statement is made: ''Comments to Docket No. FAA–2008–0986; Airspace Docket No. 08–ASO–15.'' The postcard will be date stamped and returned to the commenter.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 modifies Class E5 airspace at Franklin, NC, to provide the controlled airspace that is required to support the Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAPs) that have been developed for Macon County Airport. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface of the Earth are published in Paragraph 6005 of FAA Order 7400.9S, signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

Agency Findings

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies controlled airspace at Franklin, NC.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, effective October 31, 2008, is amended as follows:

Paragraph 6005 Class E Airspace Designated as Surface Areas.

* * * * *

ASO NC E5 Franklin, NC [Amended]

Macon County Airport,
(Lat. 35°13′21″ N., long 83°25′09″ W.)

Angel Medical Center, Franklin, NC Point In Space Coordinates
(Lat. 35°10′37″ N., long 83°22′04″ W.)

That airspace extending upward from 700 feet or more above the surface of the Earth within a 6.4-mile radius of Macon County Airport and that airspace within a 6-mile radius of the Point in Space Coordinates (Lat. 35°10′37″ N., Long. 83°22′04″ W.) serving the Angel Medical Center.

* * * * *

Issued in College Park, Georgia, on November 20, 2008.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. E8–29753 Filed 12–16–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

28 CFR Part 32

[Docket No.: OJP (BJA) 1478]

RIN 1121–AA75

Public Safety Officers' Benefits Program

AGENCY: Office of Justice Programs, Justice.

ACTION: Final rule.

SUMMARY: The Office of Justice Programs (OJP) of the U.S. Department of Justice published the proposed rule for the Public Safety Officers' Benefits (PSOB) Program on July 10, 2008, 73 FR 39632. During the comment period, OJP received comments on its proposed rule from numerous parties. After further review of the proposed rule and careful consideration and analysis of all comments, OJP has made amendments that are incorporated into this final rule, which is intended (insofar as consistent with law) to be effective and applicable to all claims from and after the effective date hereof, whether pending (in any stage) as of that date or subsequently filed.

DATES: Effective January 16, 2009.

FOR FURTHER INFORMATION CONTACT: Hope Janke, Counsel to the Director, Bureau of Justice Assistance, at (202) 514–6278, or toll-free at 1 (888) 744–6513.

SUPPLEMENTARY INFORMATION:

Further to Executive Order 12866's call upon agencies to examine existing regulations for opportunities to achieve their intended regulatory goal more effectively, and pursuant to 42 U.S.C. 3796c(a), 3796(a) & (b), 3796d–3(a) & (b), and 3782(a) (each of which expressly authorizes the issuance of regulations), on July 10, 2008, OJP published the proposed rule for the PSOB Program. During the comment period, BJA received comments on its proposed rule from numerous interested parties: National police and fire associations; municipal police, fire, and rescue departments; survivors of fallen public safety officers; and individual concerned citizens, including claims attorneys. Additionally, Members of Congress commented on the proposal.

Some commentators approved of the specific provisions proposed, but others were dissatisfied with them, finding one or another proposed provision confusing, unclear, or too restrictive, and expressing concerns about BJA's implementation of the program. One

Member of Congress, Representative Donald A. Manzullo, made the following comments in the *Congressional Record:*

Madam Speaker, I rise to recognize the Department of Justice for recently proposed regulations relating to the Public Safety Officers' Benefit Program. The program provides death benefits for the survivors of public safety officers who die in the line of duty; and disability benefits to those officers who have been permanently and totally disabled by a catastrophic personal injury sustained in the line of duty, and thereby prevented from performing any gainful work; and also educational assistance benefits for surviving family members. Among other things, these proposed regulations will help to shore up the program against fraud and abuse by clarifying the requirements for certifications and their effect. I strongly support the mission of the Public Safety Officers' Benefit Program, and I commend the Department of Justice for keeping the regulations up to date and for taking action to ensure that the funds available go to those public safety officers (and their survivors) that deserve them. I would like to take a moment to comment on the statutory predicate for some of these regulations.

As the 9th Circuit Court of Appeals recognized,[1] Public Law 94–430 creates a ''limited program,'' whose principal purpose is to help ensure that the families of ''public'' officers be protected from financial calamity that is likely to result from the death or permanent and total disability, in the line of duty, of the primary money-maker. The statute (including the two parallel 2001 benefits statutes, which do not, strictly speaking, amend the Public Law or directly affect the precise program it creates) enshrines various and competing policy considerations and purposes that it proposes to achieve by particular means that have been worked out, over the last 30 years and more, in the legislative process. Because no law pursues its ends at all costs, the limitations expressly or implicitly contained in its text and structure are no less an articulation of its purposes (and the intent, goals, and policies that inform it), than its substantive grants of authority are. Benefits under these statutes-charges on the public fisc—are to be granted fairly, but not speculatively, or beyond what the statutory language unequivocally requires and unequivocally expresses, or beyond the letter of the difficult judgments reached in the legislative process and clearly reflected in the statutory text. It is precisely to enable the Department to balance and harmonize these various considerations into a single workable and coherent program that the law confers extraordinary administrative and interpretive authority on the Department. For example, at least seven distinct statutory provisions—42 U.S.C. 3796c(a) (twice), 3796(a) & (b), 3796d–3(a) & (b), 3782(a)—expressly authorize the Department to issue program regulations and policies here, and the law expressly provides that those regulations and policies are determinative of conflict of law issues relating to the program, and that responsibility for making final determinations shall rest with the Department. Under the Public Law (as under the parallel 2001 statutes), the very right to a death or disability benefit, which the Supreme Court correctly has recognized as a legal '''gratuity''' [2] (and thus not ''remedial'' in nature), is not freestanding, but contingent, rather, upon a determination by the Department.

When Public Law 94–430 was enacted in 1976, only the Circuit Courts or the old Court of Claims (of similar rank) heard appeals from final rulings of the Department of Justice thereunder, which meant that only one level of judicial review ordinarily was available to claimants and the Department, alike. In 1982 (when the appellate functions of the Court of Claims generally were merged into the newly-created Court of Appeals for the Federal Circuit), jurisdiction over these appeals—apparently as a result of an oversight—was not transferred to the Federal Circuit, and thus (unlike the case with other administrative appeals, *see, e.g.*, 28 U.S.C. 1295, 1296), by default, lay in what is now the Court of Federal Claims, established under Article I of the Constitution, rather than Article III, with an additional level of appeals available in the Federal Circuit. Although there are notable and distinguished exceptions,[3] over the past decade or so, many of the Federal Claims Court's rulings on these appeals applied the law incorrectly,[4] sometimes disregarding the express terms of the relevant statute [5] or implementing regulations,[6] or binding and applicable Federal Circuit/Court of Claims precedent,[7]

[1] *Russell*, 637 F.2d 1261 (1980); *Holstine*, No. 80–7477 (Aug. 4, 1982), 688 F.2d 846 (table).

[2] *Rose* v. *Arkansas State Police*, 479 U.S. 1, 4 (1986) (quoting legislative history).

[3] *E.g., Dawson*, 75 Fed. Cl. 53 (2007); *LaBare*, 72 Fed. Cl. 111 (2006); *Cook*, No. 05–1050C (Jun. 15, 2006); *Porter*, 64 Fed. Cl. 143 (2005); *One Feather*, 61 Fed. Cl. 619 (2004); *Davison*, No. 99–361C, (Apr. 19, 2002); *Brister*, No. 01–180C (Mar. 27, 2002); *Yanco*, 45 Fed. Cl. 782 (2000); *Ramos-Vélez*, No. 93–588C (Jan. 31, 1995); *Chacon*, 32 Fed. Cl. 684 (1995); *Nease*, No. 91–1518C (Mar. 29, 1993); *see also Cartwright*, 16 Cl. Ct. 238 (1989); *Durco*, 14 Cl. Ct. 423 (1988); *Wydra*, No. 764–83C (Jan. 31, 1986); *Tafoya*, 8 Cl. Ct. 256 (1985); *North*, 555 F.Supp. 832 (1982). When appealed, these decisions invariably have been affirmed.

[4] *E.g., Winuk*, 77 Fed. Cl. 207 (2007) (holding that the Department was required to accept, as legally sufficient certifications, instruments and language that would have been insufficient even for an ordinary certificate of service in court); *White,* 74 Fed. Cl. 769 (2006), *appeal filed*, No. 2007–5126; *Hillensbeck*, 74 Fed. Cl. 477 (2006) (holding that the position of the Department (which was actually correct, *see, e.g.*, *Nease, supra*, slip op. at 5 n.4; 132 Cong. Rec. 27,928–929 (1986) (colloquy between Sens. Sasser and Thurmond)) was ''substantially unjustified''); *Bice,* 72 Fed. Cl. 432 (2006); *Groff*, 72 Fed. Cl. 68 (2006); *Messick*, 70 Fed. Cl. 319 (2006); *Hillensbeck*, 69 Fed. Cl. 369 (2006) (this holding immediately occasioned the enactment of corrective legislation, Pub. L. 109–162, § 1164(a)(2)); *Cassella*, 68 Fed. Cl. 189 (2005); *Hawkins*, 68 Fed. Cl. 74 (2005) (this holding immediately occasioned the enactment of corrective legislation, *see* Pub. L. 109–162, § 1164(a)(4)); *Hillensbeck*, 68 Fed. Cl. 62 (2005); *Bice*, 61 Fed. Cl. 420 (2004); *Davis*, 50 Fed. Cl. 192 (2001); *Demutiis*, 48 Fed. Cl. 81 (2000); *Davis,* 46 Fed. Cl. 421 (2000); *Greeley*, 30 Fed. Cl. 721 (1994); *see also Canfield*, No. 339–79C (July 27, 1982).

[5] *E.g., Winuk*, 77 Fed. Cl. at 225 (directing the agency to pay only one of two living parents the full benefit amount, despite the statutory command that the amount be divided between living parents ''in equal shares''), *and* at 224 (holding certain instruments to be legally sufficient certifications, even though they did not contain elements expressly required by the statute—e.g., ''identification of all eligible payees of benefits,'' and acknowledgment that the decedent actually was ''employed by [the certifying] agency'' itself), *and* at 220–21 (holding that ''under the statute the [agency] is directed to expedite payment without further inquiry upon the requisite certification,'' even though the statute distinguishes between ''eligible payees of benefits'' (i.e., individuals—potentially eligible for payment of benefits under the statute—for whom the certifications are made by the public safety agencies), on the one hand, and ''qualified beneficiaries'' (i.e., individuals whose claims the Department of Justice determines to qualify for benefits under the statute and implementing regulations, upon considering those certifications as *prima facie* evidence), on the other), *and* at 218–225 (holding that a certification under the 2001 statutes could go to status (i.e., that they authorize certification that an individual was an officer at the time of injury), even though, under those statutes, such certifications may go only to line-of-duty (i.e., properly speaking, they authorize certification only that an individual, acknowledged otherwise to have the requisite status, ''was killed or suffered a catastrophic injury'' under the required circumstances); *Hillensbeck*, 69 Fed. Cl. 381–82 and 68 Fed. Cl. at 73–74 (holding, despite an express statutory reference to ''public employee member of a rescue squad or ambulance crew,'' that the agency committed legal error in understanding the statute to require members of rescue squads or ambulance crews to be public employees).

[6] *E.g., Winuk*, 77 Fed. Cl. at 222 (holding the agency to have committed legal error, ''in the absence* * * of a regulatory definition of service to a public agency in an official capacity''); *but see* 28 CFR 32.3 (containing a highly relevant definition of ''Official capacity''), *and* at 220–21 (holding that ''under the statute the [agency] is directed to expedite payment without further inquiry upon the requisite certification''); *but see* 28 CFR 32.3 (definitions of ''Eligible payee'' ¶ (1), ''Employed by a public agency'' ¶ (1), & ''Qualified beneficiary'' ¶ (1)(i)), 32.6(b)(2)(ii), 32.53(b)(2)); *Bice*, 61 Fed. Cl. at 434 (finding the agency to have committed prejudicial legal error when it declined to consider action by a private non-profit memorial foundation chartered under State law to be ''evidence [or a] finding[] of fact presented by [a] State, local, [or] Federal administrative [or] investigating agenc[y]'' under since-repealed 28 CFR § 32.5).

[7] *E.g., (a) Winuk*, 77 Fed. Cl. at 221–22, 225 (giving dispositive effect to post-hoc State government action purporting to alter the actual facts at issue; *but see Chacon*, 48 F.3d 508, 513 (1995) (post-hoc State government actions ''do not erase the fact[s]''); *cf. also Groff*, 493 F.3d 1343, 1355 (2007) (''post-mortem statements'' of government agencies do not ''transform[private parties] into government employees'')), *and* at 218–21 (declaring it erroneous for the agency not to have understood ''should'' to mean ''must''; *but see Maggit*, 202 F.3d 1370, 1378 (2000) (''should'' in benefits law not understood to mean ''must'')), and at 224 (holding the decedent's lack of any legal authority or legal duty to engage in public safety activity to be irrelevant to whether he was a public safety officer (as opposed to being a good Samaritan); *but see Amber-Messick*, 483 F.3d 1316, 1323–25 (2007) (public safety officer status turns on actual legal authority to engage in requisite public safety activity); *Cassella*, 469 F.3d 1376, 1386 (2006) (public safety officer status turns on whether one is ''appointed for and given the authorization or obligation to perform [requisite public safety]

Continued

and even Supreme Court precedent.[8] To order the administering agency to pay on a claim when payment is not clearly warranted by the programmatic statutes and their implementing regulations and administrative interpretive superstructure is as much an affront to the law as for the agency not to pay when payment is clearly required by those statutes and regulations.

Overall, the sixteen opinions issued to date by the Federal Circuit (and its predecessor) under the statute[9] indicate a proper understanding of the law and the application of the *Chevron* doctrine to the Department's determinations. (All but two of these opinions were affirmances of the administering agency; in *Demutiis,* the agency was affirmed on all points but a very minor one (relating to application of a (now-repealed) regulation),[10] and the 1980 holding in Harold, which reversed the Department's determination, itself soon thereafter was rendered moot, as a practical matter, by a statutory amendment consonant with the Department's position.) For these reasons, the corrective proviso in the consolidated appropriations legislation, entrusting judicial appeals under Public Law 94–430 (and the two 2001 statutes) exclusively to the Federal Circuit[11] (and returning to a single level of judicial review, as originally intended) should further the purposes of the program, reduce litigation costs for claimants and the taxpayers, and serve the interests of justice.

154 Cong. Rec. E1,833 (daily ed., Sept. 18, 2008) (some minor formatting changes made).

Finally, the Department held a conference call with representatives from the following organizations, shortly after the notice of proposed rulemaking was issued, in which it provided a briefing on the proposals and offered an opportunity for questions and answers: Fraternal Order of Police, National Sheriffs' Association, International Association of Fire Chiefs, National Fallen Firefighters Foundation, National Association of Police Organizations, Major County Sheriffs' Association, Sergeants Benevolent Association of New York City, Concerns of Police Survivors, Congressional Fire Services Institute, National Organization of Black Law Enforcement Executives, National Fire Protection Association, National Volunteer Fire Council, International Association of Women Police.

After careful consideration and analysis of all comments received, BJA made amendments that are incorporated into this final rule. In addition, the final rule contains a few clarifying changes to provisions in the proposed rule where there were some previously unnoticed ambiguities, or where the language was more complex than necessary. This final rule is intended (insofar as consistent with law) to be effective and applicable to all claims from and after the effective date hereof, whether pending (in any stage) as of that date or subsequently filed. A general discussion of the comments received and changes made, broken out generally by topic area, follows:

• *Authorized commuting.* Several comments on this proposed definition were received, some of which questioned whether the proposed changes (which generally are intended to broaden the scope of coverage) were unduly narrow. Overall, the comments focused particularly on four points. *First,* some commentators objected to the proposed addition of ''(as authorized)'' to paragraph (1) of the definition, opining that the added term could preclude eligibility for benefits ''unless the qualifying public safety officer was specifically 'authorized' to respond to the public safety emergency.'' These commentators misunderstand the term, which is in no way limited to direct, particular, or specific authorizations and would not require that the responses at issue be ''specifically'' authorized. Nothing in the proposed rule indicated, or should be understood to indicate, such a result, which would be sharply contrary to OJP's intention, which is to cover both general authorizations (*e.g.*, any response obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, under the auspices of the relevant public agency), and *specific* authorizations (*e.g.*, any response obligated or authorized by particular direction, indication, or command).

Second, some commentators questioned the use of ''and extraordinary'' in the portion of paragraph (1) of the definition that was proposed to expand coverage, asking whether the term were ''a reference to dangerous circumstances''—as opposed to a reference to something that ''simply is not commonplace''—and insisted that eligibility should not be precluded in cases where the injury was sustained during travel ''pursuant to a particular request'' by the public safety agency, to perform even non-dangerous line of duty public safety activity. OJP agrees, and nothing in the proposed rule indicated, or should be understood to indicate, otherwise. In the proposed rule, the term ''extraordinary'' was intended to mean nothing more and

duties''); *Hawkins*, 469 F.3d 993 (2006) (the decedent's ''*actual* responsibilities or obligations as appointed, rather than some theoretical authorizations, are controlling'' for determining public safety officer status); *Howard*, 231 Ct. Cl. 507, 510 (1981) (''eligibility under the Act turns on whether the specific activity causing death was an inherent part of employment as an officer and whether it was required'' of the decedent); *Budd*, 225 Ct. Cl. 725, 726–27 n.6 (1980) (the activity causing ''the death must be 'authorized, required, or normally associated with' an officer's * * * duties''));

(b) *White*, 74 Fed. Cl. at 776–79 (terming ''ridiculous'' the agency's position that the inchoate right to the gratuity expired upon the death of the statutory beneficiary prior to actually receiving it); *but see Semple*, 24 Ct. Cl. 422 (1889) (the inchoate right to a legal gratuity expires upon the death of a statutory beneficiary prior to actually receiving it); *cf. also* 16 Att'y Gen. 408 (1879));

(c) *Hillensbeck*, 74 Fed. Cl. at 481 (directly contrary to the precise rationale that informs the Federal Circuit's reversal of the same judge, a few days earlier, in a substantially-similar case, Hawkins, 469 F.3d 993, 1002 (2006)), *and* at 482–84 (adjusting and awarding attorney fees in a manner directly contrary to the holding in *Levernier Constr.*, 947 F.2d 497, 503–04 (1997)); and

(d) *Davis*, 50 Fed. Cl. at 211 and 46 Fed. Cl. at 424–25 (declaring controlling language in *Budd,* 225 Ct. Cl. at 727 n.6, to be mere ''dicta'' and ''non-precedential,'' and either ''erroneous[]'' or ''mistaken[]''); *but see Howard*, 229 Ct. Cl. at 510 (holding that same *Budd* language to be legally ''dispositive'')).

[8] *E.g., Winuk*, 77 Fed. Cl. at 225 (declaring the 2001 statutes to be ''remedial laws''); *White*, 74 Fed. Cl. 773 (declaring Pub.L. 94–430 to be a ''remedial statute''); *LaBare*, 72 Fed. Cl. at 124 (a correct ruling, overall, but unfortunately describing P.L. 94–430 as ''remedial legislation''); *Bice*, 72 Fed. Cl. at 450 (declaring Pub. L. 94–430 to be a ''remedial statute''); *Groff*, 72 Fed. Cl. at 79 (declaring P.L. 94–430 to be ''remedial in nature''); *Bice*, 61 Fed. Cl. at 435 (declaring P.L. 94–430 to be a ''remedial statute''); *Davis*, 50 Fed. Cl. at 208 (describing P.L. 94–430 in remedial terms); *Demutiis*, 48 Fed. Cl. at 86 (declaring P.L. 94–430 to be ''remedial in nature''); *but see Rose*, 479 U.S. at 4 (holding the program benefit to be a legal '''gratuity''' (*cf. Lynch*, 292 U.S. 571, 577 (1934); 36 Att'y Gen. 227, 230 (1930))). No opinion of the Federal Circuit/Court of Claims describes the program as ''remedial.''

[9] *Groff,* 493 F.3d 1343 (2007) (two cases); *Amber-Messick,* 483 F.3d 1316 (2007); *Cassella,* 469 F.3d 1376 (2006); *Hawkins,* 469 F.3d 993 (2006); *Demutiis,* 291 F.3d 1373 (2002); *Yanco,* 258 F.3d 1356 (2001); *Greeley,* 50 F.3d 1009 (1995); *Chacon,* 48 F.3d 508 (1995); *Canfield,* No. 339–79 (Dec. 29, 1982); *Russell,* 231 Ct. Cl. 1022 (1982); *Melville,* 231 Ct. Cl. 776 (1982); *Howard,* 231 Ct. Cl. 507 (1981); *Smykowski,* 647 F.2d 1103 (1981); *Morrow,* 647 F.2d 1099 (1981); Budd, 225 Ct. Cl. 725 (1980); *Harold,* 634 F.2d 547 (1980). No opinion was issued in Bice, 227 Fed. App'x 927 (2007); *Porter,* 176 Fed. App'x 111 (2006); or *One Feather,* 132 Fed. App'x 840 (2005).

[10] Without opinion, in Bice, the Federal Circuit affirmed the Federal Claims Court judgment, which was based entirely on a misapplication of this same now-repealed regulation.

[11] In providing that the ''appeals from final decisions of the Bureau'' that it refers to specifically include those ''under any statute authorizing payment of benefits described under subpart 1'' of Pub. L. 90–351, title I, part L (i.e., the 2001 statutes), the legislation (among other things) is framed to counter the holding in *Winuk,* 77 Fed. Cl. at 220–21, that ''under the statute the [agency] is directed to expedite payment without further inquiry upon the requisite certification,'' as a result of which holding the Department was ordered by the court to accept as ''certified'' purported ''facts'' that were known not to be true, and, further, to accept such ''certification'' not as mere *prima facie* evidence (rebuttable by other evidence) of those purported ''facts,'' but as dispositive and binding on the Department, thus purporting to deny it its legal authority to render meaningful, substantive ''final decisions'' under those statutes.

nothing less than what it says on its face: ''not ordinary.'' As was stated in the preamble to the PSOB rule promulgated on August 10, 2006,

> although the PSOB Act does not cover all conceivable commuting injuries, neither does it or the term ''line of duty'' exclude all commuting injuries. [T]he definition of ''authorized commuting'' in the proposed regulation is consistent with this understanding. The definition is based on the concept of ''line of duty'' under both the current and final rules: When a public safety officer is engaged in activities or actions that he is obligated or authorized to perform as a public safety officer, he is acting in the line of duty, or is, in effect, ''on duty.'' In general, under workers' compensation law, injuries incurred while commuting to and from work are not necessarily regarded as occurring within the scope of employment, except under certain circumstances where it can be shown that there is a '' 'sufficient nexus between the employment and the injury to conclude that it was a circumstance of employment.' '' *Russell,* 637 F.2d at 1265 (quoting *Hicks* v. *General Motors,* 238 N.W.2d 194, 196 (Mich. Ct. App. 1975)). * * * In the case of officers who are commuting to or from work [other than under certain circumstances], the ordinary line of duty analysis would apply: Where it can be shown that they were injured while engaging in line of duty activities or actions, or that they sustained the injury as a result of their status as public safety officers, they would be considered as acting in the line of duty.

71 FR 46,028, 46,032–033. The term ''extraordinary'' accordingly is used in the provision to preclude any suggestion or inference that the portion of paragraph (1) that would expand coverage encompasses ordinary commuting.

Third, some commentators made the excellent suggestion that the definition also should cover travel pursuant to a public safety agency's call for one of its public safety officers to perform emergency response activity within the agency's authority (as opposed to a call to perform only one of the four specific species of public safety activity otherwise defined in the regulations). OJP agrees and accordingly has made changes in paragraph (1) of this definition, in paragraph (1)(ii)(B) of the definition of *Line of duty activity or line of duty action,* and in section 32.5(i).

Finally, one commentator expressed sound concerns that the proposed definition did not make clear that the word ''situs'' therein referred to any place designated for the performance of public safety activity. A conforming change has been made to the rule.

• *Divorce.* One commentator correctly pointed out that the definition of this term, as proposed, did not make clear on its face that a legal divorce (discussed in the first half of the definition) always trumps the *de-facto*-divorce provisions in the second half thereof. A change has been made accordingly.

• *Certification.* The proposed provisions generated several different comments, but overall the general concern was that the provisions—particularly as applied to prerequisite certifications currently described in sections 32.15 and 32.25 of the PSOB regulations and most particularly as applied to ''claimants, who may not be sophisticated''—potentially could ''result in the improper rejection of certain claims on non-substantive, technical grounds'' by ''requiring a near-impossible-to-attain level of precision.'' These comments, which often were grounded in significant misconceptions of the facts and holdings of decisions of the Court of Federal Claims, are somewhat inapposite, because (as indicated in the preamble to the proposed rule) the thrust of these provisions is merely to incorporate *current* general agency practice into the body of the regulations: The primary purpose of placement in the regulations, therefore, is to provide the public with clear notice of what the agency in main *already* has been doing in the PSOB Program for years (in an effort to ''help to shore up the program against fraud and abuse,'' as Rep. Manzullo recognized), not to provide the agency with a regulatory predicate to start a new practice. (This is in keeping with the holdings of the Federal Circuit in *Amber-Messick* v. *United States,* 483 F.3d 1316 (2007), *cert.* denied, 128 S.Ct. 648 (2007); *Groff* v. *United States,* 493 F.3d 1343 (2007), *cert.* denied, 128 S.Ct. 1219 (2008), that the agency's practice *already* has ''the force of law,'' even if not in the regulation) In sum, the apprehensions of the commentators on this point are unwarranted, particularly as sections 32.15 and 32.25 both contain express provisions for administrative waiver of the certification requirements. In connection with the hundreds of claims that it has processed with the basic substance of the proposed definition of *Certification* in place, BJA has not hesitated to waive the certification requirements as appropriate. Moreover, where there has been a significant defect (as to form or substance) in certifications that have been received, BJA's invariable practice has been to offer the certifying party (almost always a public agency, rather than a claimant) ample notice of the defect and ample opportunity to cure it.

• *Commonly accepted.* Several commentators, apprehensive as to how it might come to be applied, objected to what they seem to have believed was a proposed ''new'' definition of *Commonly accepted.* No ''new'' definition of that term was proposed: The same definition, rather, currently found in the regulation at section 32.13 (and applied to hundreds of PSOB claims, without incident, for several years), simply was proposed to be moved, without any change whatsoever, to section 32.3.

• *Training.* Several comments (one of which was very favorable) were received in connection with the proposed provisions relating to training. The critical comments focused particularly on four points. *First,* some commentators objected variously to the proposed inclusion of ''official'' and/or ''his public agency'' in connection with ''training program'' within the definitions of *Line of duty activity or line of duty action* and *Participation in a training exercise,* and suggested that the words ''official'' and/or ''his public agency'' be removed, because ''a plain reading of the proposed language would seem to suggest that a local or State law enforcement officer who attends a training program conducted by the Federal government and dies as a result of his participation in the program would not be considered as having died in the line of duty, even if the officer's employing agency approved or even directed that the officer participate in the training program.'' These commentators misunderstand the rule; specifically, the commentators appear to misapprehend the significance of the definition (included in the proposed rule) of *Official training program of a public agency,* which expressly encompassed any program whatsoever—''(1) That is officially sponsored, -conducted, or -authorized by the public agency; and (2) Whose purpose is to train public safety officers in (or to improve their skills in), specific activity or actions encompassed within their respective lines of duty.'' OJP intended this proposed definition to be applied to the term found in the proposed definitions of *Line of duty activity or line of duty action* and *Participation in a training exercise,* and nothing in the proposed rule indicated, or should be understood to indicate, otherwise or to require that the officer's public agency itself offer the training: Under the rule, it suffices on this point merely that the training be sponsored, conducted, or authorized by the officer's public agency. To clarify any possible confusion here, OJP has amended the term defined to read ''*Official training program of a public safety officer's public agency,*'' and has made conforming changes in its text.

Second, some commentators objected variously to the proposed inclusion of ''mandatory'' in connection with training activity in the definition of *Participation in a training exercise,* and suggested that it be removed, because it could ''exclude officers who, even with their agencies' approval, participate in voluntary training.'' As to the word ''mandatory,'' the comments have persuaded OJP that the provision as proposed would (inadvertently) make the rule more restrictive than the statute; accordingly (as described immediately below) it has made changes in the final rule to ensure that non-mandatory activity also is covered.

Third, as to the proposed inclusion of ''formal'' and/or ''structured,'' the comments appear to misapprehend the statute. For the presumption established by 42 U.S.C. 3796(k) to arise, a public safety officer must have ''engaged in a situation * * * involv[ing certain public safety] activity'' or ''participated in a training exercise.'' Applying the traditional interpretive canon *noscitur a sociis, see, e.g., Hibbs* v. *Winn,* 542 U.S. 88 (2004); *Gutierrez* v. *Ada,* 528 U.S. 250, 255 (2000) (''Words and people are known by their companions.''), BJA has understood the use of ''participation in a training exercise'' in the statute to be informed by the parallel use there of ''engagement in a situation involving public safety activity'': There is a distinction between ''engagement *in a situation* involving public safety activity'' (which is what the statute requires as a predicate for the presumption, and notionally would include such things as—

> involvement in a physical struggle with a suspected or convicted criminal; performing a search and rescue mission; performing or assisting with emergency medical treatment; performing or assisting with fire suppression; involvement in a situation that requires either a high speed response or pursuit on foot or in a vehicle; participation in hazardous material response; responding to a riot that broke out at a public event; and physically engaging in the arrest or apprehension of a suspected criminal[,]

149 Cong. Rec. H12,299 to H12,300 (daily ed., Nov. 21, 2003) (statement of Rep. Sensenbrenner); id. at S16,053 (Nov. 25, 2003) (statement of Sen. Leahy)), on the one hand, and mere ''engagement in public safety activity'' (which could include—

> sitting at a desk; typing on a computer; talking on the telephone; reading or writing paperwork or other literature; watching a police or corrections facility's monitors of cells or grounds; teaching a class; cleaning or organizing an emergency response vehicle; signing in or out a prisoner; driving a vehicle on routine patrol; and directing traffic at or participating in a local parade[,]

149 Cong. Rec. at H12,300; id. at S16,053—all of which are important public safety activities, but nonetheless do not give rise to the presumption), on the other. And just as ''engagement *in a situation* involving public safety activity'' is not the same thing as mere ''engagement in public safety activity,'' so ''participation *in a training exercise*'' (which is what the statute requires as a predicate for the presumption and suggests a certain concreteness analogous to that implied by ''engagement *in a situation*'') is not the same thing as mere ''training.'' The use of ''formal'' and ''structured'' (and other terms) in the current, proposed, and final definitions of *Participation in a training exercise* thus are intended to effectuate the term (''a training exercise'') actually used in 42 U.S.C. 3796(k). In sum, the single word ''mandatory'' in the proposed definition of *Participation in a training exercise* has been replaced with ''mandatory, rated (i.e., officially tested, -graded, -judged, -timed, etc.), or directly supervised, -proctored, or -monitored,'' which BJA believes to conform accurately to the concreteness implied by statutory term ''a training exercise.'' Of course, in the definition of *Line of duty activity or line of duty action* where section 3796(k) is not implicated (and thus where there is no statutory requirement that there be ''a training exercise''), mere ''training'' in the line of duty, rather than ''participation in a training exercise,'' would be sufficient on this point.

Finally, BJA received one comment on its proposal to include ''trainers,'' expressly, within paragraph (1)(ii)(B) of the definition of *Line of duty activity or line of duty action* (i.e., within the provision relating to ''secondary-duty'' officers); specifically, the commentator urged the agency to include ''primary-duty'' trainers, as well. The commentator appears to have misunderstood the structure of the regulation. Assuming the training activity to be obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, under the auspices of the relevant public agency, ''primary-duty'' trainers (like ''primary duty'' trainees, and ''secondary-duty'' trainees) *already* are covered by the provisions of paragraph (1). The change in the regulation will enable ''secondary-duty'' trainers to be covered, as well.

• *Heart attack.* One commentator thought the proposed definition of this term to be too broad. Other commentators suggested that the proposed definition, which is broader than the definition currently found in the regulations, should be broadened further to cover ''situations where the heart stops due to chest trauma'' (e.g., from ''a lethal, heart-stopping blow to the chest'' received in the line of duty). These latter commentators misunderstand the function of this definition, which applies only where the provisions of 42 U.S.C. 3796(k) (which create a legal *presumption* of injury under certain circumstances where there is no *actual* injury) are implicated. The principal operative provision of the PSOB Program, however, is 42 U.S.C. 3796(a), which comes into play whenever ''a public safety officer has died as the direct and proximate result of a personal injury sustained in the line of duty.'' (A similar provision, applicable only to permanent and total disability, rather than death, is found at 42 U.S.C. 3796(b).) Since the very beginning of the program (in 1976), the Department consistently has understood 42 U.S.C. 3796(a) (and also 42 U.S.C. 3796(b), since its enactment) to cover every situation where the heart of a public safety officer has stopped due to chest trauma received in the line of duty. In other words, a claim based on an officer who, in the line of duty, receives a heart-stopping blow to the chest that causes his death has no need of the presumption established by 42 U.S.C. 3796(k), because that blow in principle would be an ''injury'' that *already* is covered under 42 U.S.C. 3796(a), without any regard whatsoever to the provisions of 42 U.S.C. 3796(k). As was stated in the preamble to the PSOB rule proposed on July 26, 2005,

> Where the requirements of [42 U.S.C. 3796(k)] are not met (e.g., where disability (rather than death) results), the absence of the statutory presumption does not necessarily entail the failure of claims based on heart attack or stroke; all such claims, rather, are governed by the ordinary rules applicable to the PSOB program. *See, e.g., Greeley* v. *United States,* 50 F.3d 1009 (Fed. Cir. 1995); *Durco* v. *United States,* 14 Cl. Ct. 424 (1988); *North* v. *United States,* 555 F.Supp. 382 (Cl. Ct. 1982); *Russell* v. *United States,* 231 Ct. Cl. 1022 (1982); *Smykowski* v. *United States,* 647 F.2d 1103 (Ct. Cl. 1981); *Morrow* v. *United States,* 647 F.2d 1099 (Ct. Cl. 1981).

71 FR 43,078, 46,079; *see also Cook* v. *United States,* No. 05–1050C (Fed. Cl., June 15, 2006); *Askew* v. *United States,* No. 542–83C (Cl. Ct., Aug. 27, 1984); *Gudzunas* v. *United States,* No. 446–83C (Cl. Ct., July 2, 1984); *Canfield* v. *United States,* No. 339–79 (Fed. Cir., Dec. 29, 1982).

One commentator also proposed adding a list of medical conditions to the definition of *Heart attack* (and to the definition of *Stroke*). All of the items on

the two suggested lists that actually *are* heart attacks or strokes are covered by the proposed change in the regulations.

BJA understands the proposed definition of *Heart attack,* to which no change has been made, to cover everything that is commonly understood within the medical profession to be a ''heart attack'' (and nothing more) and thus to give full effect to the provisions of 42 U.S.C. 3796(k).

• *Notice of potential existence of ''competent medical evidence to the contrary'' (32.14(c)).* The proposed provisions relating to requests for information in connection with the potential existence of ''competent medical evidence to the contrary'' appear to have generated considerable confusion, which may have arisen through an apparent misapprehension on the part of some commentators (though not all) as to the purpose of proposed section 32.14(c), and the October 2, 2007, policy memorandum from which it derives. Contrary to this misapprehension, proposed section 32.14(c) (like the policy memorandum) relates *only* to the question of when BJA should ''*request'' specific medical history records from the claimant* relating to ''competent medical evidence to the contrary''; neither the memorandum nor the proposed section relates at all to the very different question of whether ''competent medical evidence to the contrary'' actually exists or not, such that the claim should be denied. In other words, the purpose of the proposed provision (like that of the policy memorandum) was to govern when (and under what circumstances) the PSOB Office would provide the claimant with notice that the claim file appeared to contain ''competent medical evidence to the contrary'' that made it possible/likely that the claim was going to fail, unless sufficient medical history records (or other evidence) could be provided to counter it; in sharp contrast, nothing in the proposed provision (or the memorandum) spoke to what the PSOB Office should, or should not, consider ''competent medical evidence to the contrary'' itself to be: *That* term is defined in (and governed by) the regulations, at section 32.13. Thus, the provision in the memorandum that ''the mere presence of cardio-vascular disease/risk factors * * * shall not be considered'' means that those factors ''shall not be considered'' for purposes of determining whether or not to provide the claimant with notice (i.e., for purposes of ''requesting'' medical history records); it does not mean that the presence of those factors ''shall not be considered'' in determining if there is ''competent medical evidence to the contrary.'' It is important to recall that the memorandum was issued in response to the Congressional outcry (late in the summer of 2007) over an agency practice (in place from September 2006 to early spring of 2007) to obtain 10 years of medical history records as a matter of course in connection with every claim that implicated the provisions of 42 U.S.C. 3796(k), even where there were nothing in the claim file that affirmatively suggested that ''competent medical evidence to the contrary'' might be a relevant consideration in determining the claim. As indicated in the report by the Department's Office of the Inspector General on the Department's ''Implementation of the Hometown Heroes Survivors Benefits Act of 2003'' (# I–2008–05, p. 27 (March 2008)), the Director of BJA issued the memorandum to enshrine in writing a policy that the PSOB Office should ''request'' such records only where there was such a suggestion:

> On October 2, 2007, the BJA Director issued a memorandum directing the PSOB Office to request 10 years of medical records for Hometown Heroes Act claims only if the evidence in a case file suggests that something other than the line-of-duty activity caused the heart attack or stroke. If an autopsy report, coroner's report, or death certificate identifies the presence of cardiovascular disease or other risk factors, this information will not be considered unless the case file shows that the decedent knew of and continued to aggravate these conditions.

Nonetheless, as indicated above, many commentators appear to have misunderstood the purpose of the proposed provision (and the policy memorandum); in contrast, one very-detailed comment, from a claims attorney, clearly did grasp the essence of the matter correctly: This latter comment, although generally favorable to the proposed rule, was severely critical of proposed section 32.14(c). In particular, the commentator was disturbed by proposed paragraph 32.14(c)(3), because—

> [b]y its terms, unless the extremely restrictive conditions specified at (c)(1) and (c)(2) are satisfied, it would seem to forbid the PSOB Office from informing a practitioner/claimant that there is a problem with the claim that medical history records could cure, even if the problem is only a minor one and easily curable.

The commentator found it difficult to understand why the provision was proposed,

> which would doom some claims to be denied at the initial level, when a simple notice to the claimants or their counsel could save them. * * * A more perfect plan to deny claims, or make them more expensive by forcing appeals unnecessarily, could hardly be devised. I hope this was not intentional.

In addition, the commentator objected to proposed paragraph 32.14(c)(4):

> * * * I had thought the Department's job was to ''consider'' all the evidence filed in connection with a claim, whether supportive of the claim or not. Does this proposed provision mean that the Department will not be ''considering'' all evidence filed in connection with claims? If so, what, exactly, will the Department be doing with such evidence, and on what legal basis will it not be ''considering'' it? If not, what possible purpose can be served by specifying, in just this one limited circumstance, that the evidence will be considered? Has no lawyer in the Administration ever heard of the ''*expressio unius exclusio alterius*'' canon of construction?

The commentator also criticized the use of the term ''request'' in proposed paragraphs 32.14(c)(1) and (c)(3), as being inconsistent with the regulatory provisions governing burdens of proof; to this end (unless the term were removed in the final rule), the commentator requested clarification ''[i]f the 'request' reference is intended to mean anything other than merely offering practitioners/claimants a reminder notice of their open and ongoing opportunity to file evidence.'' Finally, the commentator asked for clarification as to the relationship between the term *Risky behavior*, found in the current regulations, and the term ''reckless behavior,'' used in proposed section 32.14(c)(2)(i), opining that it would have a deleterious effect on claims if the two terms were not defined identically; the commentator suggested that, to avoid this deleterious effect, in that section the latter term should be replaced by the former, because ''the term 'risky' behavior here offers distinct advantages, in that the term, as defined in the regulation, has a very precise and strictly limited meaning, while 'reckless' behavior, unless otherwise defined in some restrictive way, would seem to have a free ranging and very broad meaning.'' The commentator went on to suggest that, because ''all PSOB claims are subject to the provisions of section 1202(1), (2), and (3)'' of title I of the Omnibus Crime Control and Safe Streets Act of 1968, the relationship between those statutory provisions and the regulatory definition of *Risky behavior* should be specified in the regulations so as to avoid uncertainty.

Some aspects of the immediately-foregoing comments (though not the particular and concrete details) were echoed in the comments received from a national organization, which added its

concern that under ''the rules as written * * * officers may choose not to seek medical attention * * * since it could be in their best interests not to document those issues in their medical record,'' and expressed regret that, under the proposed rule, ''now, PSOB is being looked at as an entitlement.'' Finally, several other commentators indicated dissatisfaction with the structure of proposed paragraphs 32.14(c)(1) and (c)(2), finding it to be confusing and unnecessarily complex.

Further to the foregoing comments, the agency has made several changes to this provision, simplifying the structure of what was proposed as paragraphs 32.14(c)(1) and (c)(2) (largely, though not exactly, along the lines suggested by several commentators), and removing the predicates for the ''*expressio unius exclusio alterius*'' and ''forbidden communications'' problems correctly pointed out by the commentator (discussed in detail above). Lest there be any misunderstanding, the agency wishes to emphasize that the provisions of paragraph 32.14(c) will govern when medical history records will be ''requested'' in connection with PSOB Office determinations of whether there is ''competent medical evidence to the contrary'' or not: Under the provision, the mere existence of cardio-vascular-disease risk factors (even severe ones) will not trigger such a ''request''; rather, only where the claim file *already* contains indications that there may be ''competent medical evidence to the contrary'' (i.e., evidence that could defeat the claim) will the agency ''request'' information from the claimant. In other words, although a claimant always may provide the agency with evidence, information, and legal arguments in support of the claim, under section 32.14(c) the agency itself will take the proactive step of advising the claimant of a perceived weakness in the claim (relating to ''competent medical evidence to the contrary''), so that the claimant may act (if he wishes) to remedy that weakness.

• *Definition of ''Act'' (and effective-date provisions).* One comment correctly pointed out that, despite express reference to *Dawson* v. *United States*, 75 Fed. Cl. 53 (2007) (involving the issue of when and how statutory amendments become effective), the proposed rule, which contained ''numerous references to the effective dates of statutory enactments where those enactments themselves specify precisely how and when they become effective'' omitted any ''provision indicating the effective date, or the manner of application, where those enactments do not so specify.'' The rule has been changed to correct this omission, in keeping with *Dawson* and *Bice* v. *United States*, 61 Fed. Cl. 420, 437 (2004). (The change relates strictly to statutory amendments, however; regulatory amendments, including this final rule, will continue to be governed by a different principle, *see generally, e.g., Rodriguez* v. *Peake*, 511 F.3d 1147 (Fed. Cir. 2008); *Bellsouth Telecomms.* v. *Southeast Telephone*, 462 F.3d 650 (6th Cir. 2006); *Combs* v. *Comm'r of Social Security*, 459 F.3d 640 (6th Cir. 2006) (en banc); *Nat'l Mining Ass'n* v. *Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *Pine Tree Medical Assocs.* v. *Sec'y of Health & Human Servs.*, 127 F.3d 118 (1st Cir. 1997); *see also*, *e.g.*, *Groff*, 493 F.3d, at 1350–1351 & n.2; *cf.*, *e.g.*, *Morrow* v. *United States*, 647 F.2d 1099, 1101 (Fed. Cir. 1981) (in which the court applied PSOB regulations (effective May 6, 1977) that post-dated the Oct. 8, 1976, alleged injury); *Smykowski* v. *United States*, 647 F.2d 1103, 1105 (Ct. Cl. 1981) (in which the court applied PSOB regulations (effective May 6, 1977) that post-dated the Oct. 5, 1976, alleged injury); *Canfield* v. *United States*, No. 339–79 (Fed. Cir., Dec. 29, 1982), 703 F.2d 583, 585 (table) (in which the court applied PSOB regulations (effective May 6, 1977) that post-dated the Dec. 20, 1976, alleged injury). Consistent with that principle governing regulations, therefore, as indicated above this final rule is intended (insofar as consistent with law) to be effective and applicable to all claims from and after the effective date hereof, whether pending (in any stage) as of that date or subsequently filed.) Another comment correctly indicated that some of the parenthetical statements contained within the proposed definition of Act in section 32.3 were misleading or inaccurate, because they lumped death and disability provisions together, where the law distinguishes between them. (The comment went on to point out a similar problem in the definition of *Public employee* in that section.) BJA agrees and has made corresponding changes.

• *Miscellaneous.* In keeping with one of the principal purposes of the proposed rule, which was to remove ''previously unnoticed flaws, gaps, or ambiguities,'' one commentator correctly pointed an ambiguity out in paragraph 32.4(a), which provides that ''[t]he first three provisions of 1 U.S.C. 1 (rules of construction) shall apply.'' As stated by the commentator, ''[t]he intention of this provision seems to be that those rules of construction apply to the regulations, but by its terms I think the provision strictly indicates only that those rules apply to the PSOB Act.'' BJA agrees, and a conforming change has been made to clarify that the rules apply to the regulations.

Further to the changes proposed in section 32.15, a commentator asked if the term ''ruling'' in section 32.15(a)(2)—which also is found in section 32.25(a)(2)(ii)—means ''only *formal* rulings, or does it also include *ordinary* findings?'' The latter meaning is intended and a clarifying change has been made to both sections.

In connection with proposed section 32.5(d)(3), one commentator asked if it were ''sufficient merely to apply for the benefits in order to avoid the possibility of the adverse inference, or must the claimant also pursue the application as well?'' The application must be pursued, and a change has been made to the rule accordingly.

One commentator suggested that the proposed 32.5(f)(3) be reformatted into separate subparagraphs (without changing the substance of the provision) so as to make it less confusing; and suggested a similar change (again, without changing the substance of the provision) for the definitions of *Nonroutine strenuous physical activity* and *Nonroutine stressful physical activity* in section 32.13. As the commentator put it: ''Some of the component elements of those definitions are 'excluded,' while others are listed as conditions. It would be far less confusing if all the elements of these definitions were formatted similarly [in separate subparagraphs], either all as exclusions, or all as conditions.'' BJA agrees and has made conforming changes.

A commentator suggested a few (non-substantive) syntactical changes to the proposed definition of Routine in section 32.13, with which BJA agrees.

An inquiry was received in connection with proposed section 32.45(a): Specifically, asking what would happen if, with respect to the same deceased officer, there were claimants in different cities, who could not ''agree'' upon a location for the hearing. BJA agrees that the provision does not specifically address such a situation (but should) and has made a change so as to do so.

One commentator suggested that the Department should begin to implement an unenacted bill; this, of course, is beyond the authority of the Executive Branch. Other commentators variously found fault with the Department for not including ''inspectors and code officials'' appointed to assess damage and building safety, ''emergency management personnel,'' ''volunteer haz mat responders,'' and ''emergency

services personnel'' as ''public safety officers''; under the statute, the term ''public safety officer'' is limited to law enforcement officers, firefighters, certain chaplains, and public-employee members of a rescue squad or ambulance crew, and certain disaster-relief workers (which does appear to include at least some of the emergency response personnel described in some of the comments, at least under some circumstances), and the Executive Branch is not at liberty to expand the categories beyond the limits prescribed in the statute; this having been said, it should be noted that the definition of *Suppression of fire* in section 32.3 expressly includes ''on-site hazard evaluation.''

Another commentator opined that the educational assistance benefits available under 42 U.S.C. 3796d to 3796d–7 ''should be the FIRST source of funding for college not the LAST source''; the Executive Branch is not at liberty to implement this suggestion, because, notwithstanding the commentator's expressed belief that ''it was Congress' intent to provide scholarship funds to surviving spouses and children of fallen public safety officers without being directed to other sources first,'' in fact, 42 U.S.C. 3796d–1(a)(3)(A) expressly commands that the amount of the PSOB educational assistance benefit ''shall be reduced by the sum of * * * the amount of educational assistance benefits from other Federal, State, or local governmental sources to [*sic*] which the eligible dependent would otherwise be entitled to receive.''

One comment expressed concern that the proposed definition of *Prison security activity* might allow security personnel who were not ''sworn officers'' to be covered; the current definition of Involvement, found at section 32.3, which runs counter to such a result, remains in force. Another comment, in connection with proposed section 32.6(a), expressed concerns as to the difficulty inherent in determining who may have had ''the closest relationship'' with an officer who is deceased at the time of the determination; BJA agrees that such a determination well may be difficult in particular cases, but a similar difficulty currently exists under section 32.16(a), which has similar language and has proven to be workable nonetheless. Yet another comment sought clarification as to what life insurance policy would be ''the most recent'' if the one on file with the agency were older than one not on file; the statute, 42 U.S.C. 3796(a)(4)(B), decrees that the relevant policy is the ''most recently executed life insurance policy on file at the time of death with such officer's public safety agency, organization, or unit,'' thus making any policy not so on file irrelevant, regardless of when it may have been executed.

One commentator opined that the benefits available for government employees surpass those available for similarly-situated individuals in the private sector and objected that more resources are being allocated to government employees; the commentator should refer his views to the Congress, as the regulations do but implement a series of statutory enactments that enshrine the policy choice that funds collected from taxpayers by the federal government should be used to pay the benefits authorized thereby: It is not the regulations, but the statutes, that establish the program. Finally, one commentator asked for clarification regarding the meaning of the regulatory term ''purported spouse'' (a term used in several places in the program regulations): A ''purported spouse'' is any person who is *alleged* (on any basis or pretext) to be a spouse within the meaning of the PSOB Act and its implementing regulations.

III. Regulatory Certifications

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, the Office of Justice Programs has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule addresses federal agency procedures; furthermore, this rule makes amendments to clarify existing regulations and agency practice concerning death, disability, and education payments and assistance to eligible public safety officers and their survivors and does nothing to increase the financial burden on any small entities.

Executive Order 12866

This rule has been drafted and reviewed in accordance with Executive Order No. 12866, § 1(b). The costs of implementing this rule are minimal. The only costs to OJP consist of appropriated funds, and the benefits of the rule far exceed the costs. As discussed in more detail in the ''Background'' section above, all of the substantive regulatory changes in this rule tend to relieve unnecessary burdens and restrictions placed on claimants by the current rule. The non-substantive changes largely incorporate existing law and clarify the regulation so that it reflects current agency practice. The rest of the changes, in main, are grammatical and syntactical.

The Office of Justice Programs has determined that this rule is a ''significant regulatory action'' under § 3(f) of the Executive Order, and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132

This rule 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. The PSOB Act provides benefits to individuals and does not impose any special or unique requirements on States or localities. Therefore, in accordance with Executive Order No. 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in §§ 3(a) & (b)(2) of Executive Order No. 12988. Pursuant to § 3(b)(1)(I) of the Executive Order, nothing in this or any previous rule (or in any administrative policy, directive, ruling, notice, guideline, guidance, or writing) directly relating to the Program that is the subject of this rule is intended to create any legal or procedural rights enforceable against the United States, except as the same may be contained within part 32 of title 28 of the Code of Federal Regulations.

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. The PSOB Act is a federal benefits program that provides benefits directly to qualifying individuals. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse

effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

List of Subjects in 28 CFR Part 32

Administrative practice and procedure, Claims, Disability benefits, Education, Emergency medical services, Firefighters, Law enforcement officers, Reporting and recordkeeping requirements, Rescue squad.

■ Accordingly, for the reasons set forth in the preamble, part 32 of chapter I of Title 28 of the Code of Federal Regulations is amended as follows:

PART 32—PUBLIC SAFETY OFFICERS' DEATH, DISABILITY, AND EDUCATIONAL ASSISTANCE BENEFITS CLAIMS

■ 1. Revise the authority citation for part 32 to read as follows:

Authority: 42 U.S.C. ch. 46, subch. XII; 42 U.S.C. 3782(a), 3787, 3788, 3791(a), 3793(a)(4) &(b), 3795a, 3796c–1, 3796c–2; sec. 1601, title XI, Public Law 90–351, 82 Stat. 239; secs. 4 through 6, Public Law 94–430, 90 Stat. 1348; secs. 1 and 2, Public Law 107–37, 115 Stat. 219.

■ 2. Revise § 32.0 to read as follows:

§ 32.0 Scope of part.

This part implements the Act, which, as a general matter, authorizes the payment of three different legal gratuities:

(a) Death benefits;

(b) Disability benefits; and

(c) Educational assistance benefits.

■ 3. Amend § 32.3 as follows:

a. Revise the definitions of ''*Act*'', ''*Authorized commuting*'', ''*Determination*'', ''*Divorce*'', ''*Eligible payee*'', ''*Fire protection*'', ''*Fire, rescue, or police emergency*'', ''*Firefighter*'', ''*Hazardous-materials emergency response*'', ''*Heart attack*'', ''*Injury*'', ''*Injury date*'', ''*Intentional misconduct*'', ''*Law enforcement*'', ''*Line of duty activity or action*'', ''*Occupational disease*'', ''*Posthumous child*'', ''*Public employee*'', ''*Qualified beneficiary*'', ''*Substantial factor*'', and ''*Voluntary intoxication at the time of death or catastrophic injury*''.

b. Add the definitions of ''*Biological*'', ''*Certification*'', ''*Certification described in the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37*'', ''*Commonly accepted*'', ''*Consequences of an injury that permanently prevent an individual from performing any gainful work*'', ''*Direct and proximate cause*'', ''*Emergency response activity*'', ''*Employment in a civilian capacity*'', ''*Official training program of a public safety officer's public agency*'', ''*Prison security activity*'', and ''*Public safety activity*'' in alphabetical order.

§ 32.3 Definitions.

Act means the Public Safety Officers' Benefits Act of 1976 (generally codified at 42 U.S.C. 3796, *et seq.*; part L of title I of the Omnibus Crime Control and Safe Streets Act of 1968) (including (uncodified) sections 4 through 6 thereof (payment in advance of appropriations, rule of construction and severability, and effective date and applicability)), as applicable (*cf.* § 32.4(d)) according to its effective date and those of its various amendments (*e.g.*, Sept. 29, 1976 (deaths of State and local law enforcement officers and firefighters); Jan. 1, 1978 (educational assistance (officer died)); Oct. 1, 1984 (deaths of federal law enforcement officers and firefighters); Oct. 18, 1986 (deaths of rescue squad and ambulance crew members); Nov. 29, 1990 (disabilities); Oct. 3, 1996 (educational assistance (officer disabled)); Oct. 30, 2000 (disaster relief workers); Sept. 11, 2001 (chaplains and insurance beneficiaries); Dec. 15, 2003 (certain heart attacks and strokes); and Apr. 5, 2006 (designated beneficiaries)); and also includes Public Law 107–37 and section 611 of the USA PATRIOT Act (both of which relate to payment of benefits, described under subpart 1 of such part L, in connection, respectively, with the terrorist attacks of Sept. 11, 2001, or with such terrorist attacks as may occur after Oct. 26, 2001), as well as the proviso under the Public Safety Officers Benefits heading in title II of division B of section 6 of Public Law 110–161.

* * * * *

Authorized commuting means travel (not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or a detour) by a public safety officer—

(1) In the course of actually responding (as authorized) to a fire-, rescue-, or police emergency, or to a particular and extraordinary request (by the public agency he serves) for that specific officer to perform public safety activity (including emergency response activity the agency is authorized to perform), within his line of duty; or

(2) Between home and work (at a situs (for the performance of line of duty activity or action) authorized or required by the public agency he serves), or between any such authorized or required situs and another—

(i) Using a vehicle provided by such agency, pursuant to a requirement or authorization by such agency that he use the same for commuting; or

(ii) Using a vehicle not provided by such agency, pursuant to a requirement by such agency that he use the same for work.

* * * * *

Biological means genetic, but does not include circumstances where the genetic donation (under the laws of the jurisdiction where the offspring is conceived) does not (as of the time of such conception) legally confer parental rights and obligations.

* * * * *

Certification means a formal assertion of a fact (or facts), in a writing that is—

(1) Expressly intended to be relied upon by the PSOB determining official in connection with the determination of a claim specifically identified therein;

(2) Expressly directed to the PSOB determining official;

(3) Legally subject to the provisions of 18 U.S.C. 1001 (false statements) and 1621 (perjury), and 28 U.S.C. 1746 (declarations under penalty of perjury), and expressly declares the same to be so;

(4) Executed by a natural person with knowledge of the fact (or facts) asserted and with legal authority to execute the writing (such as to make the assertion legally that of the certifying party), and expressly declares the same (as to knowledge and authority) to be so;

(5) In such form as the Director may prescribe from time to time;

(6) True, complete, and accurate (or, at a minimum, not known or believed by the PSOB determining official to contain any material falsehood, incompleteness, or inaccuracy); and

(7) Unambiguous, precise, and unequivocal, in the judgment of the PSOB determining official, as to any fact asserted, any matter otherwise certified, acknowledged, indicated, or declared, and any provision of this definition.

Certification described in the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, means a certification, acknowledging all the matter specified in § 32.5(f)(1) and (2)—

(1) In which the fact (or facts) asserted is the matter specified in § 32.5(f)(3);

(2) That expressly indicates that all of the terms used in making the assertion described in paragraph (1) of this definition (or used in connection with such assertion) are within the meaning of the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, and of this part; and

(3) That otherwise satisfies the provisions of the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, and of this part.

* * * * *

Commonly accepted means generally agreed upon within the medical profession.

Consequences of an injury that permanently prevent an individual from performing any gainful work means an injury whose consequences permanently prevent an individual from performing any gainful work.

* * * * *

Determination means the approval or denial of a claim (including an affirmance or reversal pursuant to a motion for reconsideration under § 32.27), the determination described in the Act, at 42 U.S.C. 3796(c), or any recommendation under § 32.54(c)(3).

* * * * *

Direct and proximate cause—Except as may be provided in the Act, at 42 U.S.C. 3796(k), something directly and proximately causes a wound, condition, or cardiac-event, if it is a substantial factor in bringing the wound, condition, or cardiac-event about.

* * * * *

Divorce means a legally-valid divorce from the bond of wedlock (i.e., the bond of marriage), except that, otherwise, and notwithstanding any other provision of law, a spouse (or purported spouse) of an individual shall be considered to be divorced from that individual within the meaning of this definition if, subsequent to his marriage (or purported marriage) to that individual (and while that individual is living), the spouse (or purported spouse)—

(1) Holds himself out as being divorced from, or not being married to, the individual;

(2) Holds himself out as being married to another individual; or

(3) Was a party to a ceremony purported by the parties thereto to be a marriage between the spouse (or purported spouse) and another individual.

* * * * *

Eligible payee means—

(1) An individual (other than the officer) described in the Act, at 42 U.S.C. 3796(a), with respect to a claim under subpart B of this part; or

(2) An individual described in the Act, at 42 U.S.C. 3796(b), with respect to a claim under subpart C of this part.

* * * * *

Emergency response activity means response to a fire-, rescue-, or police emergency.

* * * * *

Employment in a civilian capacity refers to status as a civilian, rather than to the performance of civilian functions.

* * * * *

Fire protection means—

(1) Suppression of fire;

(2) Hazardous-material response; or

(3) Emergency medical services or rescue activity of the kind performed by firefighters.

Fire-, rescue-, or police emergency includes disaster-relief emergency.

Firefighter means an individual who—

(1) Is trained in—

(i) Suppression of fire; or

(ii) Hazardous-material response; and

(2) Has the legal authority and responsibility to engage in the suppression of fire, as—

(i) An employee of the public agency he serves, which legally recognizes him to have such (or, at a minimum, does not deny (or has not denied) him to have such); or

(ii) An individual otherwise included within the definition provided in the Act, at 42 U.S.C. 3796b(4).

* * * * *

Hazardous-material response means emergency response to the threatened or actual release of hazardous materials, where life, property, or the environment is at significant risk.

Heart attack means—

(1) A myocardial infarction; or

(2) A cardiac-event (i.e., cessation, interruption, arrest, or other similar disturbance of heart function), not included in paragraph (1) of this definition, that is—

(i) Acute; and

(ii) Directly and proximately caused by a pathology (or pathological condition) of the heart or of the coronary arteries.

* * * * *

Injury means a traumatic physical wound (or a traumatized physical condition of the body) directly and proximately caused by external force (such as bullets, explosives, sharp instruments, blunt objects, or physical blows), chemicals, electricity, climatic conditions, infectious disease, radiation, virii, or bacteria, but does not include—

(1) Any occupational disease; or

(2) Any condition of the body caused or occasioned by stress or strain.

Injury date—Except with respect to claims under the Act, at 42 U.S.C. 3796(k) (where, for purposes of determining beneficiaries under the Act, at 42 U.S.C. 3796(a), it generally means the time of the heart attack or stroke referred to in the Act, at 42 U.S.C. 3796(k)(2)), injury date means the time of the line of duty injury that—

(1) Directly and proximately results in the public safety officer's death, with respect to a claim under—

(i) Subpart B of this part; or

(ii) Subpart D of this part, by virtue of his death; or

(2) Directly (or directly and proximately) results in the public safety officer's total and permanent disability, with respect to a claim under—

(i) Subpart C of this part; or

(ii) Subpart D of this part, by virtue of his disability.

* * * * *

Intentional misconduct—A public safety officer's action or activity is intentional misconduct if—

(1) As of the date it is performed,

(i) Such action or activity—

(A) Is in violation of, or otherwise prohibited by, any statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law; or

(B) Is contrary to the ordinary, usual, or customary practice of similarly-situated officers within the public agency in which he serves; and

(ii) He knows, or reasonably should know, that it is so in violation, prohibited, or contrary; and

(2) Such action or activity—

(i) Is intentional; and

(ii) Is—

(A) Performed without reasonable excuse; and

(B) Objectively unjustified.

* * * * *

Law enforcement means enforcement of the criminal laws, including—

(1) Control or reduction of crime or of juvenile delinquency;

(2) Prosecution or adjudication of individuals who are alleged or found to have violated such laws;

(3) Prison security activity; and

(4) Supervision of individuals on parole or probation for having violated such laws.

Line of duty activity or action—Activity or an action is performed in the line of duty, in the case of a public safety officer who is—

(1) A law enforcement officer, a firefighter, or a member of a rescue squad or ambulance crew—

(i) Whose primary function (as applicable) is public safety activity, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour, it is activity or an action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform (including any social, ceremonial, or athletic functions (or any official training programs of his public agency)

to which he is assigned, or for which he is compensated), under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes that activity or action to have been so obligated or authorized at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); or

(ii) Whose primary function is not public safety activity, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour—

(A) It is activity or an action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform, under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes that activity or action to have been so obligated or authorized at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); and

(B) It is performed (as applicable) in the course of public safety activity (including emergency response activity the agency is authorized to perform), or taking part (as a trainer or trainee) in an official training program of his public agency for such activity, and such agency (or the relevant government) legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such);

(2) A disaster relief worker, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour, it is disaster relief activity, and the agency he serves (or the relevant government), being described in the Act, at 42 U.S.C. 3796b(9)(B) or (C), legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); or

(3) A chaplain, only if, not being described in the Act, at 42 U.S.C. 3796a(1), and not being a frolic or detour—

(i) It is activity or an action that he is obligated or authorized by statute, rule, regulation, condition of employment or service, official mutual-aid agreement, or other law, to perform, under the auspices of the public agency he serves, and such agency (or the relevant government) legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such); and

(ii) It is performed in the course of responding to a fire-, rescue-, or police emergency, and such agency (or the relevant government) legally recognizes it to have been such at the time performed (or, at a minimum, does not deny (or has not denied) it to have been such).

* * * * *

Occupational disease means a disease (including an ailment or condition of the body) that routinely constitutes a special hazard in, or is commonly regarded as a concomitant of, an individual's occupation.

* * * * *

Official training program of a public safety officer's public agency means a program—

(1) That is officially sponsored, -conducted, or -authorized by the public agency in which he serves; and

(2) Whose purpose is to train public safety officers of his kind in (or to improve their skills in), specific activity or actions encompassed within their respective lines of duty.

* * * * *

Posthumous child—An individual is a posthumous child of a public safety officer only if he is a biological child of the officer, and the officer is—

(1) Alive at the time of his conception; and

(2) Deceased at or before the time of his birth.

Prison security activity means correctional or detention activity (in a prison or other detention or confinement facility) of individuals who are alleged or found to have violated the criminal laws.

* * * * *

Public employee means—

(1) An employee of a government described in the Act, at 42 U.S.C. 3796b(8), (or of a department or agency thereof) and whose acts and omissions while so employed are legally those of such government, which legally recognizes them as such (or, at a minimum, does not deny (or has not denied) them to be such); or

(2) An employee of an instrumentality of a government described in the Act, at 42 U.S.C. 3796b(8), who is eligible to receive disability benefits (or whose survivors are eligible to receive death benefits) from such government on the same basis as an employee of that government (within the meaning of paragraph (1) of this definition), or his survivors, would.

* * * * *

Public safety activity means any of the following:

(1) Law enforcement;

(2) Fire protection;

(3) Rescue activity; or

(4) The provision of emergency medical services.

Qualified beneficiary—An individual is a qualified beneficiary under the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, only if he is an eligible payee—

(1) Who qualifies as a beneficiary pursuant to a final agency determination that—

(i) The requirements of the Act, at 42 U.S.C. 3796(a) or (b) (excluding the limitations relating to appropriations), as applicable, have been met; and

(ii) The provisions of this part, as applicable, relating to payees otherwise have been met; and

(2) Whose actions were not a substantial contributing factor to the death of the public safety officer (with respect to a claim under subpart B of this part).

* * * * *

Substantial factor—A factor substantially brings about a death, injury, disability, wound, condition, cardiac-event, heart attack, or stroke if—

(1) The factor alone was sufficient to have caused the death, injury, disability, wound, condition, cardiac-event, heart attack, or stroke; or

(2) No other factor (or combination of factors) contributed to the death, injury, disability, wound, condition, cardiac-event, heart attack, or stroke to so great a degree as it did.

* * * * *

Voluntary intoxication at the time of death or catastrophic injury means the following, as shown by any commonly-accepted tissue, -fluid, or -breath test or by other competent evidence:

(1) With respect to alcohol, (i) In any claim arising from a public safety officer's death in which the death was simultaneous (or practically simultaneous) with the injury, it means intoxication as defined in the Act, at 42 U.S.C. 3796b(5), unless convincing evidence demonstrates that the officer did not introduce the alcohol into his body intentionally; and

(ii) In any claim not described in paragraph (1)(i) of this definition, unless convincing evidence demonstrates that the officer did not introduce the alcohol into his body intentionally, it means intoxication—

(A) As defined in the Act, at 42 U.S.C. 3796b(5), *mutatis mutandis* (i.e., with ''post-mortem'' (each place it occurs) and ''death'' being substituted, respectively, by ''post-injury'' and ''injury''); and

(B) As of the injury date; and

(2) With respect to drugs or other substances, it means intoxication as defined in the Act, at 42 U.S.C. 3796b(5), as evidenced by the presence (as of the injury date) in the body of the public safety officer—

(i) Of any controlled substance included on Schedule I of the drug

control and enforcement laws (*see* 21 U.S.C. 812(a)), or any controlled substance included on Schedule II, III, IV, or V of such laws (*see* 21 U.S.C. 812(a)) and with respect to which there is no therapeutic range or maximum recommended dosage, unless convincing evidence demonstrates that such introduction was not a culpable act of the officer's under the criminal laws; or

(ii) Of any controlled substance included on Schedule II, III, IV, or V of the drug control and enforcement laws (*see* 21 U.S.C. 812(a)) and with respect to which there is a therapeutic range or maximum recommended dosage—

(A) At levels above or in excess of such range or dosage, unless convincing evidence demonstrates that such introduction was not a culpable act of the officer's under the criminal laws; or

(B) At levels at, below, or within such range or dosage, unless convincing evidence demonstrates that—

(*1*) Such introduction was not a culpable act of the officer's under the criminal laws; or

(*2*) The officer was not acting in an intoxicated manner immediately prior to the injury date.

■ 4. Revise § 32.4 to read as follows:

§ 32.4 Terms; construction, severability; effect.

(a) In determining the meaning of any provision of this part, unless the context should indicate otherwise, the first three provisions of 1 U.S.C. 1 (rules of construction) shall apply.

(b) If benefits are denied to any individual pursuant to the Act, at 42 U.S.C. 3796a(4), or otherwise because his actions were a substantial contributing factor to the death of the public safety officer, such individual shall be presumed irrebuttably, for all purposes, not to have survived the officer.

(c) Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

(d) Unless the same should expressly provide otherwise (e.g., by use of the word ''hereafter'' in an appropriations proviso), any amendment to the Act (or any statutory enactment otherwise directly referent or -applicable to the program that is the subject of this part), shall apply only with respect to injuries (or, in connection with claims under the Act, at 42 U.S.C. 3796(k), shall apply only with respect to heart attacks or strokes referred to in the Act, at 42 U.S.C. 3796(k)(2)) occurring on or after the date it takes effect.

■ 5. Revise § 32.5 to read as follows:

§ 32.5 Evidence.

(a) Except as otherwise may be expressly provided in the Act or this part, a claimant has the burden of persuasion as to all material issues of fact, and by the standard of proof of ''more likely than not.''

(b) Except as otherwise may be expressly provided in this part, the PSOB determining official may, at his discretion, consider (but shall not be bound by) the factual findings of a public agency.

(c) Rules 301 (presumptions), 401 (relevant evidence), 402 (admissibility), 602 to 604 (witnesses), 701 to 704 (testimony), 901 to 903 (authentication), and 1001 to 1007 (contents of writings, records, and photographs) of the Federal Rules of Evidence shall apply, *mutatis mutandis,* to all filings, hearings, and other proceedings or matters. No extrinsic evidence of authenticity as a condition precedent to admissibility shall be required with respect to any document purporting to bear the signature of an expert engaged by the BJA.

(d) In determining a claim, the PSOB determining official may, at his discretion, draw an adverse inference if, without reasonable justification or excuse—

(1) A claimant fails or refuses to file with the PSOB Office—

(i) Such material- or relevant evidence or -information within his possession, control, or ken as may reasonably be requested from time to time by such official; or

(ii) Such authorizations or waivers as may reasonably be requested from time to time by such official to enable him (or to assist in enabling him) to obtain access to material- or relevant evidence or -information of a medical, personnel, financial, or other confidential nature;

(2) A claimant under subpart C of this part fails or refuses to appear in person—

(i) At his hearing under subpart E of this part (if there be such a hearing); or

(ii) Before such official (or otherwise permit such official personally to observe his condition), at a time and location reasonably convenient to both, as may reasonably be requested by such official; or

(3) A claimant under subpart B or C of this part fails or refuses to apply for (or to pursue to completion), in timely fashion, the benefits, if any, described in § 32.15(a)(1)(i) or § 32.25(a)(1)(i), respectively.

(e) In determining a claim, the PSOB determining official may, at his discretion, draw an inference of voluntary intoxication at the time of death or catastrophic injury if, without reasonable justification or excuse, appropriate toxicologic analysis (including autopsy, in the event of death) is not performed, and/or the results thereof are not filed with the PSOB Office, where there is credible evidence suggesting that intoxication may have been a factor in the death or injury, or that the public safety officer—

(1) As of or near the injury date, was—

(i) A consumer of alcohol—

(A) In amounts likely to produce a blood-alcohol level of .10 per centum or greater in individuals similar to the officer in weight and sex; or

(B) In any amount, after ever having been treated at an inpatient facility for alcoholism;

(ii) A consumer of controlled substances included on Schedule I of the drug control and enforcement laws (*see* 21 U.S.C. 812(a)); or

(iii) An abuser of controlled substances included on Schedule II, III, IV, or V of the drug control and enforcement laws (see 21 U.S.C. 812(a)); or

(2) Immediately prior to the injury date, was under the influence of alcohol or drugs or other substances or otherwise acting in an intoxicated manner.

(f) In determining a claim under the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, the certification described therein shall constitute *prima facie* evidence—

(1) Of the public agency's acknowledgment that the public safety officer, as of the injury date, was—

(i) A public safety officer of the kind described in the certification;

(ii) Employed by the agency (i.e., performing official functions for, or on behalf of, the agency); and

(iii) One of the following:

(A) With respect to a law enforcement officer, an officer of the agency;

(B) With respect to a firefighter,

(*1*) An officially recognized or designated member of the agency (if it is a legally organized volunteer fire department); or

(*2*) An employee of the agency;

(C) With respect to a chaplain,

(*1*) An officially recognized or designated member of the agency (if it is a legally organized police or volunteer fire department); or

(*2*) An officially recognized or designated public employee of the agency (if it is a legally organized police or fire department);

(D) With respect to a member of a rescue squad or ambulance crew, an officially recognized or designated public employee member of one of the agency's rescue squads or ambulance crews; or

(E) With respect to a disaster relief worker, an employee of the agency (if it is described in the Act, at 42 U.S.C. 3796b(9)(B) or (C));

(2) Of the public agency's acknowledgment that there are no eligible payees other than those identified in the certification; and

(3) That the public safety officer—

(i) Sustained a line of duty injury in connection with public safety activity (or, otherwise, with efforts described in the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37) related to a terrorist attack (under the former statute) or to the terrorist attacks of September 11, 2001 (under the latter statute); and

(ii) As a direct and proximate result of such injury, was (as applicable)—

(A) Killed (with respect to a claim under subpart B of this part); or

(B) Totally and permanently disabled (with respect to a claim under subpart C of this part).

(g) In determining a claim, the PSOB determining official shall have, in addition to the hearing-examiner powers specified at 42 U.S.C. 3787 (hearings, subpoenas, oaths, witnesses, evidence), and to the authorities specified at 42 U.S.C. 3788(b)–(d) (experts, consultants, government resources) and in the Act and this part, the authority otherwise and in any reasonable manner to conduct his own inquiries, as appropriate.

(h) Acceptance of payment (by a payee (or on his behalf)) shall constitute *prima facie* evidence that the payee (or the pay agent)—

(1) Endorses as his own (to the best of his knowledge and belief) the statements and representations made, and the evidence and information provided, pursuant to the claim; and

(2) Is aware (in connection with the claim) of no—

(i) Fraud;

(ii) Concealment or withholding of evidence or information;

(iii) False, incomplete, or inaccurate statements or representations;

(iv) Mistake, wrongdoing, or deception; or

(v) Violation of 18 U.S.C. 287 (false, fictitious, or fraudulent claims), 1001 (false statements), or 1621 (perjury), or 42 U.S.C. 3795a (falsification or concealment of facts).

(i) A public safety officer's response to an emergency call from his public agency for him to perform public safety activity (including emergency response activity the agency is authorized to perform) shall constitute prima facie evidence of such response's non-routine character.

■ 6. Revise § 32.6 to read as follows:

§ 32.6 Payment and repayment.

(a) No payment shall be made to (or on behalf of) more than one individual, on the basis of being a particular public safety officer's spouse. If more than one should qualify, payment shall be made to the one with whom the officer considered himself, as of the injury date, to have the closest relationship, except that the individual (if any) who was a member of the officer's household (as of such date) shall be presumed rebuttably to be such one, unless legal proceedings (by the officer against such member, or vice versa) shall have been pending then in any court.

(b) No payment shall be made, save—

(1) To (or on behalf of) a living beneficiary; and

(2) Pursuant to—

(i) A written claim filed by (or on behalf of) such beneficiary; and

(ii) Except as provided in the Act, at 42 U.S.C. 3796(c), approval of such claim.

(c) Any amounts that would be paid but for the provisions of paragraph (b) of this section shall be retained by the United States and not paid.

(d) With respect to the amount paid to a payee (or on his behalf) pursuant to a claim, the payee shall repay the following, unless, for good cause shown, the Director grants a full or partial waiver pursuant to the Act, at 42 U.S.C. 3796(m):

(1) The entire amount, if approval of the claim was based, in whole or in material part, on the payee's (or any other person's or entity's) fraud, concealment or withholding of evidence or information, false, incomplete, or inaccurate statements or representations, mistake, wrongdoing, or deception; or

(2) The entire amount subject to divestment, if the payee's entitlement to such payment is divested, in whole or in part, such as by the subsequent discovery of individuals entitled to make equal or superior claims.

(e) At the discretion of the Director, repayment of amounts owing or collectable under the Act or this part may, as applicable, be executed through setoffs against future payments on financial claims under subpart D of this part.

■ 7. Revise § 32.12 to read as follows:

§ 32.12 Time for filing claim.

(a) Unless, for good cause shown, the Director extends the time for filing, no claim shall be considered if it is filed with the PSOB Office after the later of—

(1) Three years after the public safety officer's death; or

(2) One year after—

(i) A final determination of entitlement to receive, or of denial of, the benefits, if any, described in § 32.15(a)(1)(i); or

(ii) The receipt of the certification described in § 32.15(a)(1)(ii).

(b) A claimant may file with his claim such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

■ 8. Amend § 32.13 as follows:

a. Remove the definitions of ''*Circumstances other than engagement or participation*'', ''*Commonly accepted*'', and ''*Engagement in a situation*''.

b. Revise the definitions of ''B*eneficiary of a life insurance policy of a public safety officer*'', ''*Beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A)*'', ''*Competent medical evidence to the contrary*'', ''*Most recently executed life insurance policy of a public safety officer*'', ''*Nonroutine strenuous physical activity*'', ''*Nonroutine stressful physical activity*'', ''*Participation in a training exercise*'', ''*Public safety agency, organization, or unit*'', and ''*Risky behavior*''.

c. Add the definitions of ''*Designation on file*'', ''*Extrinsic circumstances*'', ''*Engagement in a situation involving law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity*'', ''*Life insurance policy on file*'', and ''*Routine*'' in alphabetical order.

§ 32.13 Definitions.

* * * * *

Beneficiary of a life insurance policy of a public safety officer—An individual (living or deceased on the date of death of the public safety officer) is designated as beneficiary of a life insurance policy of such officer as of such date, only if the designation is, as of such date, legal and valid (as a designation of beneficiary of a life insurance policy) and unrevoked (by such officer or by operation of law) or otherwise unterminated, except that—

(1) Any designation of an individual (including any designation of the biological or adoptive offspring of such individual) made in contemplation of such individual's marriage (or purported marriage) to such officer shall

be considered to be revoked by such officer as of such date of death if the marriage (or purported marriage) did not take place, unless preponderant evidence demonstrates that—

(i) It did not take place for reasons other than personal differences between the officer and the individual; or

(ii) No such revocation was intended by the officer; and

(2) Any designation of a spouse (or purported spouse) made in contemplation of or during such spouse's (or purported spouse's) marriage (or purported marriage) to such officer (including any designation of the biological or adoptive offspring of such spouse (or purported spouse)) shall be considered to be revoked by such officer as of such date of death if the spouse (or purported spouse) is divorced from such officer after the date of designation and before such date of death, unless preponderant evidence demonstrates that no such revocation was intended by the officer.

Beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A)—An individual (living or deceased on the date of death of the public safety officer) is designated, by such officer (and as of such date), as beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A), only if the designation is, as of such date, legal and valid and unrevoked (by such officer or by operation of law) or otherwise unterminated, except that—

(1) Any designation of an individual (including any designation of the biological or adoptive offspring of such individual) made in contemplation of such individual's marriage (or purported marriage) to such officer shall be considered to be revoked by such officer as of such date of death if the marriage (or purported marriage) did not take place, unless preponderant evidence demonstrates that—

(i) It did not take place for reasons other than personal differences between the officer and the individual; or

(ii) No such revocation was intended by the officer; and

(2) Any designation of a spouse (or purported spouse) made in contemplation of or during such spouse's (or purported spouse's) marriage (or purported marriage) to such officer (including any designation of the biological or adoptive offspring of such spouse (or purported spouse)) shall be considered to be revoked by such officer as of such date of death if the spouse (or purported spouse) is divorced from such officer subsequent to the date of designation and before such date of death, unless preponderant evidence demonstrates that no such revocation was intended by the officer.

* * * * *

Competent medical evidence to the contrary—The presumption raised by the Act, at 42 U.S.C. 3796(k), is overcome by competent medical evidence to the contrary, when evidence indicates to a degree of medical probability that extrinsic circumstances, considered in combination (as one circumstance) or alone, were a substantial factor in bringing the heart attack or stroke about.

Designation on file—A designation of beneficiary under the Act, at 42 U.S.C. 3796(a)(4)(A), is on file with a public safety agency, -organization, or -unit, only if it is deposited with the same by the public safety officer making the designation, for it to maintain with its personnel or similar records pertaining to him.

* * * * *

Engagement in a situation involving law enforcement, fire suppression, rescue, hazardous material response, emergency medical services, prison security, disaster relief, or other emergency response activity—A public safety officer is so engaged only when, within his line of duty—

(1) He is in the course of actually—

(i) Engaging in law enforcement;

(ii) Suppressing fire;

(iii) Responding to a hazardous-material emergency;

(iv) Performing rescue activity;

(v) Providing emergency medical services;

(vi) Performing disaster relief activity; or

(vii) Otherwise engaging in emergency response activity; and

(2) The public agency he serves (or the relevant government) legally recognizes him to have been in such course at the time of such engagement (or, at a minimum, does not deny (or has not denied) him so to have been).

* * * * *

Extrinsic circumstances means—

(1) An event or events; or

(2) An intentional risky behavior or intentional risky behaviors.

Life insurance policy on file—A life insurance policy is on file with a public safety agency, -organization, or -unit, only if—

(1) It is issued through (or on behalf of) the same; or

(2) The original (or a copy) of one of the following is deposited with the same by the public safety officer whose life is insured under the policy, for it to maintain with its personnel or similar records pertaining to him:

(i) The policy (itself);

(ii) The declarations page or -statement from the policy's issuer;

(iii) A certificate of insurance (for group policies);

(iv) Any instrument whose execution constitutes the execution of a life insurance policy; or

(v) The substantial equivalent of any of the foregoing.

* * * * *

Most recently executed life insurance policy of a public safety officer means the most recently executed policy insuring the life of a public safety officer that, being legal and valid (as a life insurance policy) upon its execution, as of the date of death of such officer—

(1) Designates a beneficiary; and

(2) Remains legally unrevoked (by such officer or by operation of law) or otherwise unterminated.

Nonroutine strenuous physical activity means line of duty activity that—

(1) Is not excluded by the Act, at 42 U.S.C. 3796(l);

(2) Is not performed as a matter of routine; and

(3) Entails an unusually-high level of physical exertion.

* * * * *

Nonroutine stressful physical activity means line of duty activity that—

(1) Is not excluded by the Act, at 42 U.S.C. 3796(l);

(2) Is not performed as a matter of routine;

(3) Entails non-negligible physical exertion; and

(4) Occurs—

(i) With respect to a situation in which a public safety officer is engaged, under circumstances that objectively and reasonably—

(A) Pose (or appear to pose) significant dangers, threats, or hazards (or reasonably-foreseeable risks thereof), not faced by similarly-situated members of the public in the ordinary course; and

(B) Provoke, cause, or occasion an unusually-high level of alarm, fear, or anxiety; or

(ii) With respect to a training exercise in which a public safety officer participates, under circumstances that objectively and reasonably—

(A) Simulate in realistic fashion situations that pose significant dangers, threats, or hazards; and

(B) Provoke, cause, or occasion an unusually-high level of alarm, fear, or anxiety.

* * * * *

Participation in a training exercise—A public safety officer participates (as a trainer or trainee) in a training exercise only when actually taking formal part in a structured activity that itself is—

(1) Within an official training (or -fitness) program of his public agency; and

(2) Mandatory, rated (i.e., officially tested, -graded, -judged, -timed, etc.), or directly supervised, -proctored, or -monitored.

Public safety agency, -organization, or -unit means a department or agency (or component thereof)—

(1) In which a public safety officer serves in an official capacity, with or without compensation, as such an officer (of any kind but disaster relief worker); or

(2) Of which a public safety officer is an employee, performing official duties as described in the Act, at 42 U.S.C. 3796b(9)(B) or (C), as a disaster relief worker.

Risky behavior means—

(1) Failure (without reasonable justification or excuse) to undertake treatment—

(i) Of any commonly-accepted cardiovascular-disease risk factor associated with clinical values, where such risk factor is—

(A) Known (or should be known) to be present; and

(B) Present to a degree that substantially exceeds the minimum value commonly accepted as indicating high risk;

(ii) Of any disease or condition commonly accepted to be associated with substantially increased risk of cardiovascular disease, where such associated disease or condition is known (or should be known) to be present; or

(iii) Where a biological parent, -sibling, or -first-generation offspring, is known to have (or have a history of) cardiovascular disease;

(2) Smoking an average of more than one-half of a pack of cigarettes (or its equivalent) per day;

(3) Excessive consumption of alcohol;

(4) Consumption of controlled substances included on Schedule I of the drug control and enforcement laws (*see* 21 U.S.C. 812(a)), where such consumption is commonly accepted to be associated with increased risk of cardiovascular disease;

(5) Abuse of controlled substances included on Schedule II, III, IV, or V of the drug control and enforcement laws (*see* 21 U.S.C. 812(a)), where such abuse is commonly accepted to be associated with increased risk of cardiovascular disease; or

(6) Any activity or action, specified in the Act, at 42 U.S.C. 3796a(1), (2), or (3), that is commonly accepted to be associated with substantially increased risk of cardiovascular disease.

Routine—Neither of the following shall be dispositive in determining whether an activity or action shall be understood to have been performed as a matter of routine:

(1) Being generally described by the public agency as routine or ordinary; or

(2) The frequency with which it may be performed.

* * * * *

■ 9. Revise § 32.14 to read as follows:

§ 32.14 PSOB Office determination.

(a) Upon its approving or denying a claim, the PSOB Office shall serve notice of the same upon the claimant (and upon any other claimant who may have filed a claim with respect to the same public safety officer). In the event of a denial, such notice shall—

(1) Specify the factual findings and legal conclusions that support it; and

(2) Provide information as to requesting a Hearing Officer determination.

(b) Upon a claimant's failure (without reasonable justification or excuse) to pursue in timely fashion the determination, by the PSOB Office, of his filed claim, the Director may, at his discretion, deem the same to be abandoned. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

(c) In connection with its determination (pursuant to a filed claim) of the existence of competent medical evidence to the contrary, the PSOB Office shall serve the claimant with notice (indicating that he may file such documentary, electronic, video, or other non-physical evidence (such as medical-history records, as appropriate) and legal arguments in support of his claim as he may wish to provide), where there is evidence before it that affirmatively suggests that—

(1) The public safety officer actually knew or should have known that he had cardio-vascular disease risk factors and appears to have worsened or aggravated the same through his own intentional and risky behavior (as opposed to where the evidence affirmatively suggests merely that cardio-vascular disease risk factors were present); or

(2) It is more likely than not that a public safety officer's heart attack or stroke was imminent.

■ 10. Revise § 32.15 to read as follows:

§ 32.15 Prerequisite certification.

(a) Except as provided in the Act, at 42 U.S.C. 3796c–1 or Public Law 107–37, and unless, for good cause shown, the Director grants a waiver, no claim shall be approved unless the following (which shall be necessary, but not sufficient, for such approval) are filed with the PSOB Office:

(1) Subject to paragraphs (b) and (d) of this section, a certification from the public agency in which the public safety officer served (as of the injury date) that he died as a direct and proximate result of a line of duty injury, and either—

(i) That his survivors (listed by name, address, relationship to him, and amount received) have received (or legally are entitled to receive) the maximum death benefits legally payable by the agency with respect to deaths of public safety officers of his kind, rank, and tenure; or

(ii) Subject to paragraph (c) of this section, that the agency is not legally authorized to pay—

(A) Any benefits described in paragraph (a)(1)(i) of this section, to any person; or

(B) Any benefits described in paragraph (a)(1)(i) of this section, to public safety officers of the kind, rank, and tenure described in such paragraph;

(2) A copy of any findings or rulings made by any public agency that relate to the officer's death; and

(3) A certification from the claimant listing every individual known to him who is or might be the officer's child, spouse, or parent.

(b) The provisions of paragraphs (a)(1) and (d) of this section shall also apply with respect to every public agency that legally is authorized to pay death benefits with respect to the agency described in that paragraph.

(c) No certification described in paragraph (a)(1)(ii) of this section shall be deemed complete for purposes of this section unless it—

(1) Lists every public agency (other than BJA) that legally is authorized to pay death benefits with respect to the certifying agency; or

(2) States that no public agency (other than BJA) legally is authorized to pay death benefits with respect to the certifying agency.

(d) Subject to paragraphs (b) and (c) of this section, if the Director finds that the conditions specified in the Act, at 42 U.S.C. 3796(k), are satisfied with respect to a particular public safety officer's death, and that no circumstance specified in the Act, at 42 U.S.C. 3796a(1), (2), or (3), applies with respect thereto—

(1) The certification as to death, described in paragraph (a)(1) of this section, shall not be required; and

(2) The certification as to benefits, described in paragraph (a)(1)(ii) of this section, shall be deemed complete for purposes of this section if it—

(i) Describes the public agency's understanding of the circumstances

(including such causes of which it may be aware) of the officer's death; and

(ii) States that, in connection with deaths occurring under the circumstances described in paragraph (d)(2)(i) of this section, the public agency is not legally authorized to pay any benefits described in paragraph (a)(1)(i) of this section.

■ 11. Revise § 32.16 to read as follows:

§ 32.16 Payment.

(a) No payment shall be made to (or on behalf of) more than one individual, on the basis of being a public safety officer's parent as his mother, or on that basis as his father. If more than one parent qualifies as the officer's mother, or as his father, payment shall be made to the one with whom the officer considered himself, as of the injury date, to have the closest relationship, except that any biological or legally adoptive parent whose parental rights have not been terminated as of the injury date shall be presumed rebuttably to be such one.

(b) Any amount payable with respect to a minor or incompetent shall be paid to his legal guardian, to be expended solely for the benefit of such minor or incompetent.

(c) If more than one individual should qualify for payment—

(1) Under the Act, at 42 U.S.C. 3796(a)(4)(i), payment shall be made to each of them in equal shares, except that, if the designation itself should manifest a different distribution, payment shall be made to each of them in shares in accordance with such distribution; or

(2) Under the Act, at 42 U.S.C. 3796(a)(4)(ii), payment shall be made to each of them in equal shares.

■ 12. Revise § 32.22 to read as follows:

§ 32.22 Time for filing claim.

(a) Unless, for good cause shown, the Director extends the time for filing, no claim shall be considered if it is filed with the PSOB Office after the later of—

(1) Three years after the injury date; or

(2) One year after—

(i) A final determination of entitlement to receive, or of denial of, the benefits, if any, described in § 32.25(a)(1)(i); or

(ii) The receipt of the certification described in § 32.25(a)(1)(ii).

(b) A claimant may file with his claim such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

■ 13. Revise § 32.29 to read as follows:

§ 32.29 Request for Hearing Officer determination.

(a) In order to exhaust his administrative remedies, a claimant seeking relief from the denial of his claim shall request a Hearing Officer determination under subpart E of this part—

(1) Of—

(i) His entire claim, if he has not moved for reconsideration of a negative disability finding under § 32.27; or

(ii) Consistent with § 32.42(c), the grounds (if any) of the denial that are not the subject of such motion, if he has moved for reconsideration of a negative disability finding under § 32.27; and

(2) Of a negative disability finding that is affirmed pursuant to his motion for reconsideration under § 32.27.

(b) Consistent with § 32.8, the following shall constitute the final agency determination:

(1) Any denial not described in § 32.27 that is not the subject of a request for a Hearing Officer determination under paragraph (a)(1)(i) of this section;

(2) Any denial described in § 32.27 that is not the subject of a request for a Hearing Officer determination under paragraph (a)(1)(ii) of this section, unless the negative disability finding is the subject of a motion for reconsideration; and

(3) Any affirmance that is not the subject of a request for a Hearing Officer determination under paragraph (a)(2) of this section.

■ 14. Revise § 32.32 to read as follows:

§ 32.32 Time for filing claim.

(a) Subject to the Act, at 42 U.S.C. 3796d–1(c), and to paragraph (b) of this section, a claim may be filed with the PSOB Office at any time after the injury date.

(b) Unless, for good cause shown, the Director grants a waiver, no financial claim may be filed with the PSOB Office, with respect to a grading period that commences more than six months after the date of filing.

(c) A claimant may file with his claim such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

■ 15. Revise § 32.41 to read as follows:

§ 32.41 Scope of subpart.

Consistent with § 32.1, this subpart contains provisions applicable to requests for Hearing Officer determination of claims denied under subpart B, C (including affirmances of negative disability findings described in § 32.27), or D of this part, and of claims remanded (or matters referred) under § 32.54(c).

■ 16. Revise § 32.42 to read as follows:

§ 32.42 Time for filing request for determination.

(a) Subject to paragraph (c) of this section, and unless, for good cause shown, the Director extends the time for filing, no claim shall be determined if the request therefor is filed with the PSOB Office later than thirty-three days after the service of notice of—

(1) The denial (under subpart B, C (except as may be provided in paragraph (a)(2) of this section), or D of this part) of a claim; or

(2) The affirmance (under subpart C of this part) of a negative disability finding described in § 32.27.

(b) A claimant may file with his request for a Hearing Officer determination such supporting documentary, electronic, video, or other non-physical evidence and legal arguments as he may wish to provide.

(c) The timely filing of a motion for reconsideration under § 32.28(a) shall be deemed to constitute a timely filing, under paragraph (a) of this section, of a request for determination with respect to any grounds described in § 32.29(a)(1)(ii) that may be applicable.

■ 17. Revise § 32.43 to read as follows:

§ 32.43 Appointment and assignment of Hearing Officers.

(a) Pursuant to 42 U.S.C. 3787 (employment and authority of hearing officers), Hearing Officers may be appointed from time to time by the Director, to remain on the roster of such Officers at his pleasure.

(b) Upon the filing of a request for a Hearing Officer determination (or upon remand or referral), the PSOB Office shall assign the claim to a Hearing Officer on the roster; the PSOB Office may assign a particular claim to a specific Hearing Officer if it judges, in its discretion, that his experience or expertise suit him especially for it.

(c) Upon its making the assignment described in paragraph (b) of this section, the PSOB Office shall serve notice of the same upon the claimant, with an indication that any evidence or legal argument he wishes to provide is to be filed simultaneously with the PSOB Office and the Hearing Officer.

(d) With respect to an assignment described in paragraph (b) of this section, the Hearing Officer's consideration shall be—

(1) *De novo* (unless the Director should expressly prescribe otherwise, with respect to a particular remand or referral), rather than in review of the findings, determinations, affirmances,

reversals, assignments, authorizations, decisions, judgments, rulings, or other actions of the PSOB Office; and

(2) Consistent with subpart B, C, or D of this part, as applicable.

(e) OJP's General Counsel shall provide advice to the Hearing Officer as to all questions of law relating to any matter assigned pursuant to paragraph (b) of this section.

■ 18. Revise § 32.45 to read as follows:

§ 32.45 Hearings.

(a) Except with respect to a remand or referral, at the election of a claimant under subpart B or C of this part, the Hearing Officer shall hold a hearing, at a location agreeable to the claimant and the Officer (or, otherwise, at a location ruled by the Hearing Officer to be suitable), for the sole purposes of obtaining, consistent with § 32.5(c),

(1) Evidence from the claimant and his fact or expert witnesses; and

(2) Such other evidence as the Hearing Officer, at his discretion, may rule to be necessary or useful.

(b) Unless, for good cause shown, the Director extends the time for filing, no election under paragraph (a) of this section shall be honored if it is filed with the PSOB Office later than ninety days after service of the notice described in § 32.43(c).

(c) Not less than seven days prior to any hearing, the claimant shall file simultaneously with the PSOB Office and the Hearing Officer a list of all expected fact or expert witnesses and a brief summary of the evidence each witness is expected to provide.

(d) At any hearing, the Hearing Officer—

(1) May exclude any evidence whose probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

(2) Shall exclude witnesses (other than the claimant, or any person whose presence is shown by the claimant to be essential to the presentation of his claim), so that they cannot hear the testimony of other witnesses.

(e) Each hearing shall be recorded, and the original of the complete record or transcript thereof shall be made a part of the claim file.

(f) Unless, for good cause shown, the Director grants a waiver, a claimant's failure to appear at a hearing (in person or through a representative) shall constitute a withdrawal of his election under paragraph (a) of this section.

(g) Upon a claimant's failure to pursue in timely fashion his filed election under paragraph (a) of this section, the Director may, at his discretion, deem the same to be abandoned. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

■ 19. Revise § 32.52 to read as follows:

§ 32.52 Time for filing Director appeal.

(a) Unless, for good cause shown, the Director extends the time for filing, no Director appeal shall be considered if it is filed with the PSOB Office later than thirty-three days after the service of notice of the denial (under subpart E of this part) of a claim.

(b) A claimant may file with his Director appeal such supporting documentary, electronic, video, or other nonphysical evidence and legal arguments as he may wish to provide.

■ 20. Revise § 32.54 to read as follows:

§ 32.54 Director determination.

(a) Upon the Director's approving or denying a claim, the PSOB Office shall serve notice of the same simultaneously upon the claimant (and upon any other claimant who may have filed a claim with respect to the same public safety officer), and upon any Hearing Officer who made a determination with respect to the claim. In the event of a denial, such notice shall—

(1) Specify the factual findings and legal conclusions that support it; and

(2) Provide information as to judicial appeals (for the claimant or claimants).

(b) Upon a claimant's failure (without reasonable justification or excuse) to pursue in timely fashion the determination of his claim pursuant to his filed Director appeal, the Director may, at his discretion, deem the same to be abandoned, as though never filed. Not less than thirty-three days prior thereto, the PSOB Office shall serve the claimant with notice of the Director's intention to exercise such discretion.

(c) With respect to any claim before him, the Director, as appropriate, may—

(1) Remand the same to the PSOB Office, or to a Hearing Officer;

(2) Vacate any related determination under this part; or

(3) Refer any related matters to a Hearing Officer (as a special master), to recommend factual findings and dispositions in connection therewith.

■ 21. Revise § 32.55 to read as follows:

§ 32.55 Judicial appeal.

(a) Consistent with § 32.8, any approval or denial described in § 32.54(a) shall constitute the final agency determination.

(b) A claimant seeking relief from the denial of his claim may appeal judicially pursuant to the Act, at 42 U.S.C. 3796c–2.

Dated: December 10, 2008.

Jeffrey L. Sedgwick,

Assistant Attorney General.

[FR Doc. E8–29703 Filed 12–16–08; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–1001]

RIN 1625–AA87

Security Zone; Potomac and Anacostia Rivers, Washington, DC, Arlington and Fairfax Counties, VA, and Prince George's County, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary security zone encompassing certain waters of the Potomac and Anacostia Rivers. This action is necessary to ensure the security of persons and property, and to prevent terrorist acts or incidents before, during, and after scheduled activities associated with the 2009 U.S. Presidential Inauguration. This rule prohibits vessels and persons from entering the security zone and requires vessels and persons in the security zone to depart the security zone during the effective time frame, and to immediately depart the security zone when requested to do so by government authorities.

DATES: This rule is effective from 4 a.m. on January 14, 2009, through 10 p.m. on January 25, 2009.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2008–1001 and are available online by going to *http://www.regulations.gov*, selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2008–1001 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. This material is also available for inspection or copying at two locations: The Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays and the Commander, U.S. Coast Guard Sector Baltimore, 2401 Hawkins Point Road,