

DEPARTMENT OF JUSTICE**Office of the Attorney General****28 CFR Part 104****[CIV 104P; AG Order No. 2541-2001]****RIN 1105-AA79****September 11th Victim Compensation Fund of 2001****ACTION:** Interim final rule with request for comments.

SUMMARY: Shortly after the September 11, 2001 terrorist attacks, the President signed the "September 11 Victim Compensation Fund of 2001" (the "Fund") into law as Title IV of Public Law 107-42 ("Air Transportation Safety and System Stabilization Act") (the "Act"). The Act authorizes compensation to any individual (or the personal representative of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes on that day. The Act provides that the Fund will be administered by a Special Master appointed by the Attorney General. On November 26, 2001, the Attorney General appointed Kenneth R. Feinberg as Special Master.

The Department of Justice, in consultation with the Special Master, is issuing certain procedural rules so the Special Master may commence operations of the program as soon as practicable. In order to allow the Special Master to begin distributing funds, the Department is issuing this rule as an "Interim Final Rule" that will have the force and effect of law immediately upon publication. This rule is designated "interim," however, because the Department is also seeking further comment for a period of 30 days as part of its further review and may expand or adjust aspects of the rule after receiving additional comments.

DATES: This interim rule takes effect on December 21, 2001. Comments in response to this notice are due by January 22, 2002.

ADDRESSES: Comments on the interim rule should be submitted by e-mail to: victimcompensation.comments@usdoj.gov, or by telefax to 301-519-5956. Telefaxes should be limited to 15 pages. Comments may also be mailed to Kenneth L. Zwick, Director, Office of Management Programs, Civil Division, U.S. Department of Justice, Main Building, Room 3140, 950 Pennsylvania Avenue NW, Washington, DC 20530. However, the Department encourages commenters to submit their comments by e-mail or telefax. Comments received

are public records. The name and address of the commenter should be included with all submissions. The comments will be made available on the Victim Compensation Fund Web site, www.usdoj.gov/victimcompensation. Comments will also be available for public inspection at a reading room in Washington, DC. Arrangements to visit the reading room must be made in advance by calling 888-714-3385 (TDD: 888-560-0844).

FOR FURTHER INFORMATION CONTACT:

Kenneth L. Zwick, Director, Office of Management Programs, Civil Division, U.S. Department of Justice, Main Building, Room 3140, 950 Pennsylvania Avenue NW, Washington, DC 20530, telephone 888-714-3385 (TDD 888-560-0844).

SUPPLEMENTARY INFORMATION:**Statement by the Special Master**

The September 11th Victim Compensation Fund of 2001 is an unprecedented expression of compassion on the part of the American people to the victims and their families devastated by the horror and tragedy of September 11. The Act itself (specifically Title IV—Victim Compensation), and the attached regulations drafted and implemented pursuant to the Act, are designed to bring some measure of financial relief to those most devastated by the events of September 11. In one important sense, the Fund symbolizes the commitment of the American people to those most in need. It is an example of how Americans rally around the less fortunate.

The attached regulations have two objectives: (1) To provide fair, predictable and consistent compensation to the victims of September 11 and their families throughout the life of the program; and (2) to do so in an expedited, efficient manner without unnecessary bureaucracy and needless demands on the victims. The regulations highlight a fast track administrative compensation program, eliminating the red tape, time and expense of a traditional lawsuit. Quick payment to eligible claimants characterizes this program.

The Fund offers the eligible claimant an alternative to litigation. To succeed in the courtroom, a victim of the September 11 tragedy, or his or her representative, would be compelled to litigate, probably for many years at excessive cost, and with all the uncertainty of result which is part of the litigation process. Among the hazards of such a court proceeding are: Would liability be demonstrated? Against

whom? Would sufficient funds be available to pay in full any resulting tort award? Would the verdict, even if favorable, withstand appellate challenge?

Trade-offs are required in developing Fund procedures that are different than those in the more conventional lawsuit. It is possible to develop an alternative administrative scheme, providing speedy and efficient compensation, which will help bring some closure to the events of September 11. We should not require its victims to revisit the tragic events of September 11 over and over again during the pendency of a lawsuit in our courts.

In formulating the regulations, we heeded the instruction of the Attorney General to help the neediest of victims as quickly as possible. Accordingly, under these regulations, an eligible claimant can receive an *immediate* advance payment of \$50,000 in cases involving death, or \$25,000 in certain cases involving serious physical injury. These payments are downpayments only, advanced to provide immediate financial assistance to those in need.

We were required, of course, to adhere to the language which Congress set out in the statute, including the provisions requiring that awards be offset by all collateral source compensation such as benefits from life insurance and other government programs. However, we did find ambiguity in the statute as to gifts provided to victims and their families by private charities. These regulations do not require that awards be offset by such private charitable assistance.

We have concluded that the purpose of the Act is not simply to examine economic and noneconomic harm, but also to provide compensation that is just and appropriate in light of claimants' individual circumstances. We have concluded that any methodology that does nothing more than attempt to replicate a theoretically possible future income stream would lead to awards that would be insufficient relative to the needs of some victims' families, and excessive relative to the needs of others. The statute specifies that individual circumstances beyond economic and noneconomic harm should be taken into account. It is our view that, absent extraordinary circumstances, awards in excess of \$3 million, tax-free, will rarely be appropriate in light of individual needs and resources. At the same time, we want to ensure that victims' families are receiving at least a minimum level of resources to help meet their needs and rebuild their lives. Thus, we have concluded that the families of deceased victims should receive a combined total

of at least \$500,000 from this program, other state and Federal programs, life insurance policies and other sources of compensation. Similarly, the baseline for single decedents should be \$300,000. This ensures that every needy claimant's total compensation from this program and other sources will be at least equal to these threshold amounts.

In sum, the September 11th Victim Compensation Fund of 2001 is an attempt by the American people to demonstrate their solidarity with, and generosity for, those injured by the terrible September 11 attack on our country. It provides an alternative compensation scheme to the traditional tort system, a method of providing substantial and quick compensation to those who elect to participate.

Neither this Fund nor any monetary compensation can possibly provide a full measure of relief to those who have suffered as a result of September 11. But the Fund will provide appropriate compensation and some measure of comfort to those whose lives have been torn asunder by the events of September 11.

Background

The following discussion provides background information and explanation of the regulations promulgated herein. Section A describes the statutory backdrop for the regulations; Section B discusses the Department's rulemaking procedures to date; Section C addresses Eligibility; Section D pertains to Advance Benefits; Section E discusses Final Awards made by the Fund; Section F describes the Special Master's claims evaluation process; and Section G relates to Assistance to Claimants. The text of the regulations is set forth following these explanatory sections. A catalog of public commentary is set forth thereafter as an Appendix. More detailed information regarding the program, including a flow chart of applicable procedures and a table of estimated or "presumed" awards, will be available on the Victims Compensation Fund Web site at www.usdoj.gov/victimcompensation.

A. The Statute

The President signed the "September 11th Victim Compensation Fund of 2001" (the "Fund") into law on September 22, 2001, as Title IV of Public Law 107-42 ("Air Transportation Safety and System Stabilization Act") ("the Act"). The purpose of this Fund is to provide compensation to eligible individuals who were physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001, and compensation through a "personal

representative" for those who died as a result of the crashes. Generally, eligibility is limited to: (1) Individuals on the planes at the time of the crashes (other than the terrorists); and (2) individuals present at the World Trade Center, the Pentagon or the site of the crash in Pennsylvania at the time of the crashes or in the immediate aftermath of the crashes.

The Fund is designed to provide a no-fault alternative to tort litigation for individuals who were physically injured or killed as a result of the aircraft hijackings and crashes on September 11, 2001. Others who may have suffered losses as a result of those events (e.g., those without identifiable physical injuries but who lost employment) are not included in this special program. Indeed, compensation will be provided only for losses caused on account of personal physical injuries or death, even though the victims may have suffered other losses, such as property loss. For this reason, the Department and the Special Master anticipate that all awards from the Fund will be free of federal taxation. *See* I.R.C. § 104(a)(2) (stating that damages received "on account of personal physical injuries or physical sickness" are excludable from gross income for purposes of federal income taxation).

A claimant who files for compensation waives any 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, except for actions to recover collateral source obligations.

Determinations on eligibility and the amount of compensation are to be made by the Special Master. After determining whether an individual is an eligible claimant under the Act, the Special Master is to determine the amount of compensation to be awarded based upon the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant.

The law also provides that the Special Master is to make a final determination on any claim within 120 days from when the claim was filed and, if an award is made, to authorize payment within 20 days thereafter. The determinations of the Special Master are final and are not reviewable by any court. Claims with the Fund must be filed on or before two years after the effective date of these regulations, i.e. December 22, 2003. Payments from the Fund are made by the United States Government, which in turn obtains the right of subrogation to each award.

Pursuant to the Act, regulations addressing certain administrative

matters must be issued within 90 days of enactment. Section 407 of the Act provides that the Department, in consultation with the Special Master, promulgate regulations on four matters by December 21, 2001:

(1) Forms to be used in submitting claims;

(2) The information to be included in such forms;

(3) Procedures for hearing and the presentation of evidence; and

(4) Procedures to assist an individual in filing and pursuing claims under this title.

In addition, section 407 authorizes, but does not require, the Department to issue additional rules to implement the program. This Interim Final Rule addresses issues beyond the four specifically required by the Act in order to create a program that will be efficient, will treat similarly situated claimants alike, and will allow potential claimants to make informed decisions regarding whether to file claims with the Fund. Nonetheless, the Department recognizes that it cannot anticipate all of the issues that will arise over the course of the program and that there will inevitably be many difficult issues that the Special Master will have to resolve in the course of making determinations on individual claims.

B. Rulemaking History to Date

On November 5, 2001, the Department requested public input on a number of issues. 66 FR 55901. The Department noted that, at that time, the Special Master had not yet been appointed, but that it wanted as much public comment as feasible before issuing the regulations by December 21, 2001. On November 26, 2001, the Attorney General appointed Kenneth R. Feinberg as Special Master. As called for by the Act, this interim final rule is promulgated in consultation with the Special Master.

The Department received more than 800 comments in response to the Department's Notice of Inquiry. Some were very brief and only spoke to a single issue; others responded to the Department's questions on a point by point basis. Still others contained detailed analyses, recommendations and even proposed regulatory language.

The range of commenters was very broad. Some commenters identified themselves as citizens, taxpayers or law professors, and many identified themselves as individuals who had contributed to charities for those impacted by the terrorist crashes. Many other commenters identified themselves as members of victims' families, partners or close friends, including some from organizations and groups of

survivors. Several commenters identified themselves as employers who lost a significant number of employees in the crashes. A number of commenters identified themselves as residents of housing near "Ground Zero" in New York.

In addition, the Department received comments from many organizations including the American Insurance Association, the American Arbitration Association, the American Bar Association, Trial Lawyers Care, New York Trial Lawyers' Association, New York City Bar Association, Massachusetts Bar Association, National Center for Victims of Crime, National Association of Crime Victim Compensation Boards, the Oklahoma Crime Victim Compensation Board, Consumers Union, Public Citizen, the National Right To Life Committee, the Lambda Legal Defense & Education Fund, the American Civil Liberties Union, the Association of Flight Attendants, the Council on Foundations, the Nonprofit Coordinating Committee of New York, Independent Sector, the Alternative Dispute Resolution of the Federal Bar Association, the Alliance of Fiduciary Consultants, and the Foreign Claims Settlement Commission.

Individual members of Congress, groups of members, and members of the Senate leadership also provided comments. Further, joint comments were submitted on behalf of the New York City Mayor, the New York Governor, and the New York Attorney General, by members of the New York Assembly, and by the Attorney General of Connecticut.

Comments were also submitted by United Airlines and American Airlines, and from various individuals and companies who identified themselves as having expertise or experience in the administration of claims programs.

The Department has read every submission it received in response to this notice, from handwritten notes to scholarly discussions. The Department wants to express its appreciation for the time and careful thought reflected in those submissions.

While the Department has reviewed every submission it received, it will not regulate on every topic addressed in those comments. Over 70 separate topics were identified; almost two dozen full size notebooks are necessary to organize all of the comments by topic. All of the comments will be retained by the Department for subsequent consideration when it reviews comments on this interim final rule, and the comments will remain posted on the Department's web site where they may be reviewed by the public. The

Department was pleased to see that some comments responded to others placed on the web site, and hopes this facility will continue to be of interest to the public.

It is not feasible to repeat here all of the suggestions received in the comments, let alone directly respond to each. The Appendix to this interim final rulemaking highlights some of the points raised by commenters in order to indicate the range of views received on how various issues should be approached.

C. Eligibility

Section 405(b) of the Act requires the Special Master to determine whether a claimant is an "eligible individual" under section 405(c). "Eligibility," in turn, is defined by the Act to include: (1) individuals (other than the terrorists) aboard American Airlines flights 11 and 77 and United Airlines flights 93 and 175; (2) individuals who were "present at" the World Trade Center, the Pentagon, or the site of the aircraft crash at Shanksville, Pennsylvania at the time or in the immediate aftermath of the crashes; or (3) personal representatives of deceased individuals who would otherwise be eligible. Moreover, to be eligible for an award, an individual must have suffered physical harm or death as a result of one of the terrorist-related air crashes. This interim final rule addresses eligibility by defining the terms "present at the site," "immediate aftermath," "physical harm," and "personal representative."

"*Present at the site*": This rule defines the term "present at the site" (i.e. the World Trade Center, Pentagon, or Shanksville site) to mean physically present at the time of the crashes or immediate aftermath:

(1) In the buildings or portions of buildings that were destroyed as a result of the airplane crashes; or

(2) In any area contiguous to the crash sites that the Special Master determines was sufficiently close to the site that there was a demonstrable risk of physical harm resulting from the impact of the aircraft or any subsequent fire, explosions, or collapse of buildings (generally, the immediate area in which the impact occurred, fire occurred, portions of buildings fell, or debris fell upon and injured persons).

There are several reasons for this geographic limitation. First, this geographic limitation comports with the plain meaning of the statutory term "present at." Second, this geographic limitation is consistent with the further statutory requirement of physical injury or death, because the zone designated is that in which there was a demonstrable

risk of physical harm from falling debris, explosions, or fire.

"*Immediate aftermath*": This rule defines the term "immediate aftermath" of the crashes to mean, for purposes of all claimants other than rescue workers, the period of time from the crashes until 12 hours after the crashes. This time frame appears to cover all of those who suffered physical injury or death, with the exception of rescue workers.

With respect to rescue workers who assisted in efforts to search for and recover victims, the regulations define "the immediate aftermath" to include the period from the crashes until 96 hours after the crashes. The regulations provide for this longer time period for rescue workers in recognition of their heroic efforts and their selfless reasons for being at the sites, and responds to a request by the Mayor of New York City that the program recognize the high level of danger and difficulty during the first four days of rescue operations.

"*Physical harm*": This rule defines the term "physical harm" to mean an objectively verifiable physical injury that was treated by a medical professional within 24 hours of the injury having been sustained or within 24 hours of rescue and either required hospitalization as an in-patient for at least 24 hours or caused, either temporarily or permanently, partial or total physical disability, incapacity, or disfigurement.

There are several reasons for this definition. The statutory term "physical harm" indicates that Congress did not intend for this Fund to compensate those who suffered only emotional harm or property damage. The statutory term "physical harm" also indicates that Congress did not intend for this Fund to cover those who face only a risk of future injury (i.e. latent harm that does not fully manifest itself within the statutory time period for this Fund). Indeed, because participation in this Fund precludes claimants from recovering through tort litigation, those with latent injuries that later became manifest would likely be *undercompensated* if they sought compensation now from the Fund before the injuries became manifest. Conversely, those who recovered for latent injuries that did *not* later become manifest could be *overcompensated* if they recovered from the Fund. While Congress might later consider whether an administrative program for latent harm caused by the September 11, 2001 terrorist-related aircraft crashes may be appropriate, the language of the statute that created this Fund does not contemplate awards for that purpose.

“Personal Representative”: Section 405(c)(2)(C) provides that in the case of an individual who is deceased but who otherwise meets the other criteria for eligibility, a claim can be filed by the Personal Representative of the decedent. Section 405(c)(3)(A) provides that no more than one claim may be submitted by an individual or on behalf of a deceased individual.

In many or most cases, the identity of the “Personal Representative” will not be in dispute. Where there are disputes, two issues arise: (1) What are the rules for determining who is the Personal Representative?; and (2) who should apply the rules and resolve the dispute?

As to the first issue, the regulations rely on state law. Subject to certain contingencies, this rule defines the term “Personal Representative” to mean 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. 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 his discretion, determine that the Personal Representative is the person named by the decedent in the decedent’s will as the executor or administrator. In the event no will exists, the Special Master may, in his discretion, determine that the Personal Representative is the first person in the line of succession established by the laws of the state of the decedent’s domicile governing intestacy.

Reliance on state law is necessary in part because those who file for recovery under the Fund waive their rights to recover through litigation, in which state law would determine the identity of the appropriate representatives of the decedent, or the decedent’s estate, to bring suit. Thus, if the identity of Personal Representatives for purposes of this Fund were determined by federal regulation, there could be many situations in which the representative as defined by state law would choose litigation while the Personal Representative as defined by federal regulation would seek to recover from the Fund.

The second issue raises questions of program administration. Disputes between relatives, former spouses and other interested parties can be exceptionally fact-intensive and time-consuming. Indeed, state courts often spend considerable time and resources resolving such matters. The Special Master cannot accomplish his statutory

duties if bogged down with these types of complex disputes. Nor would it be advisable for the Special Master to attempt to step in and supplant state court practice or the testamentary intent of decedents. Consequently, the rule provides that the Special Master has no obligation to arbitrate, litigate or otherwise resolve disputes as to the identity of the Personal Representative. Instead, to ensure that funds are not needlessly tied up due to disputes regarding the identity of the Personal Representative, the regulations provide that 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 those disputing parties work to settle their dispute. In appropriate cases, the Special Master may determine an award, but place the payment in escrow until the dispute regarding the Personal Representative is finally resolved.

Finally, the determination of the Personal Representative is not the same question as the determination of who ultimately will receive the award. In that regard, this rule provides that 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. However, in order to assure that the families of needy victims receive adequate compensation, the regulations further provide that the Personal Representative shall, before payment is authorized, provide to the Special Master a plan for distribution of any award received from the Fund. 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 be distributed to such spouse, children, or other relatives.

D. Advance Benefits

In order to comply with the Attorney General’s November 26, 2001 instructions to the Special Master to pay benefits to eligible claimants as quickly as possible, these regulations permit claimants to seek immediate “Advance Benefits” in the fixed amount of \$50,000 in the case of deceased individuals and \$25,000 in the case of severely injured individuals who required hospitalization for one week or more.

To qualify for advance benefits, applicants must complete a short form

(the “Eligibility Form”) identifying basic eligibility and indicating that advance benefits would assist them in confronting current or immediate financial hardships. Such forms will be made available at claims intake centers as they are established, in response to telephone requests (888-714-3385, 202-305-1352, TDD: 888-560-0844), and on the Victims Compensation Fund Web site at www.usdoj.gov/victimcompensation.

Eligible claimants may apply for and receive advance benefits and then file their lengthier “Personal Injury Compensation Form” or “Death Compensation Form” at any time within the two-year time frame for filing claims under the program. This will allow needy eligible claimants to obtain prompt advance payments even though they may need more time to collect full information regarding the amount of compensation they seek. The 120-day period for determination of compensation will be stayed or tolled until the claimant files the completed “Personal Injury Compensation Form” or “Death Compensation Form” needed to allow the Special Master to determine the amount of the final award. However, once a claimant applies for Advance Benefits, the claimant will be deemed to have waived the right to file a civil action in state or federal court for damages sustained as a result of the September 11 attacks.

Advance benefits will be treated as advance payments on ultimate awards from the Fund. Thus, the amount of any advance benefits received will be deducted from the claimant’s subsequent award.

E. Final Awards Made by the Fund

Section 405(b) of the Act provides that the Special Master shall compensate eligible claimants based on the harm to the claimant (including both economic loss and noneconomic losses), the facts of the claim, and the individual circumstances of the claimant. The Act further provides that the Special Master shall determine the claimant’s eligibility and the amount of compensation within 120 days.

The Special Master and the Department have studied the language of the Act, the varying public comments, evidence and data about the many victims of the September 11 attacks, and economic and demographic studies and data in fashioning the interim final rule. After this careful consideration, the Special Master and the Department have concluded that the following principal objectives should guide any determination of economic and noneconomic losses.

The first objective is that the process should be efficient, straightforward, and understandable to the claimants. This objective is based in part upon the statutory requirement that the Special Master review each claim and make an award determination within 120 days of filing. More important, however, is that claimants be able to enter the program—or choose not to enter the program—with an understanding of how their claims will be treated. This is especially important because the Act provides that, upon submission of a claim, a claimant waives the right to file a civil action for damages sustained as a result of the September 11 attacks. For claimants to make an informed decision regarding this waiver, they should have some understanding of how their award will be calculated and how much they would receive from the Fund should they decide to file a claim.

The second objective is that each claimant should, to the greatest extent possible, be treated fairly based on the claimant's own individual circumstances and relative to other claimants. While the circumstances of death for many victims will differ, those circumstances will in many cases be unknowable. In principle, similarly situated claimants should not receive dramatically differing treatment.

After careful consideration, the Special Master and the Department have concluded that, in order best to achieve these principal objectives, the Special Master should develop a methodology for calculating *presumed* economic and noneconomic losses that is based on readily identifiable individual circumstances for each claimant, such as age, prior income levels, marital status, and the number and ages of the victim's dependents. A methodology for determining presumed economic and noneconomic losses will also assist the Special Master in making fair and appropriate compensation determinations swiftly and efficiently within the time frame permitted by the Act.

In order to enable claimants to make informed decisions regarding whether to submit a claim under the Fund and, if so, whether to submit evidence of extraordinary individual circumstances that could justify departure from the presumed awards, the interim final rule directs the Special Master to publish schedules, tables, or charts of presumed determinations for economic and noneconomic losses. While these schedules, tables, or charts cannot cover every possible claimant (e.g., injured claimants), they are extensive and detailed enough to provide the majority of potential claimants with a general

dollar range into which their awards may fall.

Nonetheless, the Special Master and the Department recognize that it will be impossible to fashion a presumptive methodology that will take into account *all* of the individual facts and circumstances for every claimant. Rather, some claimants may have extraordinary individual circumstances that justify departure from the presumed awards. Thus, the interim final rule provides that claimants may request that the Special Master depart from the presumed economic and noneconomic losses based upon a demonstration of extraordinary circumstances that the presumed award methodology does not adequately address.

Economic loss: Determination of economic loss requires a prediction about each claimant's future. This assessment will be, by its nature, somewhat speculative. While the determination of economic loss should be based upon facts regarding the individual victim where those facts are available, some facts cannot be predicted on an individualized basis.

The regulations also provide that the Special Master's schedules, tables, or charts should identify presumed determinations of economic loss up to a salary level commensurate with the 98th percentile of individual income in the United States. The Department recognizes that projecting earnings over worklife for people with extraordinary annual incomes is a very complex exercise, often requiring a detailed evaluation of variable and often complex formulae for nonvariable income, differing work life expectations, often highly volatile industries or markets, and other factors that are not often subject to easy generalization. We have also concluded that the purpose of the Act is not simply to examine economic and noneconomic harm, but also to provide compensation that is just and appropriate in light of the financial needs and resources of claimants. Any methodology that does nothing more than attempt to replicate a theoretically possible future income stream would lead to awards that would be insufficient relative to the needs of some victims' families, and excessive relative to the needs of others. Therefore, a claimant should not assume that he or she will receive an award greater than the presumed award simply because the victim had an income that exceeded the income for the 98th percentile. Indeed, the Act's requirement that the Special Master consider "the individual circumstances of the claimant" indicates that the Special Master may consider a particular claimant's

financial needs and resources, just as the Department and the Special Master considered the needs of the claimants in concluding that no claimant bringing a claim on behalf of a deceased victim should receive less than \$500,000 or \$300,000 before collateral source offsets.

If a claimant seeks review of a presumed award, the Special Master may consider a range of information, including demographic information on retirement trends for high wage earners, the individual's historical expenses, savings, and any other factors he deems relevant, including economic trends, information available from the Bureau of Labor Statistics, the Census Bureau and other entities on *average* income and retirement age for the victim's profession or even for the victim's former employer. Claimants should not expect awards grossly in excess of the highest awards listed on the Special Master's presumed award chart, as the individual circumstances of the wealthiest and highest-income claimants will often indicate that multi-million dollar awards out of the public coffers are not necessary to provide them with a strong economic foundation from which to rebuild their lives.

The Special Master and the Department recognize that the extent of physical injury for those victims who survived the September 11 attacks may vary to a degree that does not lend itself to a schedule, table, or chart. If the claimant's injury causes only a temporary disability, the Special Master may consider evidence regarding the length of time the claimant was absent from his employment in determining the appropriate compensation for economic loss. For those victims who suffered permanent physical disability, the Special Master may rely upon his economic loss methodology, but adjust the award based upon the extent of the physical disability. 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 injuries.

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. The Special Master may require an evaluation of the claimant's disability and ability to perform his or her occupation from medical experts.

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.

Noneconomic losses: Each person who was killed or injured in the September 11 attacks suffered grievous harm, and each person experienced the unspeakable events of that day in a unique way. Some victims experienced terror for many minutes, as they were held hostage by terrorists on an airplane or trapped in a burning building. Some victims had no warning of what was coming and died within seconds of a plane hitting the building in which they worked. While these circumstances may be knowable in a few extraordinary circumstances, for the vast majority of victims these circumstances are unknowable.

After extensive fact finding, public outreach, and review of public comments, the Special Master and the Department have concluded that the most rational and just way to approach the imponderable task of placing a dollar amount upon the pain, emotional suffering, loss of enjoyment of life, and mental anguish suffered by the thousands of victims of the September 11 attacks is to assess the noneconomic losses for categories of claimants. The most obvious distinction is between those who died and those who suffered physical injury but survived.

The regulations therefore set a *presumed* award for noneconomic losses sustained. For those victims who died as a result of the September 11 aircraft crashes, the presumed noneconomic losses will be \$250,000, plus an additional \$50,000 for the spouse and each dependent of the deceased victim. That \$250,000 figure is roughly equivalent to the amounts received under existing federal programs by public safety officers who are killed while on duty, or members of our military who are killed in the line of duty while serving our nation. See 38 U.S.C. 1967 (military personnel); 42 U.S.C. 3796 (Public Safety Officers Benefit Program). The latter figures—\$50,000 for the spouse and each dependent—include a noneconomic component of “replacement services loss.”

For those victims who suffered physical injury but survived the September 11 attacks, the Special Master may establish a methodology for estimating their noneconomic losses. The Special Master may determine that

it is appropriate to give some percentage of the noneconomic loss award given for victims who died, based upon the extent of the injury.

The Special Master and the Department recognize, however, that no presumed award can take into account all of the unique individual circumstances of each claimant. Accordingly, as noted above, claimants may either accept the presumed award or instead attempt to demonstrate in a hearing before the Special Master extraordinary circumstances that justify departure from the presumed award.

Collateral Sources: Section 405(b)(6) of the Act provides that the Special Master *shall* reduce the amount of compensation by the amount of the collateral source compensation “a claimant has received or is entitled to receive” as a result of the terrorist-related aircraft crashes of September 11, 2001. The interim final rule provides that collateral sources will include life insurance, pension funds, death benefit programs, and payments by federal, state, or local governments related to the terrorist-related aircraft crashes of September 11, 2001. While many public commenters voiced strong opposition to the inclusion of some or all of these as collateral source compensation, the Act expressly includes each one within the definition of “collateral sources.”

At the same time, the Act does not address whether certain other types of payments constitute collateral source compensation. The interim final rule provides that the following are *not* 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 private charitable entities; provided, however, that the Special Master may determine that funds provided to victims or their families through a private charitable entity constitute, in substance, a collateral source as described above.

The Department has concluded that charitable contributions should not be considered collateral source compensation within the meaning of the Act because, among other reasons, such charitable contributions are different in kind from the collateral sources listed in the Act. Moreover, because the collateral offset only applies to collateral source compensation that the claimant has received or is entitled to receive, deducting charitable awards from the amount of compensation would have the perverse effect of

encouraging potential donors to withhold their giving until after claimants have received their awards from the Fund.

F. The Claims Evaluation Process

Section 405(b)(4) of the Act provides that a claimant, after the filing of the claim, has the right to present evidence to the Office of the Special Master. The statute specifically provides that the claimant has the right to present witness statements and documents, the right to obtain legal counsel, and such other due process rights as are determined to be appropriate by the Special Master.

The interim final regulations provide claimants with a choice of two Procedural Options—Track A or Track B. If a claimant selects *Track A*, the Claims Evaluator will determine eligibility and the claimant's presumed award and, within 45 days of the date the claim was deemed filed, notify the claimant in writing of the eligibility determination, the amount of the presumed award, and the right to request a hearing before the Special Master or his designee under § 104.33 of these regulations. After an eligible claimant has been notified of the presumed award, 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 his designee pursuant to § 104.33. If a claimant opts for a review, the claimant may make supplemental submissions. The Special Master may alter or modify the award if the presumed award was calculated erroneously, or if the claimant demonstrates extraordinary circumstances indicating that the presumed award does not adequately address the claimant's injury. There will be no further review or appeal from this determination.

If the claimant selects *Track B*, a Claims Evaluator will determine eligibility within 45 days of the date the claim was deemed filed, but shall not determine the claimant's presumed award. The Claims Evaluator will then notify the claimant in writing of the eligibility determination. Upon notification of eligibility, the claimant will proceed to a hearing pursuant to § 104.33. At such hearing, the Special Master or his designee will utilize the presumed award methodology, but may modify or vary the award if the claimant presents extraordinary circumstances not adequately addressed by the presumed award methodology. There shall be no review or appeal from this determination.

Hearings, when sought, will be held by the Special Master or his designee. These hearings shall be conducted in a nonadversarial manner, the objective of which will be to permit the claimant to present information or evidence that the claimant believes is necessary to a full understanding of the claim. Claimants will be permitted, but not required, to present witnesses, including expert witnesses. The hearing officer shall be permitted to examine the credentials of experts.

The hearings shall be limited in length to a time period determined by the Special Master or the relevant hearing officer, but generally not to exceed two hours. The hearings shall, to the extent practicable, be scheduled at times and in locations convenient to the claimant or his or her representative. 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.

G. Assistance to Claimants

In its November 5, 2001 Notice of Inquiry, the Department noted that section 405(a) of the Act establishes some specific requirements with respect to the claim form and the information to be included. The law requires the Special Master to develop a claim form to use in filing claims for compensation under this program. The Special Master is to ensure that the form can be filed electronically if it is determined to be practicable. Moreover, by law, the form must include a statement of the factual basis for eligibility and information regarding income in recent years. In addition, the form is to request information from the claimant as to: (1) The physical harm suffered by a victim, or information confirming the death of the victim, as a result of the terrorist-related aircraft crashes of September 11, 2001; (2) income tax returns for recent years and other records; and (3) documentation regarding collateral source compensation including life insurance policies and government or employment-related programs which have or may provide funds or benefits to the claimant.

The Department believes that it is important that this Fund be accessible to potential claimants who have limited resources and who are not trained in the law. Rather than attempt to address in detail the means by which the Special Master should provide assistance to claimants, these regulations leave the Special Master with discretion to implement steps to provide assistance to claimants and to make this Fund accessible to them.

Because the Act does not provide for payment of legal or other fees by the Fund, these regulations do not impose any limits on the types or amount of fees that claimants may pay their attorneys or others providing assistance. Although the Department's regulations do not set specific limits on attorneys fees separate from those existing in state law or attorney ethical standards, the Department believes that contingency arrangements exceeding 5% of a claimant's recovery from the Fund would not be in the best interest of the claimants.

The Department contemplates that the Special Master will have discretion to inform potential claimants of the nature of the Fund so that they may make informed decisions regarding the types or amount of fees that they pay for legal or other assistance. For example, the Special Master may notify claimants and potential claimants of the availability of free legal services. Likewise, the Special Master may inform claimants and potential claimants that the Fund is a no-fault, administrative scheme that should not involve the kind of risks and expense that would justify any significant contingency fees.

These regulations similarly do not address the manner in which claimants may use funds that they receive from the Fund, except that the Personal Representatives must agree in an acknowledgment and release form to distribute the award to the beneficiaries of the decedent in accordance with the decedent's will or applicable state law or ruling by a court of competent jurisdiction. While the Department does not believe that it is appropriate for the Special Master to place further legal restrictions on the claimants' or beneficiaries' use of payments from the Fund, the Department does contemplate that the Special Master will have discretion to provide claimants with information regarding annuities or other financial planning devices or to offer structured awards with periodic payments.

Application of Various Laws and Executive Orders to This Rulemaking

Administrative Procedure Act, 5 U.S.C. 553

This rule provides for compensation to eligible individuals who were physically injured and to the personal representatives of those who were killed as a result of the terrorist-related aircraft crashes of September 11, 2001. In order to provide compensation to eligible claimants as expeditiously as possible, Congress set a short 90-day deadline for

the issuance of these regulations. The Department did seek public input on the issues, but it was not possible for the Department to prepare and publish a proposed rule for notice and comment within that very short time period.

The APA provides that an agency need not go through proposed rulemaking and comment before issuing rules to implement benefits programs. 5 U.S.C. 553(a)(2). Moreover, the Department, in consultation with the Special Master, determined that taking the time to draft and publish a proposed rule for notice and comment before this rule took effect would have been impracticable in light of the short time between the enactment of the statute and the deadline for rulemaking, and also would have been contrary to the public interest, which strongly favors prompt disbursement of benefits. Accordingly, the Department has determined that there is "good cause" for exempting this rule from the provision of the Administrative Procedure Act that requires a notice of proposed rulemaking and the opportunity for public comment. 5 U.S.C. 553(b)(B).

For the same reasons, the Department also finds "good cause" for exempting this rule from the provision of the Administrative Procedure Act providing for a delayed effective date. 5 U.S.C. 553(d). Delaying the opportunity for eligible claimants to seek Advance Benefits or to file claims under the Act would be contrary to the public interest.

Congressional Review Act

The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget has designated this interim final rule as a "major rule" as that term is defined by the Congressional Review Act ("CRA"), 5 U.S.C. 801 *et. seq.* Pursuant to section 808(2) of the CRA, the Department finds that "good cause" exists for establishing an effective date for this rule upon publication because delay would be impracticable in light of the short time between the enactment of the statute and the deadline for rulemaking, and also would be contrary to the public interest favoring prompt disbursement of benefits.

Paperwork Reduction Act of 1995

The Department of Justice, Civil Division, has submitted the following 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. OMB approval has been granted, and this information collection

has been assigned OMB control number 1105-0073. The proposed information collection is published to obtain comments from the public and affected agencies. The emergency approval is only valid for 180 days. Comments should be directed to OMB, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530.

During the first 60 days of this same review period, a regular review of this information collection will be undertaken. All comments and suggestions, or questions regarding additional information, including obtaining a copy of the proposed information collection instrument with instructions, should be directed to Office of the Special Master, U.S. Department of Justice, 950 Pennsylvania Avenue, NW., Washington, DC 20530. We request written comments and suggestions from the public and affected agencies concerning the proposed emergency collection of information.

Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Registration/Eligibility Form and Application for Emergency Benefits from the Victim Compensation Fund.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: SM-001, Office of the Special Master, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals who were physically injured and personal

representatives of those killed as a result of the terrorist-related aircraft crashes of September 11, 2001. Abstract: The information collected from the Registration/Eligibility Form and Application for Emergency Benefits from the Victim Compensation Fund will be used to make advance payments to those claimants deemed eligible by the Special Master or his designee.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 5,000 claimants with an average of 6.0 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 30,000 hours annually.

If additional information is required, contact: Robert B. Briggs, Department Clearance Officer, Information Management and Security Staff, Justice Management Division, United States Department of Justice, 601 D Street NW, Suite 1600, Washington, D.C. 20004.

Privacy Act of 1974

The Department of Justice, Civil Division is establishing a new Privacy Act system of records entitled "September 11th Victim Compensation Fund of 2001, JUSTICE/CIV-008." By law, regulations addressing certain administrative matters for the September 11th Victim Compensation Fund of 2001 must be issued within the 90-day period established by Congress. The Privacy Act notice will be published with no routine uses, so that it will be effective on the date published. It is likely that amendments to this notice, including routine uses, will be published at a later date, with the opportunity to comment. In the interim, disclosures necessary to process claims will be made only with the written consent of claimants or as otherwise authorized under 5 U.S.C. 552a(b).

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 Victims Compensation Fund. To the extent that small entities, including small government entities, will be economically affected by the promulgation of these regulations, such effects will likely be minimal. Further, the number of entities that will be affected will, in all probability, fall short

of a "substantial number" of small entities. In fact, the Department believes that the promulgation of these rules will play a considerable role in reducing the amount of complex, private litigation, wherein a substantial number of small (and large) entities would undoubtedly be significantly impacted.

Accordingly, the Department has reviewed this rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and by approving it certifies that this rule will not have a significant economic impact on a substantial number of small entities because it provides compensation to eligible individuals who were physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001, and compensation through a "personal representative" for those who were killed as a result of those crashes. This rule provides compensation to individuals, not to entities.

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.

Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a "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.

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 of the initial request for comment and will be taking similar action in connection with the interim final rule.

List of Subjects in 28 CFR Part 104

Disaster assistance, Disability benefits, Terrorism.

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

PART 104—SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001

Subpart A—General; Eligibility

- 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 rule.

Subpart B—Filing for Compensation; Application for Advance Benefits

- 104.21 Filing for compensation.
- 104.22 Advance benefits.

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 decedents.
- 104.45 Determination of presumed economic loss for claimants who suffered physical harm.
- 104.46 Determination of presumed noneconomic losses for claimants who suffered physical harm.
- 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.

Authority: Title IV of Pub. L. 107-42, 115 Stat. 230, 49 U.S.C. 40101 note.

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) to provide compensation to eligible individuals who were physically injured as a result of the terrorist-related aircraft crashes of September 11, 2001, and to the "personal representatives" of those who were killed as a result of the crashes. All compensation provided through the Fund will be on account of personal physical injuries or death.

§ 104.2 Eligibility definitions and requirements.

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

(1) Individuals present at the World Trade Center, Pentagon, or Shanksville, Pennsylvania site at the time of or in the immediate aftermath of the crashes and who suffered physical harm, as defined herein, as a direct result of the terrorist-related aircraft crashes;

(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 the World Trade Center, Pentagon, or Shanksville, Pennsylvania 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.

(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.

(b) *Immediate aftermath.* The term *immediate aftermath* of the crashes shall mean, for purposes of all claimants other than rescue workers, the period of time from the crashes until 12 hours after the crashes. With respect to rescue workers who assisted in efforts to search for and recover victims, the immediate aftermath shall include the period from the crashes until 96 hours after the crashes.

(c) *Physical harm.*

(1) The term *physical harm* shall mean a physical injury to the body that was treated by a medical professional within 24 hours of the injury having been sustained or within 24 hours of rescue; and

(i) Required hospitalization as an inpatient for at least 24 hours; or

(ii) Caused, either temporarily or permanently, partial or total physical disability, incapacity or disfigurement.

(2) In every case not involving death, the physical injury must be verified by contemporaneous medical records created by or at the direction of the medical professional who provided the medical care.

(d) *Personal Representative.* The term *Personal Representative* shall mean the person determined to be the Personal Representative under § 104.4 of this part.

(e) *Present at the site.* The term *present at the site* (i.e., the World Trade Center, Pentagon, or Shanksville, Pennsylvania site) shall mean physically present at the time of the crashes or in the immediate aftermath:

(1) In the buildings or portions of buildings that were destroyed as a result of the airplane crashes; or

(2) In any area contiguous to the crash sites that the Special Master determines was sufficiently close to the site that there was a demonstrable risk of physical harm resulting from the impact of the aircraft or any subsequent fire, explosions, or building collapses (generally, the immediate area in which the impact occurred, fire occurred, portions of buildings fell, or debris fell upon and injured persons).

§ 104.3 Other definitions.

(a) *Beneficiary.* The term *beneficiary* shall mean a person entitled under the laws of the decedent's domicile to receive payments or benefits from the estate of or on behalf of the decedent on whose behalf the claim to the Fund was filed.

(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 2000 unless:

(1) The claimant demonstrates that a minor child of the victim was born or adopted on or after January 1, 2001;

(2) Another person became a dependent in accordance with then-applicable law on or after January 1, 2001; or

(3) The victim was not required by law to file a federal income tax return for the year 2000.

(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 2000 unless:

(1) The victim was married or divorced in accordance with applicable state law on or after January 1, 2001; or

(2) The victim was not required by law to file a federal income tax return for the year 2000.

(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.

(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.

§ 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 his 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 his 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.* 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. 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 rule.

In the event that amendments are subsequently made to any section of this Part, claimants are entitled to have their claims processed in accordance with the provisions that were in effect at the time that their claims were submitted under § 104.21(d).

Subpart B—Filing for Compensation; Application for Advance Benefits

§ 104.21 Filing for compensation.

(a) *Compensation form; “filing.”* Except for applications for Advance Benefits pursuant to § 104.22, no claim may be considered until the claimant has submitted both an “Eligibility Form” and either a “Personal Injury Compensation Form” or a “Death Compensation Form.” A claim shall be deemed “filed” for purposes of section 405(b)(3) of the Act (providing that the Special Master shall issue a determination not later than 120 days

after the date on which a claim is filed), and for any time periods in this part, when a Claims Evaluator determines that both the Eligibility Form and either a Personal Injury Compensation Form or a Death Compensation Form are substantially complete. *Provided*, however, that if a claimant files an Eligibility Form requesting Advance Benefits pursuant to § 104.22 of this part without filing either a “Personal Injury Compensation Form” or a “Death Compensation Form,” the claim shall be deemed “filed” when the Claims Evaluator determines that the Eligibility Form is substantially complete, but the time period for determination and any time periods in this part shall be stayed or tolled as described in § 104.22(g) of this part.

(b) *Eligibility Form.* The Special Master shall develop an Eligibility 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 (except for actions seeking collateral source benefits) within 90 days of the effective date of this part pursuant to section 405(c)(3)(B)(ii) of the Act 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 claimant 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 one of the crash sites, which may include, without limitation, a death certificate, records of employment, contemporaneous medical records, contemporaneous records of federal, state, city or local government, 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 death on board aircraft: Death certificate or records of American or United Airlines or other sufficient official documentation;

(iv) Proof of physical harm: Contemporaneous medical records of hospitals, clinics, physicians, licensed medical personnel, or registries maintained by federal, state, or local government, and records of all continuing medical treatment;

(v) 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;

(vi) Any other information that the Special Master deems necessary to determine the claimant's eligibility.

(4) 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.

(5) Application for Advance Benefits: The Eligibility Form shall include a section allowing claimants to indicate that they wish to apply for Advance Benefits. Claimants who apply for such Advance Benefits must certify on that Form that they have not yet received \$450,000 in collateral source compensation if they are bringing a claim on behalf of a deceased victim with a spouse or dependent, \$250,000 in collateral source compensation if they are bringing a claim on behalf of a deceased victim who was single with no dependents, or an amount in excess of their lost wages plus out-of-pocket medical expenses if they are an injured claimant. All such claimants also must state on the Form facts establishing financial hardship that would justify a determination that they are in need of Advance Benefits.

(6) 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) *Personal Injury Compensation Form and Death Compensation Form.* The Special Master shall develop a

Personal Injury Compensation Form that each injured claimant must submit. The Special Master shall also develop a Death Compensation 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, 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) Claimants shall, at a minimum, submit all tax returns that were filed for the years 1998, 1999, and 2000. The Special Master may, at his discretion, require that claimants submit copies of tax returns or other records for any other period of years he 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)(B) 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, except for civil actions to recover collateral source obligations. A claim shall be deemed submitted for purposes of section 405(c)(3)(B) of the Act when the claim is deemed filed pursuant to § 104.21, regardless of whether any time limits are stayed or tolled.

(e) *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 his designee may, at his or her discretion, include the written

statements or information as part of the claim.

§ 104.22 Advance Benefits.

(a) *Advance Benefits.* Eligible Claimants may apply for immediate "Advance Benefits" in a fixed amount as follows:

(1) \$50,000 for Personal Representatives; and

(2) \$25,000 for injured claimants who meet the requirements of paragraph (d) of this section.

(b) *Credit against award.* The Advance Benefit shall be credited against any final compensation award so that the amount of the Advance Benefit is deducted from the final award under this program.

(c) *Application for Advance Benefits.* An otherwise eligible claimant may seek Advance Benefits to alleviate financial hardship faced by the claimant (or financial hardship faced by the beneficiaries of the decedent) by submitting an Eligibility Form described in § 104.21(b) and indicating thereon that he or she is applying for Advance Benefits.

(d) *Eligibility for Advance Benefits.* In the case of a Personal Representative, the claimant may be deemed eligible for Advance Benefits if a Claims Evaluator or the Special Master or his designee determines that the claimant is eligible to recover under the Fund. In the case of an injured claimant, the claimant may be deemed eligible for Advance Benefits when the Special Master or his designee determines that the claimant is eligible to recover under the Fund *and* that the claimant's physical injury required hospitalization for one week or more.

(e) *Authorization of payments.*

(1) Payment in the amount described in paragraph (a) of this section will be authorized immediately upon a determination that the claimant is eligible for Advance Benefits and the claimant is:

(i) An injured claimant;

(ii) A Personal Representative who was the spouse of the deceased victim on September 11, 2001; or

(iii) A Personal Representative who has obtained the consent of the spouse of the deceased victim (or, if there is no surviving spouse, all of the dependents of the deceased victim) to file for Advance Benefits.

(2)(i) With respect to other Personal Representatives, payment will be authorized within 15 days after the determination that the claimant is eligible for Advance Benefits, provided that no other individual has asserted a colorable conflicting claim as the Personal Representative with respect to the decedent and the Personal

Representative identifies and has given notice to the beneficiaries to whom such Advance Benefits will be distributed.

(ii) In the event that a colorable conflicting claim has been asserted, no Advance Benefit will be paid until a final eligibility determination has been made.

(f) *Tolling of 120-day clock and other time periods.* A claimant filing an Eligibility Form requesting Advance Benefits before filing a Personal Injury Compensation Form or Death Compensation Form will be deemed to have waived his right to commencement of the 120-day period in section 405(b)(3) of the Act (providing that the Special Master shall provide notice to the claimant of his determination within 120 days after the date on which a claim is filed). The 120-day period and all other time limitations in this part, except those applicable to Advance Benefit payments, shall be stayed or tolled until such time that a Claims Evaluator determines that the claimant's Personal Injury Compensation Form or Death Compensation Form is substantially complete.

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" (pursuant to 104.21(a)) or notify the claimant of any deficiency in the forms or any required documents.

(b) *Procedural tracks.* Each claim will be placed on a procedural track, described herein as "Track A" and "Track B," selected by the claimant on the Personal Injury Compensation Form or Death Compensation Form.

(1) *Procedure for Track A.* The Claims Evaluator shall determine eligibility and the claimant's presumed award pursuant to §§ 104.43 to 104.46 of this part and, within 45 days of the date the claim was deemed filed, notify the claimant in writing of the eligibility determination, the amount of the presumed award, and the right to request a hearing before the Special Master or his designee under § 104.33 of this part. After an eligible claimant has been notified of the presumed award, 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 his designee pursuant to § 104.33. Claimants found to be ineligible may appeal pursuant to § 104.32.

(2) *Procedure for Track B.* The Claims Evaluator shall determine eligibility

within 45 days of the date the claim was deemed filed, but shall not determine the claimant's presumed award; the Claims Evaluator shall notify the claimant in writing of the eligibility determination. Upon notification of eligibility, the claimant will proceed to a hearing pursuant to § 104.33. At such hearing, the Special Master or his designee shall utilize the presumptive award methodology as set forth in §§ 104.43 to 104.46 of this part, but may modify or vary the award if the claimant presents extraordinary circumstances not adequately addressed by the presumptive award methodology. There shall be no review or appeal from this determination.

(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 his designee by filing an eligibility appeal on forms created by the office of the Special Master.

§ 104.33 Hearing.

(a) *Supplemental submissions.* The claimant may prepare and file Supplemental Submissions within 21 calendar days from notification of either the presumed award (Track A) or eligibility (Track B). The Special Master shall develop forms appropriate for Supplemental Submissions.

(b) *Conduct of hearings.* Hearings shall be before the Special Master or his 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 his designee review any evidence relevant to the determination of the award, including without limitation: 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 his 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 his designee deems relevant.

(c) *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 his designee, but generally not to exceed two hours. The claimant may elect whether the hearing shall be public or private.

(d) *Witnesses, counsel, and experts.* Claimants shall be permitted, but not required, to present witnesses, including expert witnesses. The Special Master or his 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.

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

(f) *Track A review of presumed award.* For proceedings under Track A, the Special Master or his 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.

(g) *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.

§ 104.34 Publication of awards.

In order to assist potential claimants in evaluating their options of either filing a claim with the Special Master or filing a lawsuit in tort, 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 his staff.

§ 104.35 Claims deemed abandoned by claimants.

The Special Master and his 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 two-year program to requests for additional information. Claims outstanding at the end of this program 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 an award (before collateral source compensation has been deducted) be less than \$500,000 in any case brought on behalf of a deceased victim with a spouse or dependent, or \$300,000 in any case brought on behalf of a deceased victim who was single with no dependents.

§ 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 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, shall develop a methodology and publish 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 September 11, 2001; 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 1998–2000 shall be evaluated in a manner that the Special Master deems appropriate. The Special Master may, if he deems appropriate, take an average of income figures for each of those three years. The Special Master's methodology and schedules, tables, or charts shall yield presumed determinations of loss of earnings or other benefits related to employment for annual incomes up to but not beyond the 98th percentile of individual income in the United States for the year 2000. 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.

(b) *Medical expense loss.* This loss equals the 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). This loss shall be calculated on a case-by-case basis, using documentation and other information submitted by the Personal Representative.

(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 decedents.

The presumed noneconomic losses for decedents shall be \$250,000 plus an additional \$50,000 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 claimants who suffered physical harm.

In reaching presumed determinations for economic loss for claimants who suffered 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.

(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 injuries.

(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. 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.

(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 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). In addition, this loss equals future out-of-pocket medical expenses that will be incurred as a result of the physical harm suffered by the victim (*i.e.*, those medical expenses that will not be paid for or reimbursed through health insurance). These losses shall be calculated on a case-by-case basis, using documentation and other information submitted by the claimant.

(c) *Replacement services loss.* For injured claimants 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 of business or employment opportunities.* Such losses shall be addressed through the procedure outlined above in paragraph (a) of this section.

§ 104.46 Determination of presumed noneconomic losses for claimants who suffered physical harm.

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. Such presumed losses include any noneconomic component of replacement services loss.

§ 104.47 Collateral sources.

(a) *Payments that constitute collateral source compensation.* The amount of compensation shall be reduced by all collateral source compensation, including life insurance, pension funds, death benefit programs, and payments by federal, state, or local governments related to the terrorist-related aircraft crashes of September 11, 2001.

(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 private charitable entities; provided, however, that the Special Master may determine that funds provided to victims or their families through a private charitable entity constitute, in substance, a

payment described in paragraph (a) of this section.

Subpart E—Payment of Claims

§ 104.51 Payments to eligible individuals.

Not later than 20 days after the date on which a determination is made by the Special Master regarding the amount of compensation due a claimant under the Fund, the Special Master shall authorize payment to such claimant of the amount determined with respect to the claimant.

§ 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 Personal Representative shall, before payment is authorized, provide to the Special Master a plan for distribution of any award received from the Fund. 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 be distributed to such spouse, children, or other relatives.

Subpart F—Limitations

§ 104.61 Limitation on civil actions.

(a) *General.* Section 405(c)(3)(B) 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, except that this limitation does not apply to civil actions to recover collateral source obligations. The Special Master shall take appropriate steps to inform potential claimants of section 405(c)(3)(B) 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 March 21, 2002.

§ 104.62 Time limit on filing claims.

In accordance with the Act, no claim may be filed under this part after December 22, 2003.

§ 104.63 Subrogation.

Compensation under this Fund does not constitute the recovery of tort damages against 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.

Dated: December 19, 2001.

John Ashcroft,
Attorney General.

Note: This Appendix will not appear in the Code of Federal Regulations.

Appendix to Preamble—Summary of Public Comments Submitted in Response to the November 5, 2001 Notice of Inquiry and Advance Notice of Rulemaking

The following is a summary of the comments the Department of Justice ("the Department") received in response to its Notice of Inquiry published on November 5, 2001. The Notice of Inquiry sought input on numerous issues regarding potential regulations for the "September 11 Victim Compensation Fund of 2001" (the "Fund"), which was signed into law as Title IV of Public Law 107-42 ("Air Transportation

Safety and System Stabilization Act”) (the “Act”).

Over 800 comments were received by the November 26, 2001 deadline established by the Department. Additionally, hundreds of comments have been received since that date. Every comment was—and continues to be—reviewed, considered, and catalogued into one or more of 72 different topics. While the following summary does not address every issue raised by commenters, it provides a general synopsis of the most often raised issues. The summary is not intended to be an exhaustive illustration of every issue contemplated by the Special Master or the Department. Indeed, as mentioned above, all comments were considered in the promulgation of these interim final rules. Finally, the summarized issues below are not arranged in any particular order of importance or level of volume.

The Effective Date of This Interim Final Rule

While the Act specified that this rule should be issued by December 21, 2001, it did not specify when they should become effective. Accordingly, the Department sought comment on this issue. The Department noted that the Administrative Procedure Act generally provides that rules not go into effect for at least 30 days absent “good cause.”

Many commenters favored an immediate effective date so that claims could be filed right away. Many indicated an immediate need for relief and expressed frustration about their experiences with obtaining short-term assistance from other sources. However, some commenters thought an immediate effective date would be difficult to implement because the Special Master would need time to hire personnel and to set up the operation of the program before beginning to process claims.

A number of commenters suggested a compromise—making available some amount of short-term relief on an immediate basis to eligible claimants, and then commencing the more detailed review process necessary to provide a final award. Some suggested using flat amounts for these immediate awards, while another commenter suggested establishing an interest-free line of credit upon which families could draw. Another suggestion was that claims for immediate assistance be prioritized by “need.”

Eligibility

In its November 5, 2001, Notice of Inquiry, the Department noted that section 405(b) of the statute requires the Special Master to determine whether a claimant is an “eligible individual” under section 405(c). “Eligibility,” in turn, is defined by the Act to include: (1) individuals (other than the terrorists) aboard American Airlines flights 11 and 77 and United Airlines flights 93 and 175; or (2) individuals who were “present at” the World Trade Center, the Pentagon, or the site of the aircraft crash at Shanksville, Pennsylvania at the time or in the immediate aftermath of the crashes; or (3) personal representatives of deceased individuals who would otherwise be eligible. Moreover, to be eligible for an award, an individual must have suffered physical harm or death as a

result of one of the terrorist-related air crashes. The Department sought comment on whether a Departmental regulation or a statement of policy by the Special Master would be appropriate to clarify these criteria, and if so, what those criteria should be.

The Department specifically invited comment on the following questions related to eligibility:

- How should “present at” be interpreted?
- Should the term “physical harm” be limited to serious injuries, as it is under some other no-fault compensation schemes, (see, e.g., N.Y. Ins. Law § 5102), or should it be construed more broadly?
- Should “physical harm” be limited to currently identifiable injuries?
- Can and should the program address latent, but not yet evident, harm?
- What duration of time is intended by the statutory phrase “immediate aftermath”?

(1) “Present At” And “Immediate Aftermath”

Many of the comments addressed the question of how to define the terms “present at the site” and “immediate aftermath,” especially for purposes of those who were in New York at the time of the crashes. Some commenters urged a broad definition of these terms. They recommended that anybody in New York City be considered “present” because the debris and ash from the collapse of the World Trade Towers was widespread. Residents who live near the Ground Zero site in New York urged that they be eligible to recover under the Fund.

In contrast, other commenters argued for a narrower definition of the terms, asserting that the legislation intended to constrain the Fund to the locus of the buildings themselves, and to some very limited time period after the crashes. One comment recommended that “immediate aftermath” be defined as 48 hours after the crashes.

(2) Physical Harm

With respect to the nature of harm involved, some commenters asserted there should be no lower boundary for “nonserious” injuries. Of those who commented on the point, there were disagreements as to whether post-traumatic stress could be considered physical harm for purposes of filing a claim under the Fund. Certain commenters indicated that many people suffered substantial stress from witnessing the attacks and devastation and that they should be eligible to recover from the Fund. However, others argued that the Fund was not intended to cover psychological injury because the language of the statute specifically requires that the claimant suffer “physical harm.” These commenters feared that recovery for stress-related injuries would open a Pandora’s Box of less serious claims, which, in turn, may reduce the amount of compensation issued to those with the most serious physical injuries.

(3) Latent Harm

Some of the comments focused on the problem of latent injuries and diseases. Several commenters mentioned the coughing they have experienced as a result of exposure to the crash site in New York, and some nearby residents expressed concern about latent harm that might accrue from returning

to their homes before the conclusion of the rescue and cleanup efforts. On the other hand, other commenters expressed concern about covering any harms that do not manifest themselves within the two-year lifetime of the Fund. They argued the Fund was not designed to compensate for latent harm primarily because the Fund only exists for two years, and many injuries may not become manifest until after that time.

(4) Eligibility of Victims And Survivors

Some commenters addressed the meaning of the word “victim.” For example, some commenters urged that any unborn child who died should be considered eligible for an award as a victim. With respect to a different group of potential claimants, some commenters argued that illegal aliens should not be eligible for awards. However, other commenters did not think that legal status should preclude an award from the Fund.

With regard to claims on behalf of decedent victims, the comments evidenced a tremendous amount of confusion about whether the statute intended to cover only the losses incurred by the victim or the losses incurred by relatives and others. Some commenters noted that section 405 of the Act provides that only claims on behalf of the victim can be filed with the Fund, presumably leaving to the courts any claims by family members or partners on their own behalf. However, some commenters noted that section 403 of the Act states that its purpose is to provide compensation to any individual “or relatives of a deceased individual” who were killed as a result of the terrorist-related aircraft crashes. The commenters further noted that various types of losses that may be compensated by the Fund pursuant to section 402 are akin to those that in civil actions are normally considered losses to survivors rather than to the victim.

Many commenters commented on the “eligibility” of particular “survivors” of the victim. Some suggested that only a spouse and children be considered “eligible.” Others expressed concern as to whether parents, divorced spouses, children of a prior marriage, and others with a legal relationship would be “eligible” for an award under the Fund. In this regard, a number of comments specifically urged that non-married partners and others with a non-traditional relationship be considered “eligible” for an award. Some commenters opposed the idea of extending eligibility under the Fund to those in non-traditional relationships and argued for a narrower definition of eligibility.

Similarly, there were a number of comments about how “eligible” survivors would participate in the decision of whether to submit an application to the Fund, since in their view the application to the Fund would prohibit all of them from filing civil litigation. Some commenters explicitly suggested the law be interpreted to allow claims both on behalf of the decedent’s estate and on behalf of any survivors, and suggested that such claims could be consolidated for decision before the Special Master. Others, however, specifically recommended that claims be limited to those on behalf of the estate. Many commenters, presuming that to

be the case, recommended that the state courts be responsible for designating the representative to represent the estate, and that any award be distributed in accordance with the requirements of the will or state intestacy law.

Assistance to Claimants

In its Notice of Inquiry of November 5, 2001, the Department noted that it would appear that these requirements—combined with the statutory time frame for the Special Master to reach a decision once a claim is filed—contemplate a detailed form and filing. Accordingly, the Department invited comments on whether there are actions the Special Master should be required to take before he can accept a claim, or deem a claim “filed.” The Department noted that the statute appeared to provide a very limited time frame for the Special Master to evaluate a claim before making a decision—120 days from the date a claim is filed. Accordingly, the Department sought comment on whether the Special Master should be permitted to dismiss a claim as not properly filed for lack of adequate supporting information and, if so, whether an individual should thereafter be permitted to refile the claim. Comments were also solicited on whether it would be advisable to include in the rules a procedure where the time for making a determination could be extended by agreement.

The Department also requested comment on the design and content of the claim forms in light of the statutory requirements, as well as on making the forms and their instructions readable and readily available. The Department also sought comment on how it should implement the statutory requirement that claimants be provided with assistance.

While most of those who commented supported maintaining firm deadlines, many commenters suggested that a claimant be able to “halt the clock” at the claimant’s discretion for various purposes (e.g., to provide further evidence before the claim is evaluated, to allow more time to prepare for a hearing, or to allow for an administrative review of an initial award determination). Some suggested that the Special Master also have the authority not to start the clock until the claim contained sufficient information upon which an award determination could be made, or to halt the process for a set period of time to allow for review of an initial determination (provided that the claimant concurred with that decision).

A number of commenters stressed that a claimant should not lose the right to proceed with their claim due to an incomplete file. One commenter suggested the Special Master should have 14 days to review a claim before deciding if there is enough information to proceed. Several commenters suggested that claimants not be required to waive their right to litigation until it was determined the claimant was eligible to recover from the Fund. Similarly, some commenters stated they would have difficulty deciding whether or not to opt into the fund (and thus waive their right to sue) if they did not have some idea or presumption of the range of recovery they might expect from the Fund.

Many commenters urged the Department to establish a simplified procedure for initiating

a claim with the Fund. They expressed frustration with the barrage of paperwork required to apply for assistance with other organizations. Some employers offered to provide information on behalf of their employees or survivors in an effort to reduce the paperwork burden on claimants. On the other hand, some noted that—in light of the pro bono legal assistance that has been offered to the survivors—claimants would have the option to have the assistance of an attorney to complete the forms. A number of commenters suggested a two-step claims process that would involve a simple initial submission, followed by a more asserted effort to collect additional information with the guidance of claimant assistance personnel from the Office of the Special Master.

A number of commenters had suggestions as to how the Special Master might assist claimants both in filing claims and completing the claims process. Many suggested that local offices be established in New York City, Washington DC, Pennsylvania, and other cities that served as the domicile of victims. Some urged that outreach efforts be made to locate potential claimants and make them aware of the program’s operations. Some mentioned that outreach should include multi-lingual assistance and publications. One group suggested that each Hearing Office have an Applicant’s Assistant. Others suggested the Special Master hire victim advocates to assist claimants throughout the process.

The Claims Evaluation Process

The Department solicited comment on whether every claimant should be granted an oral hearing or whether paper hearings may be sufficient, and what types of oral hearing might be practicable in light of the statutory time frames.

Further, the Department sought comment on how evidence might be established and whether it is authorized to enforce requests made by the hearing officer to third parties for evidence that is necessary to a proceeding (e.g., evidence that might bear on whether all aspects of the claim file on which the decision will be based are accurate and complete). The Department sought comment on whether such proceedings should be recorded, whether such proceedings should be held in a location convenient to the claimant, how to deal with scheduling conflicts, and whether the opportunity for a hearing can be waived by a claimant through inaction or unwarranted delay.

Many commenters had opposing views on the role hearings should play in claims evaluation. Some commenters—comparing this program to civil litigation—viewed the hearings as essential to each and every claim. These commenters recommended hearings as a sort of “mini-trial,” which would include rules of evidence (albeit relaxed rules) and adversarial questioning of witnesses. Using the same analogy, however, these commenters suggested that many claims could be “settled” based on only the paper submissions. Other comments suggested the hearings be more akin to an opportunity—for those claimants who want to exercise it—to make an informal oral presentation of their

cases. They viewed the hearing as an opportunity to ensure that the decision maker was aware of their individual circumstances. Many of these commenters also suggested, for various reasons, that not all claimants would want a hearing. Some commenters suggested allowing claimants, upon filing a claim, to elect among different “tracks”—one that would involve a hearing, and one that would not.

On the question of who should be hired as hearing officers, suggestions included retired trust executives, retired judges, attorneys experienced in handling high volume caseloads, and those experienced in civil litigation. Some commenters recommended there be a panel of hearing officers rather than one hearing officer. A number of commenters also recommended that claimants have the opportunity for review of their award to ensure that the decision maker was aware of their individual circumstances.

Many commenters submitted detailed procedural suggestions for the claims process. Among other things, these suggestions dealt with how eligibility and damages could be established through the use of affidavits under penalty of perjury in the event relevant documents had been lost as a result of the crashes themselves (e.g., designations of beneficiaries maintained by employers). Additionally, a number of commenters suggested the Special Master have the right to subpoena evidence required to make a determination.

Awards Under the Fund

(1) Meeting the 120-Day Deadline

The Department invited comment on what means and mechanisms could be implemented to allow just compensation within the statutorily-mandated 120-day period for processing claims. In particular, the Department sought input on whether and how statistical methodologies should be developed and used as a starting point for decision, and whether publication of hypothetical or presumptive awards for classes of individuals would assist potential claimants in determining whether to opt into the Fund. For the most part, these comments were encapsulated in discussions regarding the calculation of damages; namely, economic and noneconomic losses.

(2) Calculating “Economic Losses”

The Department sought specific comment on how the Special Master should determine “economic losses.” Although retaining experts is certainly not prohibited, the Special Master will not require any claimant to obtain legal counsel or other experts to assist in proving or presenting evidence of damages. The Special Master may, however, draw on available information from appropriate specialists in relevant fields to analyze economic losses. The Department invited comment regarding the necessary qualifications for such specialists, the data that should be utilized, the methodologies that should be employed, the documentation that should be required for every claimant, and how state law should bear upon such determinations. In addition, the Department invited comments on how to address the economic losses of individuals whose lost

future income streams would have been highly contingent, variable, or unpredictable.

As expected, the range of comments on how best to calculate economic losses was widely varied. One group suggested a minimum value be calculated based on median income and remaining years of work, with flexibility to adjust the award after hearing all the evidence in individual cases. Similarly, certain comments suggested the use of a grid would be appropriate in certain circumstances to identify presumed awards. Others urged that no type of grid be used.

In terms of presumptive valuation, a few commenters recommended that awards mirror the amount a party could anticipate receiving from personal injury or wrongful death actions. Others disagreed. Many recognized the limited opportunities now available to potential plaintiffs filing claims in civil courts arising out of the September 11, 2001 terrorist attacks. At least one commenter argued that the fairest approach in determining economic losses is that which insurance companies use in settling claims.

Some commenters indicated that economic awards should not be based on differences in individual income prior to the crash. Some suggested using a flat dollar figure per surviving family member (e.g., \$250,000 for each survivor). Another suggested a flat amount for death at \$100,000, injury at \$50,000, and various other losses at slated dollar figures. On the other hand, some commenters felt the purpose of the program is to act as a substitute for civil damage actions, and that efforts should be made to determine and take into consideration the amount of income likely lost by a decedent. A large number of comments were received with respect to how to establish such income (e.g., average over a certain number of prior years, plus information supplied by employers on future prospects).

(3) Calculating "Noneconomic Losses"

The Department also sought comment as to "noneconomic losses." Most notably, the Department invited comments regarding whether, and in what manner, the Special Master can or should draw meaningful distinctions between both those victims who died in different locations and those who suffered similar injuries. The Department also invited comments on whether the Department should (as some have suggested) issue regulations determining the amount of noneconomic loss for classes of similarly situated individuals or whether, instead, the Special Master should determine all noneconomic loss on a detailed claim-by-claim basis. Further, the Department requested comment on what facts and circumstances should be considered in determining noneconomic losses for each individual, and what standards should be employed.

Comments regarding noneconomic losses were similarly varied. One commenting association suggested noneconomic losses—such as pain and suffering—should be standardized because such losses do not vary by income strata. Numerous commenters advocated a "fixed" noneconomic award, stating that the government should not attempt to draw distinctions in the amount

of pain suffered by victims or their survivors. One commenter suggested the most equitable process for determining noneconomic awards would be an elective process. Under this proposed method, a claimant could elect to have the award calculated by use of a matrix, or alternatively, could present evidence at a hearing to establish the amount to which the claimant believes he or she is entitled. A number of commenters argued that the statute necessitated an entirely individualized determination of noneconomic losses in every case. A group representing survivors of decedents suggested that noneconomic losses must be uncapped and based, in part, on the number and age of any surviving children or dependents, the current and future pain and suffering experienced by the victim's family, and the severity of pain suffered by the victim himself or herself.

(4) Taxation

A number of commenters raised questions about the taxability of various kinds of awards issued under the Fund. Several commenters asserted that compensation from the Fund should be nontaxable under federal law, similar to various types of tort awards. Another commenter stated that state victim compensation fund awards generally are not taxable, either by the state or the federal government. On the other hand, another commenter stated he did not see the purpose of distributing taxpayers' money to victims, and urged taxing the awards so as to return some of the money to the Treasury.

Collateral Sources

The Department sought comments on the issue of collateral sources. Although the Act requires that collateral sources be deducted from awards issued under the Fund (and explicitly outlines examples of certain types of collateral sources), the Department invited comment as to how the term "collateral source" should be defined.

(1) General Comments

Despite the explicit language in the Act, a number of commenters took issue with deducting any collateral sources whatsoever. Although many recognized that both the Department and the Special Master are bound to follow the language in the Act, they nonetheless argued that collateral sources are—in many states—not offset in wrongful death suits. Some urged that the type of collateral source offsets should be interpreted narrowly. A number of commenters also suggested that if collateral source benefits to a victim are to be offset, a counter-offset should be made for the premiums or contributions made by the victim to purchase various benefits. Others specifically suggested that only the value of collateral benefits funded by a victim's employer should be offset.

Many commenters, however, asserted that the program should not "unjustly enrich" the victims or their survivors, and supported the use of widespread offsets. Some of these comments mentioned that—although the statute does not provide either a ceiling or floor for the amount of awards—the Fund may have only a limited pool of resources to distribute to claimants (akin to the funds

being collected and distributed by charitable organizations), and suggested the need to help those most in need. Other comments noted that unjust enrichment should not flow through tax-payer dollars. It was mentioned that many taxpayers—who ultimately will provide the funds under the program—also sent in charitable contributions not to unjustly enrich victims or their families, but, rather, solely to help them through these troubled times.

(2) "A claimant has received or is entitled to receive"

Some commenters specifically focused on the word "claimant" in the phrase "a claimant has received or is entitled to receive," and urged that any collateral source benefits not paid or to be paid directly to the claimant not be deducted from the award. These comments were often parallel to those concerning the question of whose losses are to be compensated under the Fund: only those of the decedent (estate), or those of others as well. (See the discussion of Eligibility.)

A number of comments also focused on the words "entitled to receive." Some recommended that only those collateral benefits scheduled to be paid as a result of contractual or other clear obligations should be deducted from an award. Others recommended that only the present value of any future contingent awards be considered in making any offset.

(3) Life Insurance

Many commenters were frustrated that the Act requires life insurance proceeds to be deducted from awards. Many asserted that deducting life insurance will penalize those who planned ahead. One suggested that life insurance should only be offset if payable to a dependent of the victim, and another group of commenters indicated that only the sums received by the eligible applicant net of all taxes that exceed the premiums—or other payments made by the applicant—be deducted. A number suggested that if life insurance is to be offset, the premiums paid should be returned to the victim by reducing the amount of the benefit offset.

(4) Pensions

While similar concerns (as to life insurance) were raised in connection with pensions, a more common comment concerned the meaning of the term "pension." For example, some commenters noted that pensions are not normally considered to be "compensation for a loss" but are instead akin to savings.

(5) Workers Compensation And Victim Assistance Programs

One commenter pointed out that most of the victims may be eligible for workers' compensation benefits because they were killed while on the job. Further, with respect to those receiving benefits under New York law, the compensation insurer can terminate workers' compensation payments—absent claimants obtaining consent to enter the Fund—if benefits are being paid to the injured workers or survivors. New York State legal authorities confirmed the noteworthiness of this issue, and

recommended that workers' compensation payments not be considered a collateral source to this extent.

With respect to state victim assistance funds, one commenter noted that 42 U.S.C. 10602(e)—which generally provides that state crime victim boards may refuse to pay out benefits if another Federal program is paying benefits—was explicitly amended to exclude payments made under the September 11th Victim Compensation Fund of 2001. The commenter suggested that some programs covered under that code provision—that have already made payments—may be entitled to reimbursement as a result.

(6) Charitable Contributions

Many victims of the terrorist-related crashes on September 11, 2001, have or may receive support from special funds set up to assist them, as well as from special programs established by some of their employers to share future profits and the like. Accordingly, whether to reduce Fund awards by the amount of such contributions was one of the issues given the most attention in the comments. Notably, this issue was discussed in a number of news articles at about the time the Notice of Inquiry was issued.

Commenters were heavily divided on this issue. Many were strongly opposed to reducing awards by the amount of charity funding received. This includes some commenters who donated to charities established for this purpose, as well as employers who established funds to help the families of the victims. Many insisted that funds collected by employers solely for the

purpose of compensating victims of the September 11 attacks should not be deemed a collateral source. Many drew a distinction between funds provided for short-term assistance and need, and those designed to compensate victims for their losses.

On the other hand, a number of comments from those who contributed money to various charities viewed the purposes of the charities and the Fund as one and the same; namely, compensating the victims. These commenters asserted they had not intended making contributions to unjustly enrich the families, and would hesitate to make such contributions in the future if their help turns out only to ensure persons maintain a certain lifestyle.

A number of commenters also pointed to the practical difficulties of trying to establish what claimants may have received from charities. Some suggested the Fund should have access to any database of charitable contributions, including one that was reported to be under consideration in New York.

After discussing these factors, some commenters suggested that the Special Master only offset charitable contributions over a certain amount. A few commenters suggested only offsetting charities set up for longer term assistance to the victims (e.g., tuition funds or scholarships for the children of all the victims).

Payment of Awards

Some commenters expressed the view that payments by the fund should be in the form of "structured settlements" or annuities rather than in lump sum. One commenter

suggested payments to children should go to a trustee for the benefit of the child. However, other commenters argued for lump sum payments and objected to the government placing any restrictions on the claimants' award.

Limitations on Fees for Assistance And Payment by the Special Master

The Department requested comments on whether the Special Master has the authority to limit the types and amounts of fees that can be charged by counsel, accountants, experts or others who are retained by claimants to assist them to file and pursue compensation claims, and whether such fees can and should be paid by the Special Master directly out of compensation awards. The Department also solicited comments on what limitations, if any, the rules should impose on non-attorney, non-claimant representatives' participation in filing claims.

A number of commenters noted that the right to be represented by counsel is provided by the statute, that not all claimants would be comfortable using pro-bono counsel to represent their interests, and that payment of attorneys' fees is necessary to ensure representation by counsel of choice. Some of these commenters suggested, however, that fees could be limited so as not to exceed 10% of the award to claimant. Paradoxically, some commenters opposed using any amount of money from the Fund to pay legal fees.

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