 30 days on forms created by the office of the Special Master.

**§ 104.33 Hearing.**

- (a) *Conduct of hearings.* Hearings shall be before the Special Master or her designee. The objective of hearings shall be to permit the claimant to present information or evidence that the claimant believes is necessary to a full understanding of the claim. The claimant may request that the Special Master or her designee review any evidence relevant to the determination of the award, including without limitation: The nature and extent of the claimant's injury; evidence of the claimant's presence at a 9/11 crash site; factors and variables used in calculating economic loss; the identity of the victim's spouse and dependents; the financial needs of the claimant, facts affecting noneconomic loss; and any factual or legal arguments that the claimant contends should affect the award. Claimants shall be entitled to submit any statements or reports in writing. The Special Master or her designee may require authentication of documents, including medical records and reports, and may request and consider information regarding the financial resources and expenses of the victim's family or other material that the Special Master or her designee deems relevant.
- (b) *Location and duration of hearings.* The hearings shall, to the extent practicable, be scheduled at times and in locations convenient to the claimant or his or her representative. The hearings shall be limited in length to a time period determined by the Special Master or her designee.
- (c) *Witnesses, counsel, and experts.* Claimants shall be permitted, but not required, to present witnesses, including expert witnesses. The Special Master or her designee shall be permitted to question witnesses and examine the credentials of experts. The claimant shall be entitled to be represented by an attorney in good standing, but it is not necessary that the claimant be

represented by an attorney. All testimony shall be taken under oath.

(d) *Waivers*. The Special Master shall have authority and discretion to require any waivers necessary to obtain more individualized information on specific claimants.

(e) *Award Appeals*. For award appeals, the Special Master or her designee shall make a determination whether:

(1) There was an error in determining the presumptive award, either because the claimant's individual criteria were misapplied or for another reason; or

(2) The claimant presents extraordinary circumstances not adequately addressed by the presumptive award.

(f) *Determination*. The Special Master shall notify the claimant in writing of the final amount of the award, but need not create or provide any written record of the deliberations that resulted in that determination. There shall be no further review or appeal of the Special Master's determination. In notifying the claimant of the final amount of the award, the Special Master may designate the portions or percentages of the final award that are attributable to economic loss and non-economic loss, respectively, and may provide such other information as appropriate to provide adequate guidance for a court of competent jurisdiction and a personal representative.

#### **§ 104.34 Publication of awards.**

The Special Master reserves the right to publicize the amounts of some or all of the awards, but shall not publish the name of the claimants or victims that received each award. If published, these decisions would be intended by the Special Master as general guides for potential claimants and should not be viewed as precedent binding on the Special Master or her staff.

### **§ 104.35 Claims deemed abandoned by claimants.**

The Special Master and her staff will endeavor to evaluate promptly any information submitted by claimants. Nonetheless, it is the responsibility of the claimant to keep the Special Master informed of his or her current address and to respond within the duration of this program to requests for additional information. Claims outstanding because of a claimant's failure to complete his or her filings shall be deemed abandoned.

### **Subpart D—Amount of Compensation for Eligible Claimants**

#### **§ 104.41 Amount of compensation.**

As provided in section 405(b)(1)(B)(ii) of the Act, in determining the amount of compensation to which a claimant is entitled, the Special Master shall take into consideration the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant. The individual circumstances of the claimant may include the financial needs or financial resources of the claimant or the victim's dependents and beneficiaries. As provided in section 405(b)(6) of the Act, the Special Master shall reduce the amount of compensation by the amount of collateral source compensation the claimant (or, in the case of a Personal Representative, the victim's beneficiaries) has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001. In no event shall a Group B claim receive an amount of compensation that is greater than the amount of loss determined pursuant to these regulations less the amount of any collateral source compensation that the claimant has received or is entitled to receive for such claim as a result of the terrorist related aircraft crashes of September 11, 2001 for the Group B claim.

#### **§ 104.42 Applicable state law.**

The phrase "to the extent recovery for such loss is allowed under applicable state law," as

used in the statute's definition of economic loss in section 402(5) of the Act, is interpreted to mean that the Special Master is not permitted to compensate claimants for those categories or types of economic losses that would not be compensable under the law of the state that would be applicable to any tort claims brought by or on behalf of the victim.

**§ 104.43 Determination of presumed economic loss for decedents.**

In reaching presumed determinations for economic loss for Personal Representatives bringing claims on behalf of eligible decedents, the Special Master shall consider sums corresponding to the following:

(a) *Loss of earnings or other benefits related to employment.* The Special Master, as part of the process of reaching a "determination" pursuant to section 405(b) of the Act, has developed a methodology and may publish updated schedules, tables, or charts that will permit prospective claimants to estimate determinations of loss of earnings or other benefits related to employment based upon individual circumstances of the deceased victim, including: The age of the decedent as of the date of death; the number of dependents who survive the decedent; whether the decedent is survived by a spouse; and the amount and nature of the decedent's income for recent years. The decedent's salary/ income in the three years preceding the year of death (or for other years the Special Master deems relevant) shall be evaluated in a manner that the Special Master deems appropriate. The Special Master may, if she deems appropriate, take an average of income figures for the three years preceding the year of death, and may also consider income for other periods that she deems appropriate, including published pay scales for victims who were government or military employees. In computing any loss of earnings due to physical harm as defined herein the Special Master shall, for each year for which any loss of earnings or other benefits related to employment is

computed, limit the annual past or projected future gross income of the decedent to an amount that is not greater than \$200,000. For purposes of the computation of loss of earnings, annual gross income shall have the meaning given such term in section 61 of the Internal Revenue Code of 1986. In cases where the victim was a minor child, the Special Master may assume an average income for the child commensurate with the average income of all wage earners in the United States. For victims who were members of the armed services or government employees such as firefighters or police officers, the Special Master may consider all forms of compensation (or pay) to which the victim was entitled. For example, military service members' and uniformed service members' compensation includes all of the various components of compensation, including, but not limited to, basic pay (BPY), basic allowance for housing (BAH), basic allowance for subsistence (BAS), federal income tax advantage (TAD), overtime bonuses, differential pay, and longevity pay.

- (b) *Medical expense loss.* This loss equals the documented past out-of-pocket medical expenses that were incurred as a result of the eligible physical harm suffered by the decedent (i.e., those medical expenses that were not paid for or reimbursed through health insurance or other programs). This loss shall be calculated on a case-by-case basis, using documentation and other information submitted by the Personal Representative. The Special Master shall not consider any future medical expense loss.
- (c) *Replacement services loss.* For decedents who did not have any prior earned income, or who worked only part-time outside the home, economic loss may be determined with reference to replacement services and similar measures.
- (d) *Loss due to death/burial costs.* This loss shall be calculated on a case-by-case basis, using documentation and other information submitted by the personal representative and includes

the out-of-pocket burial costs that were incurred.

(e) *Loss of business or employment opportunities.* Such losses shall be addressed through the procedure outlined above in paragraph (a) of this section.

**§ 104.44 Determination of presumed noneconomic losses for death for claims on behalf of decedents.**

The presumed non-economic losses for an eligible death shall be \$250,000 plus an additional \$100,000 for the spouse and each dependent of the deceased victim. Such presumed losses include a noneconomic component of replacement services loss.

**§ 104.45 Determination of presumed economic loss for injured claimants.**

In reaching presumed determinations for economic loss for claimants who suffered an eligible physical harm (but did not die), the Special Master shall consider sums corresponding to the following:

(a) *Loss of earnings or other benefits related to employment.* The Special Master may determine the loss of earnings or other benefits related to employment on a case-by-case basis, using documentation and other information submitted by the claimant, regarding the actual amount of work that the claimant has missed or will miss without compensation. Alternatively, the Special Master may determine the loss of earnings or other benefits related to employment by relying upon the methodology created pursuant to § 104.43(a) and adjusting the loss based upon the extent of the victim's physical harm. In determining or computing any loss of earnings due to eligible physical harm, the Special Master shall, for each year of any past or projected future loss of earnings or other benefits related to employment, limit the annual gross income of the claimant to an amount that is not greater than \$200,000. For purposes of the computation of loss of earnings, annual gross income

shall have the meaning given such term in section 61 of the Internal Revenue Code of 1986.

- (1) Disability; in general. In evaluating claims of disability, the Special Master will, in general, make a determination regarding whether the claimant is capable of performing his or her usual profession in light of the eligible physical conditions. The Special Master may require that the claimant submit an evaluation of the claimant's disability and ability to perform his or her occupation prepared by medical experts.
  - (2) Total permanent disability. With respect to claims of total permanent disability, the Special Master may accept a determination of disability made by the Social Security Administration as evidence of disability without any further medical evidence or review. The Special Master may also consider determinations of permanent total disability made by other governmental agencies or private insurers in evaluating the claim.
  - (3) Partial disability. With respect to claims of partial disability, the Special Master may consider evidence of the effect of the partial disability on the claimant's ability to perform his or her usual occupation as well as the effect of the partial disability on the claimant's ability to participate in usual daily activities.
- (b) *Medical Expense Loss*. This loss equals the documented past out-of-pocket medical expenses that were incurred as a result of the physical harm suffered by the victim (i.e., those medical expenses that were not paid for or reimbursed through health insurance or other programs). The Special Master shall not consider any future medical expense loss.
  - (c) *Replacement Services*. For claimants who suffer physical harm and did not have any prior earned income or who worked only part time outside the home, economic loss may be determined with reference to replacement services and similar measures.
  - (d) *Loss of business or employment opportunities*. Such losses shall be addressed through the

procedure outlined above in paragraph (a) of this section.

(e) *Determination of Noneconomic Loss for Claimants Who Have a WTC-Related Physical Condition and Who Are Found Eligible for Economic Loss.* The Special Master shall determine the appropriate noneconomic loss for such claimants in accordance with the provisions of § 104.46, taking into account the extent of disability, and may consider whether the claimant has multiple WTC-Related Physical Health Conditions that contribute to the disability.

#### **§ 104.46 Determination of presumed noneconomic losses for injured claimants**

The Special Master may determine the presumed noneconomic losses for claimants who suffered physical harm (but did not die) by relying upon the noneconomic losses described in § 104.44 and adjusting the losses based upon the extent of the victim's physical harm. The presumed noneconomic loss for a claim based on any single type of cancer shall not exceed \$250,000 and the presumed noneconomic loss for a claim based on any single type of non-cancer condition shall not exceed \$90,000. Such presumed losses include any noneconomic component of replacement services loss. The Special Master has discretion to consider the effect of multiple cancer conditions or multiple cancer and non-cancer conditions in computing the total noneconomic loss.

#### **§ 104.47 Collateral sources.**

(a) *Payments that constitute collateral source compensation.* The amount of compensation shall be reduced by all collateral source compensation the claimant has received or is entitled to receive as a result of the terrorist-related aircraft crashes of September 11, 2001, or debris removal in the immediate aftermath, including life insurance, pension funds, death benefits programs, payments by Federal, State, or local governments related to the terrorist-related

aircraft crashes of September 11, 2001, or debris removal and payments made pursuant to the settlement of a civil action as described in section 405(c)(3)(C)(iii) of the Act. In determining the appropriate collateral source offset for future benefit payments, the Special Master may employ an appropriate methodology for determining the present value of such future benefits. In determining the appropriate value of offsets for pension funds, life insurance and similar collateral sources, the Special Master may, as appropriate, reduce the amount of offsets to take account of self- contributions made or premiums paid by the victim during his or her lifetime. In determining the appropriate collateral source offset for future benefit payments that are contingent upon one or more future event(s), the Special Master may reduce such offsets to account for the possibility that the future contingencies may or may not occur. In cases where the recipients of collateral source compensation are not beneficiaries of the awards from the Fund, the Special Master shall have discretion to exclude such compensation from the collateral source offset where necessary to prevent beneficiaries from having their awards reduced by collateral source compensation that they will not receive.

(b) *Payments that do not constitute collateral source compensation.* The following payments received by claimants do not constitute collateral source compensation:

- (1) The value of services or in-kind charitable gifts such as provision of emergency housing, food, or clothing; and
- (2) Charitable donations distributed to the beneficiaries of the decedent, to the injured claimant, or to the beneficiaries of the injured claimant by privately funded charitable entities; provided however, that the Special Master may determine that funds provided to victims or their families through a privately funded charitable entity constitute, in substance, a payment

described in paragraph (a) of this section.

- (3) Tax benefits received from the Federal government as a result of the enactment of the Victims of Terrorism Tax Relief Act.

### **Subpart E—Payment of Claims**

#### **§ 104.51 Payments to eligible individuals.**

- (a) *Payment date.* Subject to paragraph (c) of this section, the Special Master shall authorize payment of an award to a claimant not later than 20 days after the date on which:
  - (1) The claimant accepts the presumed award; or
  - (2) A final award for the claimant is determined after a hearing on appeal.
- (b) *Failure to accept or appeal presumed award.* If a claimant fails to accept or appeal the presumed award determined for that claimant within 30 days, the presumed award shall be deemed to have been accepted and all rights to appeal the award shall have been waived.
- (c) *Payment of Group A claims.* Group A claims shall be paid as soon as practicable from the capped amount appropriated for such claims of \$2,775,000,000.
- (d) *Payment of Group B claims.* Group B claims may be paid after the date on which new Group B claims may be filed under these regulations from the amount appropriated for Group A claims if and to the extent that there are funds remaining after all Group A claims have been paid and, thereafter, from the \$4,600,000,000 amount appropriated specifically for Group B claims once it becomes available in fiscal year 2017 until expended.
- (e) *Prioritization.* The Special Master shall identify claims that present the most debilitating physical conditions and shall prioritize the compensation of such claims so that claimants with such debilitating conditions are not unduly burdened.
- (f) *Reassessment.* Commencing on December 18, 2017, and continuing at least annually

thereafter until the closure of the Victim Compensation Fund, the Special Master shall review and reassess policies and procedures and make such adjustments as may be necessary to ensure that the total expenditures including administrative costs in providing compensation for claims in Group B do not exceed the funds deposited into the Victim Compensation Fund and to ensure that the compensation of those claimants who suffer from the most debilitating physical conditions is prioritized to avoid undue burden on such claimants.

**§ 104.52 Distribution of award to decedent's beneficiaries.**

The Personal Representative shall distribute the award in a manner consistent with the law of the decedent's domicile or any applicable rulings made by a court of competent jurisdiction. The Special Master may require the Personal Representative to provide to the Special Master a plan for distribution of any award received from the Fund before payment is authorized. Notwithstanding any other provision of these regulations or any other provision of state law, in the event that the Special Master concludes that the Personal Representative's plan for distribution does not appropriately compensate the victim's spouse, children, or other relatives, the Special Master may direct the Personal Representative to distribute all or part of the award to such spouse, children, or other relatives.

**Subpart F—Limitations**

**§ 104.61 Limitation on civil actions.**

(a) *General.* Section 405(c)(3)(C) of the Act provides that upon the submission of a claim under the Fund, the claimant waives the right to file a civil action (or be a party to an action) in any Federal or State court for damages sustained as a result of the terrorist-related aircraft crashes of September 11, 2001, or for damages arising from or related to debris removal, except that this limitation does not apply to recover collateral source obligations, or to a civil

action against any person who is a knowing participant in any conspiracy to hijack any aircraft or commit any terrorist act. The Special Master shall take appropriate steps to inform potential claimants of section 405(c)(3)(C) of the Act.

(b) *Pending actions.* Claimants who have filed a civil action or who are a party to such an action as described in paragraph (a) of this section may not file a claim with the Special Master unless they withdraw from such action not later than January 2, 2012.

(c) *Settled actions.* In the case of an individual who settled a civil action described in Section 405(c)(3)(C) of the Act, such individual may not submit a claim under this title unless such action was commenced after December 22, 2003, and a release of all claims in such action was tendered prior to January 2, 2011.

**§ 104.62 Time limit on filing claims.**

(a) *In general. Group B claims.* Group B claims that were not submitted to the Victim Compensation Fund on or before December 17, 2015 may be filed by an individual (or by a personal representative on behalf of a deceased individual) during the period beginning on June 15, 2016, and ending on December 18, 2020. Notwithstanding the above, an individual who intends to file a Group B claim must register with the Victim Compensation Fund in accordance with the following:

- (1) In the case that the individual knew (or reasonably should have known) before October 3, 2011, that the individual suffered a physical harm or died as a result of the terrorist-related aircraft crashes of September 11, 2001, or as a result of debris removal, and is eligible to file a claim under this Part as of October 3, 2011, the individual or representative of such individual as appropriate may file a claim not later than October 3, 2013.
- (2) In the case that the individual first knew (or reasonably should have known) on or after

October 3, 2011, that the individual suffered a physical harm or died or in the case that the individual became eligible to file a claim under this Part on or after that date, the individual or representative of such individual as appropriate may file a claim not later than the last day of the 2-year period beginning on the date that the individual or representative first knew (or should have known) that the individual both suffered from such harm and was eligible to file a claim under this title, but in no event beyond December 18, 2020.

(b) *Determination by Special Master.* The Special Master or the Special Master's designee should determine the timeliness of all claims under paragraph of this section.

#### **§ 104.63 Subrogation.**

Compensation under this Fund does not constitute the recovery of tort damages against a third party nor the settlement of a third party action, and the United States shall be subrogated to all potential claims against third party tortfeasors of any victim receiving compensation from the Fund. For that reason, no person or entity having paid other benefits or compensation to or on behalf of a victim shall have any right of recovery, whether through subrogation or otherwise, against the compensation paid by the Fund.

#### **Subpart G—Measures To Protect the Integrity of the Compensation Program**

##### **§ 104.71 Procedures to prevent and detect fraud.**

(a) *Review of claims.* For the purpose of detecting and preventing the payment of fraudulent claims and for the purpose of assuring accurate and appropriate payments to eligible claimants, the Special Master shall implement procedures to:

- (1) Verify, authenticate, and audit claims;
- (2) Analyze claim submissions to detect inconsistencies, irregularities, duplication, and multiple claimants; and

- (3) Ensure the quality control of claims review procedures.
- (b) *Quality control.* The Special Master shall institute periodic quality control audits designed to evaluate the accuracy of submissions and the accuracy of payments, subject to the oversight of the Inspector General of the Department of Justice.
- (c) *False or fraudulent claims.* The Special Master shall refer all evidence of false or fraudulent claims to appropriate law enforcement authorities.

### **Subpart H—Attorney Fees**

#### **§ 104.81 Limitation on attorney fees.**

- (a) *In general—* (1) *In general.* Notwithstanding any contract, the representative of an individual may not charge, for services rendered in connection with the claim of an individual under this title, including expenses routinely incurred in the course of providing legal services, more than 10 percent of an award paid under this title on such claim. Expenses incurred in connection with the claim of an individual in this title other than those that are routinely incurred in the course of providing legal services may be charged to a claimant only if they have been approved by the Special Master.
- (2) *Certification.* In the case of any claim in connection with which services covered by this section were rendered, the representative shall certify his or her compliance with this section and shall provide such information as the Special Master requires to ensure such compliance.
- (b) *Limitation—*(1) *In general.* Except as provided in paragraph (b)(2) of this section, in the case of an individual who was charged a legal fee in connection with the settlement of a civil action described in section 405(c)(3)(C)(iii) of the Act, the representative who charged such legal fee may not charge any amount for compensation for services rendered in connection with a claim filed by or on behalf of that individual under this title.

(2) *Exception.* If the legal fee charged in connection with the settlement of a civil action described in section 405(c)(3)(C)(iii) of the Act of an individual is less than 10 percent of the aggregate amount of compensation awarded to such individual through such settlement, the representative who charged such legal fee to that individual may charge an amount for compensation for services rendered to the extent that such amount charged is not more than Ten (10) percent of such aggregate amount through the settlement, minus the total amount of all legal fees charged for services rendered in connection with such settlement.

(c) *Discretion to lower fee.* In the event that the Special Master finds that the fee limit set by paragraph (a) or (b) of this section provides excessive compensation for services rendered in connection with such claim, the Special Master may, in the discretion of the Special Master, award as reasonable compensation for services rendered an amount lesser than that permitted for in paragraph (a) of this section.

Dated: June 13, 2016.

Sheila L. Birnbaum, *Special Master.*

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